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F. W. Maitland: the ‘Lawyer-Historian’

By Callum Friel

Introduction

F. W. Maitland, in his inaugural lecture as Downing Professor of the Laws of England at the University of Cambridge in 1888, elucidated clearly how and by whom legal history should be done. ‘There are,’ he laments, ‘large and fertile tracts of history which the historian as a rule has to avoid as they are too legal.’¹ The historian’s capacity to write comprehensive social, economic, religious, or moral history is limited by the fact that often technical legal documents are the only evidence that remains.² The lawyer, however, cannot write legal history effectively as ‘history involves comparison and the English lawyer who knew nothing and cared nothing for any system but his own hardly came in sight of the idea of legal history.’³ A warning follows: a lawyer may approach mediaeval law and legal history based on the demands of the present, and will not appreciate mediaeval law on its own terms – ‘what the lawyer wants is authority and the newer the better.’⁴

For Maitland, neither the historian nor the lawyer is suitably placed to write legal history, and the question remains as to who is best placed to undertake the task. Maitland identifies, as a prerequisite, that ‘a thorough training in modern law is almost indispensable for anyone who wishes to do good work on legal history.’⁵ This equips the scholar with an understanding of the legal nature of the source material; however, the full potential of historical legal sources can only be unlocked, Maitland argues, by comparison with other systems.

Maitland’s suggestion sparked more debate than it answered questions: rather than resolving the question of by whom legal history should be done and to what end, his formulation has become a point of departure for both those arguing in favour of the historian and the lawyer. The primary aims of what follows are twofold: first, to critique and deconstruct the designation of Maitland as either a lawyer or a historian, instead contextualising his works and arguing that the epithet of ‘lawyer-historian’ is a more apt characterisation; and second, to question why such characterisations matter and highlight their pertinence in current historiographical debates about legal history.

A brief biographical sketch of Maitland’s legal education and experience is necessary before analysing his works of legal history. After reading for the Moral and Mental Sciences Tripos at the University of Cambridge, Maitland was called to the Bar by Lincoln’s Inn in 1876.⁶ He subsequently practised in Chancery for seven years,

¹ Frederic William Maitland, “Why the History of English Law Is Not Written,” in *The Collected Papers of Frederic William Maitland*, *Downing Professor of the Laws of England*, ed. Herbert Albert Laurens Fisher, vol. 1 (Cambridge University Press, 1911), p. 486.

² Maitland, “Why the History,” p. 486.

³ Maitland, “Why the History,” p. 488.

⁴ Maitland, “Why the History,” p. 491.

⁵ Maitland, “Why the History,” p. 493.

⁶ Cecil Herbert Stuart Fifoot, *Frederic William Maitland: A Life* (Harvard University Press, 1971), p. 43. The Moral and Mental Sciences Tripos consisted of moral and political philosophy, mental philosophy, logic, and political economy; history and jurisprudence had been removed and instead established as a separate Tripos (see Keith Tribe, *Constructing Economic Science: The Invention of a Discipline, 1850–1950* (Oxford University Press, 2022), pp. 78, 86).

specialising in conveyancing. Given the highly technical nature of the practice, Maitland remarked that there could be no better introduction to the study of ancient *diplomata* than chancery law.⁷ Little information is available about the specific legal education Maitland received, but there is little doubt that he was an erudite and capable lawyer: his pupillage supervisor said that ‘he had not been with me a week before I found that I had in my chambers such a lawyer as I had never met before. I have forgotten, if I ever knew, where and how he acquired his mastery of law.’⁸

Legal education in the latter half of the nineteenth century primarily constituted the ‘haphazard hand-to-mouth fashion that is familiar to us under the name of “reading in chambers”’.⁹ Maitland must have learned about the law primarily during his time as a student of Lincoln’s Inn and in chambers, as it formed no part of his study at Cambridge. Universities remained on the periphery of education in the common law, primarily teaching Roman and canon law; thus there was little formal legal education in the common law.¹⁰ ‘Law students’ tended to think only that which was professionally useful was worthy of study;¹¹ history, principles of jurisprudence, and comparative law were unnecessary.¹² The increasing discontent with the content of academic courses in law reflects this opinion: Oxford offered the Law and History Tripos until 1870, when it was recommended that the subjects be studied separately, supposedly for the benefit of both disciplines.¹³ The Law Tripos at Cambridge included English constitutional history and European political history as background to the development of English law;¹⁴ however, those interested in the law found history to be a time-consuming inconvenience, believing that the only history of use to lawyers was contained in the legal record.¹⁵ This is the attitude that Maitland denounced in his inaugural lecture: lawyers who understand only their own system and know nothing of others, legal or historical, cannot effectively write the legal history of England.¹⁶

In the first section, I analyse the influence of Maitland’s legal education and practice on his works of legal history, arguing that these considerably informed his historical methodology, approach to and understanding of sources, and presentation of the English common law as organically evolving. They not only provided him with legal insight, but also informed the structure, focus and emphases of his historical scholarship. I identify two ‘lawyerly aspects’ of Maitland’s work, which I argue are the result of his legal experience. The discussion analyses the manifestation of these in Maitland’s scholarship, specifically the doctrinal organisation of *Pollock and Maitland*, which allows Maitland to write the internal history of mediaeval English legal doctrine, and the

⁷ Herbert Albert Laurens Fisher, *Frederic William Maitland, Downing Professor of the Laws of England: A Biographical Sketch* (Cambridge University Press, 1910), p. 17.

⁸ Fisher, *Frederic William Maitland*, p. 16.

⁹ Fisher, *Frederic William Maitland*, p. 16. Maitland employs the phrase to contrast the methods of legal education in the nineteenth century with the “scholastic” approach of the Middle Ages and Tudor period.

¹⁰ William Cornish, J. Stuart Anderson, Raymond Cocks, Michael Lobban, Patrick Polden, and Keith Smith, *The Oxford History of the Laws of England, vol. 11, 1820–1914: English Legal System* (Oxford University Press, 2010), pp. 1186–87.

¹¹ “Law students” is used for ease and consistency, rather than to invoke its modern definition of students undergoing an academic training in law. Instead, the phrase refers to those preparing for call to the Bar and undertaking pupillage.

¹² Cornish et al., *Oxford History of the Laws of England*, vol. 11, p. 1192.

¹³ Peter R. H. Slee, *Learning and a Liberal Education: The Study of Modern History in the Universities of Oxford, Cambridge and Manchester, 1800–1914* (Manchester University Press, 1986), p. 88.

¹⁴ Slee, *Learning and a Liberal Education*, p. 58.

¹⁵ Slee, *Learning and a Liberal Education*, p. 58.

¹⁶ Maitland, “Why the History,” pp. 489–90.

reconstruction of the history of mediaeval English common law on its own terms.¹⁷ This facilitates analysis of Maitland's presentation of the English common law as organically and gradually evolving, and the argument that this is a consequence of his legal experience.

I argue in the second section that Maitland's legal education and experience were not, however, the sole influence on his works of legal history, and it would be erroneous to view Maitland solely as a lawyer. Instead, he was acutely concerned with the subject matter typically treated by historians. The discussion concerns Maitland's emphasis on historical contextualisation and his use of comparison as a tool of inquiry in tracing the development of both the internal and external history of the mediaeval English common law.

Two definitions are required for the argument: 'lawyerly aspects' refers to Maitland's forensic approach to sources, his grasp of legal technicalities and terminology, and his method of analysis focused on the internal history of law. His examination of legal sources utilised the legal knowledge he had gained through his legal education and practice, enabling him to trace doctrinal and procedural developments, and argue that legal change happened not as a result of legislative action, but through a gradual evolution as a response to societal needs. This distinguishes Maitland from contemporary historians. Take constitutional history as an example: Stubbs, whose work greatly impressed Maitland, paid no attention to unprinted sources available in the Public Record Office;¹⁸ conversely, Maitland's discovery of the legal records held there is the bedrock of much of his work.¹⁹ 'Historian' refers not to the idea of a professional trained in archival research, devoid of any 'ideological stance', that was becoming standard in the latter decades of the nineteenth century;²⁰ Maitland was not trained in this way. Instead, it refers to a scholar whose approach derived partly from his earliest and formative intellectual influence, philosophy, and who spent most of his career not in a history department but in a law school.²¹

1. Maitland: Lawyer as Historian

*'The most obvious thing that historians miss if they disregard the fact that Maitland was a lawyer is the content of his mind.'*²²

Milsom's assertion captures succinctly the lawyer who existed within the author responsible for some of the most influential and enduring works of English legal history. This identity, the product of his legal education and practice, manifests in two 'lawyerly aspects': the first is the organisation of his works of legal history. Milsom

¹⁷ Michael Lobban notes that, even now, lawyers writing legal history tend to focus on the "history of legal doctrines whose contemporary manifestation they also teach," but historians "look not at the language and doctrines of those whose lives they teach in other courses." See Michael Lobban, "The Varieties of Legal History," *Clio@Thémis* 5 (2012), p. 1.

¹⁸ Maitland remarked in his obituary of Stubbs that he did not read Stubbs's *Constitutional History of England* because he had to, but because he found it interesting. Consequently, he perhaps "fell more completely under its domination than those who have passed through schools of history are likely to fall." Frederic William Maitland, "William Stubbs, Bishop of Oxford," in *Selected Historical Essays of F. W. Maitland*, ed. Helen Maud Cam (Cambridge University Press, 1957), p. 271.

¹⁹ James Campbell, "Stubbs, Maitland, and Constitutional History," in *British and German Historiography, 1750–1950: Traditions, Perceptions, and Transfers*, ed. Benedikt Stuchtey and Peter Wende (Oxford University Press, 2000), pp. 99–122.

²⁰ Campbell, "Stubbs, Maitland, and Constitutional History," p. 108.

²¹ Campbell, "Stubbs, Maitland, and Constitutional History," p. 108.

²² Stroud Francis Charles Milsom, "Pollock and Maitland: A Lawyer's Retrospect," in *The History of English Law: Centenary Essays on 'Pollock and Maitland'*, ed. John Hudson (Oxford University Press for the British Academy, 1996), p. 253.

argues that the lawyer ‘chooses between alternative perceptions of the same facts. Similarly, the lawyer legal historian is not so often concerned with single facts which can be proved or disproved as with the way in which combinations of facts were perceived and rationalised’; and here Maitland the lawyer was supremely convincing.²³

Maitland’s *magnum opus*, *The History of English Law Before the Time of Edward I* (hereafter referred to as *Pollock and Maitland*) embodies this approach.²⁴ Book II provides what ‘is still the standard picture’ of the birth of the common law, and is arranged doctrinally;²⁵ it follows a chronological sketch of early English legal history presented in Book I. Maitland states at the beginning of the first chapter of Book II that ‘we shall be primarily concerned with the evolution of legal doctrines, but shall try to illustrate by real examples some of the political and economic causes and effects of those rules that are under our examination.’²⁶ *Domesday Book and Beyond* is arranged thematically, and works retrogressively:²⁷ Essay I uses primarily eleventh-century material to write a history of England between 1066 and 1086, whilst Essay II interrogates how the circumstances of 1066 arose by analysing Anglo-Saxon law-codes and land-books, social structure, and administrative geography.²⁸

This arrangement facilitates the writing of internal doctrinal history, contrasting the usual interest of historians of Maitland’s age in writing narrative or ‘vertical’ histories.²⁹ Maitland did not claim to cover the whole field of economic and social development in the eleventh century in *Domesday Book*; instead, he approached it ‘mainly as a lawyer anxious to analyse the legal conceptions of that age.’³⁰ His interest in both *Pollock and Maitland* and *Domesday Book* is to understand legal development; historical detail is essential because of the ‘variety and lack of determinacy of legal development.’³¹ This is the legal history of undergraduate law courses, written as often by lawyers as by historians.³² The question of to whom this approach may be attractive emerges: tracing the history of legal concepts aligns with positivist jurisprudence, which is largely unhistorical and ‘more concerned with identifying valid rules than debating their age.’³³ It is a means to an end for lawyers, providing a more rigorous understanding of a modern legal concept; there is little desire to understand the past on its own terms or for its own sake, but instead only to inform the needs of the present. An irony here emerges, that this is the criticism Maitland levels at lawyers who might undertake legal history.

The second ‘lawyerly aspect’ of Maitland’s work is his emphasis on the importance of correctly interpreting

²³ Milsom, “Pollock and Maitland: A Lawyer’s Retrospect,” p. 254. Whilst this could be argued to be true of historians too, Maitland’s lack of professional historical training suggests that this approach emerges from his legal background.

²⁴ Frederick Pollock and Frederic William Maitland, *The History of English Law Before the Time of Edward I*, 2 vols. (Liberty Fund, 2009), reprint of the 2nd ed., 1898. Hereafter *Pollock and Maitland*. Maitland authored all but Chapter II of Book I, “Anglo-Saxon Law,” so the work provides invaluable insight into Maitland’s legal-historical scholarship; Pollock’s influence is widely recognised as minimal.

²⁵ John Hudson, *The Formation of the English Common Law: Law and Society in England from the Norman Conquest to Magna Carta* (Longman, 1996), p. 19.

²⁶ Pollock and Maitland, *History of English Law*, vol. 1, p. 210.

²⁷ Frederic William Maitland, *Domesday Book and Beyond: Three Essays in the Early History of England* (Cambridge University Press, 1996), reprint of the 1987 ed. Hereafter *Domesday Book*.

²⁸ James Clarke Holt, “Foreword,” in Frederic William Maitland, *Domesday Book and Beyond: Three Essays in the Early History of England* (Cambridge University Press, 1996), p. v. Essay III deals with the issue of the Hide, and is of little relevance to the argument.

²⁹ David M. Rabban, *Law’s History: American Legal Thought and the Transatlantic Turn to History* (Cambridge University Press, 2012), p. 384; Milsom, “Pollock and Maitland: A Lawyer’s Retrospect,” p. 254.

³⁰ Fisher, *Frederic William Maitland*, p. 91.

³¹ John Hudson, “Maitland and Austin: Legal History and Legal Thought in the Late Nineteenth Century,” in *Law and Authority in British Legal History, 1200–1900*, ed. Mark Godfrey (Cambridge University Press, 2016), p. 322.

³² David Ibbetson, “What Is Legal History a History Of?,” in *Law and History: Current Legal Issues 2003, Volume 6*, ed. Andrew Lewis and Michael Lobban (Oxford University Press, 2004), p. 34.

³³ Michael Lobban, “Introduction: The Tools and the Tasks of the Legal Historian,” in *Law and History: Current Legal Issues 2003, Volume 6*, ed. Andrew Lewis and Michael Lobban (Oxford University Press, 2004).

legal terminology. Unwilling to disregard the language of the people and laws he was studying, he sought not single definitions or a definite statement of proper usage but instead acknowledged the flexibility and variation of the meaning of terms.³⁴ The components of this ‘lawyerly aspect’ are twofold. First, he was concerned with understanding the origins of legal vocabulary and their implications. Maitland argues that it would be a futile endeavour to attempt to express a doctrine using only English words, as the language does not have the requisite resources to convey the nuances of a concept, as compared to German, which can present Roman law in genuinely German words.³⁵ The influence of the French language on English legal vocabulary is, Maitland argues, considerable. He follows this with an extensive account of the history of the Latin terms in English law.³⁶ The noteworthy aspect that emerges from Maitland’s focus on the languages of law is the importance of understanding the nuances of legal terminology, both in their specific meanings and in the ways terms in different languages may refer to similar but not identical concepts, instruments, or categories of men. The plurilingual nature of post-Conquest England naturally led to a legal system characterised by the same. Understanding the terminology of Anglo-Saxon law adds a further element which it is necessary to understand to write a history of mediaeval English law.

Maitland’s legal education equipped him well to grapple with the patchwork of languages in use, even though it did not help him understand the languages themselves: Identifying and situating legal terms in their appropriate context is not dissimilar to a lawyer identifying the facts of a case most pertinent to a legal principle; nor are grasping their significance in relation to other terms, assessing coherence or lack thereof between terms in different languages, and determining their relevance to a particular situation.

The second part of this ‘lawyerly aspect’ emerges from the first: interpreting technical legal terms is necessary to write the internal history of law and evaluate the consequences of doctrinal developments on wider historical themes. Essay I of *Domesday Book* opens with a warning that ‘we ought not to look to Domesday Book for a settled and stable scheme of technical terms.’³⁷ Maitland instead describes the legal language of late mediaeval England as one in which French and English terms are ‘rudely intermixed’.³⁸ Ambiguity and uncertainty sometimes emerge: for example, ‘we cannot tell how the English jurors would have expressed the distinction between *bordarii* and *cotarii*, for while the *cot* is English, the *borde* is French.’³⁹ Similarly, Maitland’s analysis of the distinction between *servus* and *villanus* illustrates both the complexities of legal terminology, and why Maitland the lawyer was well-placed to write such a history: in numerous entries across counties in Domesday Book, *servi* are kept separate from *villani*, *bordarii*, and *cotarii*; nonetheless, it is not possible to say that the *villanus* has a different status from the *bordarius*.⁴⁰ The *Leges Henrici Primi* categorises both under *villani*, and refers to all who are not *servi* but are not of noble status by the same term.⁴¹ Maitland’s forensic scrutiny of these sources appreciates the fluid nature of the categories of men in the years after the Conquest; he seeks not to

³⁴ Hudson, ‘Maitland and Austin,’ p. 317.

³⁵ Pollock and Maitland, *History of English Law*, vol. 1, p. 58.

³⁶ Pollock and Maitland, *History of English Law*, vol. 1, pp. 59–66.

³⁷ Maitland, *Domesday Book and Beyond*, p. 8.

³⁸ Maitland, *Domesday Book and Beyond*, pp. 8–9.

³⁹ Maitland, *Domesday Book and Beyond*, p. 39.

⁴⁰ Maitland, *Domesday Book and Beyond*, p. 39.

⁴¹ Maitland, *Domesday Book and Beyond*, p. 39.

superimpose rigid categories where they did not exist, but instead to appreciate the situation as it was through interrogation of the available material. His legal training heightened his sensitivity to nuances within and distinctions between vague legal concepts, enabling him to see how these could have informed legal relationships and affected doctrinal substance.

Maitland's extensive analysis of the meaning of *sake* and *soke* suggests the same: he starts by considering the two terms, remarking that *soke* 'is by far the commoner; indeed we hardly ever find *sake* except in connection with *soke*, and when we do, it seems just an equivalent for *soke*.'⁴² He rigorously analyses the meaning of *sake* and *soke* before turning to his main interest, the development of jurisdiction by 1086. This conceptual interrogation is an effective prelude which precedes the rich fugue discussing the concepts in practice – the argument Maitland advances about the intricacies of and contexts in which the concepts are relevant depends to a large extent on a clear definition of the terms. Maitland's legal education gave him an understanding of procedure and jurisdiction, which he applies to his task of reconstructing mediaeval jurisdiction and understanding the doctrinal evolution of *sake* and *soke*.

These 'lawyerly aspects' of Maitland's work underlie his presentation of the mediaeval English common law as organically evolving. David Rabban argues that Maitland 'often conveyed his evolutionary thought through metaphors of organic growth, portraying a continuous process of national development, often tied to race, from early origins to maturity.'⁴³ Maitland's sustained analysis of doctrinal development in *Pollock and Maitland* illustrates this. For example, the courts of the twelfth century, Maitland observes, have varied roots – the king, the church, feudal tenure, ancient communities.⁴⁴ These courts maintain different jurisdictions, emerging from the division of England into counties, further divided into hundreds, then into vills or townships.⁴⁵ Maitland argues that as these courts were the basis of community organisation, it is necessary 'to describe the nature of these communities and to consider why some of them are, whilst others of them are not, attaining personality.'⁴⁶

Take the county and its court: the term *comitatus* refers both to persons who inhabit the land and to the judicial assembly. The whole county had convened routinely since before the Conquest and, from the early twelfth century, on occasions of a visit by a royal justice in eyre, although it is unclear whether these were specially summoned courts.⁴⁷ The community, therefore, affects the function of the court. The sheriff sits in routine meetings of the court as its president; his appointment is royal, and he is directly accountable to the Exchequer.⁴⁸ Maitland asserts that twelfth-century sheriffs were great men with several functions, some of which were judicial, although these functions did not extend to making legal judgments; however, these powers were gradually declining by the beginning of the thirteenth century, and by the end of that century 'we see the germs of an institution which is destined to grow at his expense, the knights assigned to keep the peace of the county whose

⁴² Maitland, *Domesday Book and Beyond*, p. 84.

⁴³ Rabban, *Law's History*, p. 384.

⁴⁴ Pollock and Maitland, *History of English Law*, vol. 1, p. 513.

⁴⁵ Pollock and Maitland, *History of English Law*, vol. 1, p. 514.

⁴⁶ Pollock and Maitland, *History of English Law*, vol. 1, p. 513.

⁴⁷ Pollock and Maitland, *History of English Law*, vol. 1, pp. 521–22. Maitland does not explicitly date this development, nor does he develop the process by which the court was convened for justices in eyre: see John Hudson, *The Oxford History of the Laws of England*, vol. 2, 871–1216 (Oxford University Press, 2012), pp. 276–80, for historical contextualisation.

⁴⁸ Pollock and Maitland, *History of English Law*, vol. 1, p. 519. The justice in eyre would preside over cases when present; this need not be developed further for the present purpose but is nonetheless an important observation.

successors will be justices of the peace.’⁴⁹ The metaphor of organic growth that Rabban identifies is present here: the reference to ‘germs of an institution’ suggests that no moment can be identified as that at which the system of justices of the peace supplanted the sheriff; instead, the system evolved organically and gradually as justice became increasingly centralised under the king’s jurisdiction. This notion corresponds to the theoretical unity present in *Bracton*, that all temporal justice is the king’s: Maitland concedes that *Bracton* does not elucidate the extent to which reality reflected theory, but that ‘the assertion is important... it has been making itself good as against other principles which in part were older, in part were newer.’⁵⁰ Maitland’s legal education and experience again facilitate this argument, enabling the use of legal sources such as *Bracton* which may be inaccessible to an individual without developed legal knowledge; moreover, Maitland’s understanding of modern legal procedure and jurisdiction gained through this equipped him to interpret and understand technical mediaeval legal sources, as well as to apply the theory expounded therein to the legal records detailing the actions of courts. He did this, however, aware that he should not project on the past the needs of the present, separating himself from the caricature of the modern lawyer presented in his inaugural lecture.

Matters of procedure, Maitland argues, and their relationship to developments in the law, are central to both law and legal history:⁵¹ the study of the mediaeval forms of action, for example, would enable a work which analyses the conceptions underpinning various aspects of the law.⁵² Maitland’s emphasis on procedure underscores the importance he attached to its influence on the development of the common law. The growth of the writ system in England serves as a lucid example, about which Maitland remarks that ‘when we boast of the rule of law in England... we shall do well to remember that the rule of law was the rule of writs.’⁵³ He presents this as an evolving system, with the chancery issuing writs ‘one by one’.⁵⁴ In the age of Glanvill, law was not made through legislative effort but ‘rather by decisions of the courts and by writs penned in the chancery.’⁵⁵ Henry II’s legal reforms, according to Maitland, were administrative, and have left little documentary evidence.⁵⁶ Writ issuing to those who believed they had suffered an injustice increased rapidly during the reign of Henry III, enabling them to have their complaint heard before the court.⁵⁷ The writ system’s growth was more rapid than the development of the sheriff’s role in the county court, with Maitland attributing ‘the age of rapid growth’ of the writ system to the period between 1154 and 1272.⁵⁸ The latter, he concludes, is the time by which ‘the law of the king’s court has become the common law.’⁵⁹

The evolution of the writ system is not, however, a linear process, nor are the forms of action ‘the outcome of a classificatory process that has been applied to pre-existing materials. They are institutes of the law; they are – we say it without scruple – living things.’⁶⁰ Maitland considers the last years of Henry III’s reign to be the ‘golden

⁴⁹ Pollock and Maitland, *History of English Law*, vol. 1, p. 519.

⁵⁰ Pollock and Maitland, *History of English Law*, vol. 1, p. 514.

⁵¹ Hudson, “Maitland and Austin,” p. 304.

⁵² Rabban, *Law’s History*, p. 392.

⁵³ Pollock and Maitland, *History of English Law*, vol. 2, p. 561.

⁵⁴ Pollock and Maitland, *History of English Law*, vol. 2, p. 557.

⁵⁵ Pollock and Maitland, *History of English Law*, vol. 1, pp. 115, 149.

⁵⁶ Pollock and Maitland, *History of English Law*, vol. 1, p. 149.

⁵⁷ Pollock and Maitland, *History of English Law*, vol. 1, p. 174.

⁵⁸ Pollock and Maitland, *History of English Law*, vol. 1, p. 174.

⁵⁹ Pollock and Maitland, *History of English Law*, vol. 1, p. 203.

⁶⁰ Pollock and Maitland, *History of English Law*, vol. 2, p. 559.

age of the forms', as few of the writs that had been invented had fallen from use, but the 'common law's power of producing new forms was almost exhausted.'⁶¹ Each writ had its own rules, and it is in this that Maitland locates a key distinction between mediaeval and modern procedure: there is much to say about a specific action in the Middle Ages, but little to say about actions in general; the opposite is true of modern procedure.⁶² There are two noteworthy aspects here: first, the metaphor of organic growth is once again present, in that writs are 'living things'. This characterisation of writs reveals how Maitland approaches what he considers central to the mediaeval legal system. Further, it also resonates with the approach to legal history which Maitland describes in his inaugural lecture, that it is essential to understand specific details about procedure, at any one moment and as it evolved, to understand the development of substantive law.⁶³ This approach suggests that Maitland 'the lawyer' was not the sole author of these enduring works of legal history; his interest in the development of legal procedure does not align with his notion that the lawyer is only interested in what serves contemporary needs. Whilst his legal education and experience enabled his examination of mediaeval legal sources, he did not approach these necessarily with the intention and perspective of a lawyer.

Maitland's approach influenced and inspired much of the scholarship of future generations. Milsom extends Maitland's argument with regard to legal history as a whole, stating that 'the lawyer legal historian's version... must be consistent in itself and with all the known facts: but it does not normally depend on a single fact. Arguments focused on particulars do not necessarily work with generalisations, and the law is always a generalisation.'⁶⁴ Maitland's presentation of the development of procedure partly satisfies Milsom's prescription – it uses all the known facts, acquired from sources that Maitland expended considerable energy interrogating; however, the consistency extends only to the conclusion that each writ has its own function, and whilst many writs may intersect at points, connections between forms may be contrary to those which seem most natural to modern perception.⁶⁵ This is not a flaw, and is consistent with Maitland's approach: he knew the laws, procedures, and thinking of the twelfth and thirteenth centuries, but would not make generalisations if the sources did not suggest that such a clear statement reflected the reality.⁶⁶ Hudson's observation that for Maitland 'historical detail and historical process could be crucially connected' captures Maitland's presentation of procedure as evolutionary more convincingly than Milsom's.⁶⁷ Milsom may accept this, but would likely see it not as a mode of thinking, but simply as a mode of presenting an argument. This is the focus of Section II.

2. Maitland: the 'Lawyer-Historian'

'History involves comparison, and the English lawyer who knew nothing and cared nothing for any

⁶¹ Pollock and Maitland, *History of English Law*, vol. 2, p. 562.

⁶² Pollock and Maitland, *History of English Law*, vol. 2, p. 560.

⁶³ Rabban, *Law's History*, p. 405.

⁶⁴ Milsom, "'Pollock and Maitland': A Lawyer's Retrospect," p. 256.

⁶⁵ Pollock and Maitland, *History of English Law*, vol. 2, p. 597.

⁶⁶ Fisher, *Frederic William Maitland*, p. 78.

⁶⁷ Hudson, "Maitland and Austin," p. 307.

*system but his own hardly came in sight of the idea of legal history.*⁶⁸

Maitland's emphasis on the importance of comparison has already been sketched in the introduction, but this remark from his inaugural lecture provides a sensible point of departure to analyse how he employs it in his works of legal history. Maitland uses this method not simply to highlight similarities or divergencies, but to argue why the English common law developed distinctively from Continental legal systems. The main discussion is twofold: first, Maitland's use of comparison to argue why there was no reception of Roman law in England at two moments when this might have been possible, the twelfth and the sixteenth centuries; second, Maitland's broad discussion about the divergence between practices in England and on the Continent, focusing on the development of the jury as an English peculiarity and his argument that feudalism was not a monolithic European phenomenon, as feudal law in England cannot be held to be distinct from the ordinary law of the land.⁶⁹

There is an important distinction to make between 'comparison' as a method of historical inquiry and 'comparative history' as a discipline: the former has long been employed in scholarship about legal developments, particularly between common law and civil law;⁷⁰ the latter is more complex to define and continues to emerge and develop as a discipline.⁷¹ Maitland states in *Pollock and Maitland* that he will make considered but limited use of comparative legal history, aligning with the sentiment of his inaugural lecture that the things that are to be compared must first be known in isolation.⁷² He is primarily concerned with writing the legal history of England and employs comparison to achieve this – this is the focus of the section.

Before embarking upon this discussion, Maitland's emphasis that law and legal development should be understood on their own terms must be considered. He lauds the vast quantities of written legal records available for interrogation in the Plea Rolls and Year Books as the 'most glorious store of material for legal history that has ever been collected in one place.'⁷³ He writes in the introduction to volume I of the Year Books of Edward II that:

*'[H]ave we not in these ancient reports too much logic and too little life? On the contrary, we should claim that on behalf of the Year Books that, when we consider that they were written by mediaeval lawyers for mediaeval lawyers, they show us a marvellous deal of the play of those moral and economic forces of which legal logic is the instrument, and often, if we may so say, the reluctant instrument... indeed it will some day seem a wonderful thing that men once thought they could write the history of mediaeval England without using the Year Books.'*⁷⁴

⁶⁸ Maitland, "Why the History," p. 488.

⁶⁹ Pollock and Maitland, *History of English Law*, vol. 1, pp. 213–14.

⁷⁰ John Hudson and William Eves, "Introduction: Situating, Researching, and Writing Comparative Legal History," in *Common Law, Civil Law, and Colonial Law: Essays in Comparative Legal History from the Twelfth to the Twentieth Centuries*, ed. William Eves, John Hudson, Ingrid Ivarsen, and Sarah B. White (Cambridge University Press, 2021), p. 2. Sustained treatment of "comparative history" is beyond the remit of the present analysis; however, it is important to note that Maitland did not purport to write history of this genre.

⁷¹ Hudson and Eves, "Situating, Researching, and Writing Comparative Legal History," pp. 4–8.

⁷² Maitland, "Why the History," p. 489.

⁷³ Maitland, "Why the History," p. 496.

⁷⁴ Frederic William Maitland, "The Year Books and Their Origin," in *Frederic William Maitland, Historian: Selections from His Writings*, ed. Robert Livingston Schuyler (University of California Press, 1960), pp. 241–42. One must question whether Maitland perceived the absence of Year Books for the period covered by *Pollock and Maitland* as a weakness, as the first records begin in 1268, near the end date of the work.

Maitland's appreciation of the value of the Year Books is clear: they allow legal historians to reconstruct the external history of law by examining social factors. They also facilitate attempts to understand mediaeval legal thinking on its own terms, given that they were written by lawyers, for lawyers. James Campbell's observation that Maitland saw 'the history of English law as one of complex intellectual development in which progress, the contribution of successive generations of men, could be demonstrated' resonates:⁷⁵ the 'life' of mediaeval legal records is of interest to Maitland, both for what they can reveal about the internal history of the common law and for their value in constructing a broader history of England.

Maitland's approach to these sources, however, was not solely lawyerly: he suggests that the insular approach by lawyers to English law, complemented by a 'consecrated ignorance of French and German law', is the reason that its history has not been written.⁷⁶ Whilst English lawyers boast of 'the independence and extreme antiquity of their system,' they do not attempt to understand its development.⁷⁷ Maitland's importance as a historian emerges here: by understanding the historical development of other legal systems, meaningful work can be done on English legal history. Maitland was not alone in his approach to historical sources: prominent legal contemporaries of Maitland such as Sir Frederick Pollock and Oliver Wendell Holmes Jr shared this approach, particularly in their historical works.⁷⁸ Largely, however, they were concerned with the internal, doctrinal development of the law.

Similarly, Maitland's approach to the thirteenth-century treatise known as *Bracton*, which he characterises as 'the crown and flower of mediaeval jurisprudence', and the compilation known as *Bracton's Notebook* reflects his emphasis on historical contextualisation.⁷⁹ He is conscious of Bracton's self-identified purpose in the treatise, that 'he has told us how he set himself to peruse the ancient judgments of the just because his ignorant and uneducated contemporaries were misrepresenting the law.'⁸⁰ Maitland notes that the author of *Bracton* 'had not our modern notions of "authority"';⁸¹ similarly, the nineteenth-century conception of 'case law' was far from his mind.⁸² Nonetheless, Maitland does describe the cases compiled in *Bracton's Notebook* as 'case law', although he comments on how infrequently a typical mediaeval writer cites a case.⁸³ This suggests that Maitland found value in both thirteenth-century sources, but he was careful not to realise the concern he expresses in his inaugural lecture and project the needs of the present on the material. Additionally, he was aware of the limitations of the treatise and stressed that it is necessary to distinguish between Bracton's statement of thirteenth-century law and his cosmopolitan jurisprudence.⁸⁴ It was, in brief, essential to interrogate the sources on their terms.

⁷⁵ Campbell, "Stubbs, Maitland, and Constitutional History," pp. 110–11.

⁷⁶ Maitland, "Why the History," pp. 489–90.

⁷⁷ Frederic William Maitland, "English Law and the Renaissance," in *Selected Historical Essays of F. W. Maitland*, ed. Helen Maud Cam (Cambridge University Press, 1957), pp. 145–46.

⁷⁸ See Oliver Wendell Holmes Jr., *The Common Law* (Belknap Press of Harvard University Press, 2009), in particular lecture 1, "Early Forms of Liability," pp. 3–36.

⁷⁹ See Paul Brand, "The Age of Bracton," in *The History of English Law: Centenary Essays on 'Pollock and Maitland'*, ed. John Hudson (Oxford University Press for the British Academy, 1996), pp. 65–89.

⁸⁰ Pollock and Maitland, *History of English Law*, vol. 1, p. 162.

⁸¹ Pollock and Maitland, *History of English Law*, vol. 1, p. 162.

⁸² Pollock and Maitland, *History of English Law*, vol. 1, p. 187.

⁸³ Frederic William Maitland, *Bracton's Note Book: A Collection of Cases Decided in the King's Courts during the Reign of Henry the Third*, 3 vols. (C. J. Clay & Sons, 1887), p. 11.

⁸⁴ Pollock and Maitland, *History of English Law*, vol. 1, p. 189.

The resistance of the English common law to the reception of Roman law has been well treated in historical scholarship. Maitland contributed to this debate, arguing that the common law became increasingly insular. In constructing this argument, he identifies two junctures at which there was a serious possibility of Roman law supplanting the English common law. First, the period of civil war in the mid-twelfth century, when the common law was still nascent—a moment at which ‘the future of English law looks very uncertain. If English law survives at all, it may break into a hundred local customs, and if it does so, the ultimate triumph of Roman law is assured.’⁸⁵ Second, the sixteenth century, when Roman law appealed to Tudor monarchs, particularly Henry VIII, who resolved to be Head of the Church as well as of State, as a way of ensuring stronger governance.⁸⁶

Maitland says that ‘of all the centuries the twelfth is the most legal. In no other age, since the classical days of Roman law, has so large a part of the sum total of intellectual endeavour been devoted to jurisprudence.’⁸⁷ This he applies not only to English law but also to the development of canon law and the treatment of Roman law as a ‘living law’, entwined with the continuity of the empire.⁸⁸ In part, this is a consequence of the drastic increase in the number of available manuscripts containing classical texts. Roman law was studied in England in the twelfth century, and a school of Roman law flourished at Oxford during the thirteenth century.⁸⁹ Critically, though, this scholarly treatment of Roman law ‘found a small, homogenous, well conquered, much governed kingdom, a strong, a legislating kingship’ which protected the status of the English common law.⁹⁰

Maitland emphasises the English situation through comparison: in Italy, the influence of Justinian’s works was secured by the theoretical continuity of the empire; it was desirable to appeal to the classical tradition to anchor its authority in the contemporary context. But this was not the case for England: there was no group who had lived a vulgar form of an old law since lost, and would thus seek their law in the newly rediscovered Roman texts.⁹¹ Similarly in France, the Roman texts ‘gave their powerful aid to the centripetal and monarchical forces’ during the attempt to reconstitute a national unity.⁹² Maitland’s presentation of the English political context demonstrates the differences between the unity created by the strength of the Crown as an entity in England and the instability resulting from protracted fragmentation on the Continent. This use of comparison underscores why Roman law did not supplant the English common law: by highlighting certain differences between England and other territories, the unique situation in England is made clear; it is more convincing than an argument which simply describes the situation in England, but fails to illustrate why this is unique. Maitland’s argument is inherently linked to its historical context; he not only analyses its internal history, focusing on doctrinal development, but also examines the effect of external factors. This is outside the remit of the lawyer, as defined by Maitland in his inaugural lecture; it expands the insular approach assigned to the lawyer, employing historical inquiry as an analytical tool to enable better understanding of legal history.

⁸⁵ Pollock and Maitland, *History of English Law*, vol. 1, p. 108.

⁸⁶ John Hudson, *F. W. Maitland and the Englishness of English Law* (Selden Society, 2009), p. 13. Cited with thanks to Professor Hudson for providing a transcript of this lecture.

⁸⁷ Pollock and Maitland, *History of English Law*, vol. 1, p. 88.

⁸⁸ Pollock and Maitland, *History of English Law*, vol. 1, pp. 89–90.

⁸⁹ Pollock and Maitland, *History of English Law*, vol. 1, p. 100.

⁹⁰ Pollock and Maitland, *History of English Law*, vol. 1, p. 28.

⁹¹ Pollock and Maitland, *History of English Law*, vol. 1, p. 28.

⁹² Pollock and Maitland, *History of English Law*, vol. 1, p. 28.

Maitland similarly compares English legal education with instruction methods elsewhere, arguing in his 1901 Rede Lecture that the ‘schools of national law’ had ‘marked off England from the rest of the world’ and resisted the intrusion of Roman law.⁹³ Concluding the lecture with a reference to the success of these institutions, Maitland expressed the hope that the Inns of Court, ‘proud of a past that is unique in the history of the world’, might ‘become fully conscious of the heavy weight of responsibility that was assumed when English law schools saved, but isolated, English law in the days of the Reception.’⁹⁴ This outcome was, however, far from certain. Maitland highlights that, in the sixteenth century, Roman law was supplanting German law in Germany, and Henry VIII had founded professorships at Oxford and Cambridge to encourage the study of civil law.⁹⁵ ‘Codification was in the air’ by Edward VI’s reign, with calls both in France and in Germany ‘for a new Justinian’.⁹⁶ He speculates whether the Council, the Star Chamber, and the Court of Requests in England might have done ‘the Romanising work that was done in Germany by the Imperial Chamber Court’ and observes, although without development, that James V of Scotland was contemporaneously establishing the College of Justice.⁹⁷ Maitland employs the comparative approach detailed in his inaugural lecture in this discussion, and finds similarities between the government institutions of England and other countries. Although comparison in this vein is important, Maitland’s comparison between England and other legal traditions to identify crucial differences is of far more significance. His identification of the Inns of Court as a uniquely English entity allows him to highlight a key difference between England and other countries and argue that they insulated the common law from Roman influence.

Using comparison, Maitland argues that the development of the jury system is a peculiarity of mediaeval England.⁹⁸ He describes trial by jury as ‘that which modern Englishmen will be apt to think the most distinctive.’⁹⁹ Maitland posits that ‘what made it possible was the subjection of the England of the Angevin time to a strong central government, the like of which was to be found in no other land.’¹⁰⁰ By outlining the practices which preceded the jury trial, then the divergent developments in England and on the Continent, Maitland identifies a similarity between English and canonical procedure in the eleventh and twelfth centuries, in that, amongst others, both employed oath-helpers who could help the accused to ‘swear away’ the charge.¹⁰¹ By the end of the twelfth century, however, these similarities faded, and the introduction of the inquisition in 1199 marked a clear rupture.

As with the argument about the lack of reception of Roman law in England, comparison is more useful for understanding why England did not adopt this new procedure, rather than to draw parallels. In England, Maitland

⁹³ Maitland, “English Law and the Renaissance,” p. 145. Maitland here refers to the Inns of Court: for historical contextualisation, see Wilfrid R. Prest, *The Inns of Court under Elizabeth I and the Early Stuarts, 1590–1640* (Longman, 1972) and the bibliography therein. Maitland’s argument and conclusion have been refuted (see John Hamilton Baker, *The Oxford History of the Laws of England, vol. 6, 1483–1558* (Oxford University Press, 2003), pp. 3–13, for extensive discussion of Maitland’s arguments); nevertheless, the lecture effectively illustrates Maitland’s use of comparison.

⁹⁴ Maitland, “English Law and the Renaissance,” p. 148.

⁹⁵ Maitland, “English Law and the Renaissance,” pp. 137–38.

⁹⁶ Maitland, “English Law and the Renaissance,” p. 143.

⁹⁷ Maitland, “English Law and the Renaissance,” p. 142.

⁹⁸ See Pollock and Maitland, *History of English Law*, vol. 1, pp. 119–20, for Maitland’s discussion of the jury’s Frankish origins.

⁹⁹ Pollock and Maitland, *History of English Law*, vol. 1, p. 117.

¹⁰⁰ Pollock and Maitland, *History of English Law*, vol. 2, pp. 629–30.

¹⁰¹ Pollock and Maitland, *History of English Law*, vol. 2, p. 654. There is divergence in the practical use of oath-helpers in English and canonical procedure, particularly their use by the plaintiff to deny an affirmative plea (see Pollock and Maitland, *History of English Law*, vol. 2, p. 632). The comparison is nevertheless useful to demonstrate a similarity between the two procedural traditions.

writes, ‘the escape was narrow’ as the system, in which the prosecution of offences was left to the grieved party, was insufficient.¹⁰² He identifies the genesis of a new inquisitory procedure, placed alongside the existing modes of proof; however, the reforms of Henry II were introduced before the development of the canonical inquisition, and the English procedure gradually became accusatory.¹⁰³ Maitland draws upon Norman procedure to illustrate this uniquely English development: the Norman process of the ‘jury’ entailed secret questioning of twenty-four men who might know the facts; the evidence collected was shared in public, and each witness was asked whether he maintained his statement. This is the basis of divergence: Maitland argues that this is not found in England and that the *iurea patriae* ‘was at one time a plastic institution which might take different forms in two sister lands.’¹⁰⁴ Maitland considers comparison vital to understand these separate developments; he uses it to strengthen the argument that the jury is an English peculiarity in the late Middle Ages, demonstrably absent elsewhere on the Continent. His remark that ‘history involves comparison’ rings true, and his emphasis on historical contextualisation is evident. It is, however, an incomplete picture.

An extended discussion of the modes of proof follows the Norman comparison, in which Maitland directly compares English and continental perceptions of crime and methods of procedure that led to the respective procedural developments. By so doing, Maitland traces the internal history of proof, again embodying the interests typical of a lawyer. This comparison is the basis of Maitland’s argument about why trial by jury became standard procedure in England; he not only analyses the origins of the jury but also rejects any simple causal deterministic explanation.¹⁰⁵ Maitland’s concluding remarks capture this succinctly:

‘Foreign criminalists in the middle ages and in later times are for ever dwelling on the weakness of the law, and on the difficulty of obtaining convictions unless the state takes to itself every advantage in its struggle with the prisoner. Of this we hear little in England, though we can see that an enormous quantity of crime went unpunished. Our law seems to think itself quite strong enough. This difference was in great measure due to the absence of any ‘theory of legal proofs’ such as that which hampered our neighbours.’¹⁰⁶

Campbell’s argument, that Maitland considered it the historian’s duty to recover the thoughts of common men, is evidenced by Maitland’s comments about contemporaries’ perception of the strength of their law.¹⁰⁷ The interest in the internal history of theories of proof, however, resembles the ‘lawyerly’ concern with doctrinal development discussed. It concerns the contextualisation of twelfth-century procedure, and requires an understanding of emerging canonical jurisprudence, again tasks best tackled by the historian with a grasp of law; the historian pure has not the requisite tools. The ‘lawyer-historian’ again must be credited.

Maitland employs comparative analysis to explain why English law was never codified. He says that

¹⁰² Pollock and Maitland, *History of English Law*, vol. 2, p. 655.

¹⁰³ Pollock and Maitland, *History of English Law*, vol. 2, p. 655.

¹⁰⁴ Pollock and Maitland, *History of English Law*, vol. 2, p. 656.

¹⁰⁵ Hudson, *F. W. Maitland and the Englishness of English Law*, p. 8.

¹⁰⁶ Pollock and Maitland, *History of English Law*, vol. 2, p. 657.

¹⁰⁷ Campbell, “Stubbs, Maitland, and Constitutional History,” p. 110.

German codification is ‘among the great things that he [the German] has done’, that ‘he has set his legal house in order; he has swept away the rubbish into the dustbin; he has striven to make his legal system rational, coherent, modern, worthy of his country and our century.’¹⁰⁸ He attributes the desire for and success of German codification to ‘special reasons’, by which he means those that ‘cannot move us in England, though as a matter of fact they have at various times come into play in most European countries.’¹⁰⁹ He argues that as England ‘from a very remote time’ had had a uniform law, established in the twelfth and secured in the thirteenth century, there was little need to codify the law;¹¹⁰ conversely, the patchwork nature of the German legal system, as had existed for centuries, made codification desirable.¹¹¹ Maitland argues that the ‘past history of Germany had made German jurisprudence a highly controversial science.’¹¹² Any attempt to codify German law would have to balance competing schools of jurisprudence; such an endeavour in England would not have to take a side as there was one law common to the whole country.¹¹³

Maitland’s use of comparison here is not essential to make the argument as to why English law was never codified but is useful to strengthen it. He contrasts the nature of legal development on the Continent and in England by comparing their respective political contexts: English law had been centralised and unified during the reign of Henry II by a permanent court of professional judges, frequent visits by itinerant judges to other courts, and various procedural developments;¹¹⁴ Germany had no such centralisation during the Middle Ages, and there remained three or four legal systems after the unification of 1870, each with its own territory.¹¹⁵ Maitland’s approach here resembles that expressed in his inaugural lecture: to understand why England never codified her law, he explores the circumstances in which other countries did codify their law. By making this comparison, Maitland can assert that England’s early centralisation of justice, unique in Europe, contributed significantly to the nature of English legal development and the lack of desire for codification. This argument underscores effectively the notion of the ‘lawyer-historian’ as it combines the skills of each approach: Maitland engages with jurisprudential arguments about the question of codification, a task for which his legal experience will have been undoubtedly useful; his understanding of the broader English and German political contexts, which is the basis of his comparison, aligns with the approach of the nineteenth-century historian.¹¹⁶ These approaches fuse, and thus the ‘lawyer-historian’ is again responsible for the work.

Maitland employs comparison to construct his arguments about English legal history; he uses this method not simply to highlight similarities or divergencies, but to argue why English common law developed distinctly from Continental systems by resisting the reception of Roman law and the adoption of the inquisition. His rejection of feudalism as a monolithic European phenomenon similarly relies on a key difference between the

¹⁰⁸ Frederic William Maitland, “The Making of the German Civil Code,” in *The Collected Papers of Frederic William Maitland*, *Downing Professor of the Laws of England*, ed. Herbert Albert Laurens Fisher, vol. 3 (Cambridge University Press, 1911), pp. 475–76.

¹⁰⁹ Maitland, “Making of the German Civil Code,” p. 476.

¹¹⁰ Maitland, “Making of the German Civil Code,” p. 476.

¹¹¹ Maitland, “Making of the German Civil Code,” p. 478.

¹¹² Maitland, “Making of the German Civil Code,” p. 479.

¹¹³ Maitland, “Making of the German Civil Code,” p. 479.

¹¹⁴ Pollock and Maitland, *History of English Law*, vol. 1, p. 117. Maitland states in “The Making of the German Civil Code,” p. 476, that he will not go into “the geographical and historical causes... of the uniformity of mediaeval English law,” hence the reliance on *Pollock and Maitland*.

¹¹⁵ Maitland, “Making of the German Civil Code,” p. 478.

¹¹⁶ Hudson and Eves, “Situating, Researching, and Writing Comparative Legal History,” p. 9.

English doctrine of tenure and Continental land law traditions. Maitland's purpose is not to write comparative legal history, but instead he uses comparison to underscore his presentation of English common law as a peculiarity. He rarely departs from his principal concern of writing the legal history of England; even in broader works such as the *Constitutional History* and his Rede Lecture, the focus primarily remains on the exceptional development of English legal institutions.

Comparison is, for Maitland, both a method of and a tool for writing history, rather than the ultimate goal – his statement that his work is 'preliminary labour' as the 'first step towards an answer' suggests that he sought not to write broader comparisons of English and continental legal systems as an exercise in comparative history.¹¹⁷ Maitland's legal education and experience, in particular the 'lawyerly aspects' of his work identified in Section I, complement this: the approach of the lawyer and the tool of the historian are employed together, thus producing works of which the author is Maitland the 'lawyer-historian'.

Conclusion

*'The study of English legal history was revolutionised by his toil.'*¹¹⁸

Fisher's remark aptly conveys the legacy of F. W. Maitland in English historical scholarship: his conclusions have been challenged, but he remains universally admired.¹¹⁹ I have argued that Maitland's legal history needs to be understood through the lens of the dual identity of the author – that of the 'lawyer-historian' – as this significantly influenced his conception of history and methodology.

Maitland's legal experience distinctively manifests in his historical scholarship. The doctrinal organisation of his work and his emphasis on understanding legal terminology, which I have characterised as 'lawyerly aspects', are, I argue, the result of his legal education and practice. His presentation of English common law as a gradually evolving entity is similarly a product of his legal experience.

The discussion of Maitland as a 'lawyer-historian' develops this, arguing that characterising Maitland only as a lawyer fails to consider the historical aspects of his work. The second section analysed Maitland's use of comparison as a tool, focusing on his contextualisation of English law within broader European legal developments. I conclude that identifying Maitland as a historian, either instead of or as well as a lawyer, is an oversimplified and reductive dichotomy: Maitland's scholarship can only be fully appreciated by considering him as a 'lawyer-historian'.

Some 130 years after the publication of *Pollock and Maitland*, one would be forgiven for asking whether the most appropriate characterisation of Maitland deserves attention. Milsom remarked in his address at the unveiling of a memorial tablet for Maitland in 2001 that 'my tribute must be to the extraordinary man with whom

¹¹⁷ Rabban, *Law's History*, p. 395.

¹¹⁸ Fisher, *Frederic William Maitland*, p. 27.

¹¹⁹ Rabban, *Law's History*, p. 383.

I have argued for much of my life, not to the superhuman myth engulfing him.’¹²⁰ Baker, in his inaugural lecture after taking the same Chair as Maitland some 110 years later, acknowledges the extent to which scholars have benefited from Maitland’s work:¹²¹ his conclusions may have been challenged and revised, particularly by Milsom, whom Rabban identifies as Maitland’s ‘most important late-twentieth century critic’, but this does not diminish the value of his scholarship.¹²² Hudson says that Maitland’s work ‘is still the standard picture’ of the birth of the common law.¹²³

The ‘superhuman myth’ to which Milsom alludes refers partly to the reliance on and authority of Maitland’s publications in the first half of the twentieth century.¹²⁴ Maitland warned against historical orthodoxy, yet his work attained such status; historians in the following decades assumed his framework.¹²⁵ Maitland’s reputation as a historian partly sustains this, even now. Milsom argues that ‘historians have long sought to expunge the lawyer’:¹²⁶ the plaque unveiled categorises Maitland as ‘historian’, and G. R. Elton nominates him as the patron saint of historians.¹²⁷ Such characterisation perpetuates misunderstanding: all interested in mediaeval English legal history must engage with, supplement and refine Maitland’s work, whether they focus on his ‘lawyerly’ approach or his employment of historical comparison.

A scholar with extensive legal understanding, modern and mediaeval alike, and historical knowledge rivalled by few is a rarity; both influences deserve recognition. The epithet ‘lawyer-historian’ here emerges.

¹²⁰ Stroud Francis Charles Milsom, “Maitland,” *Cambridge Law Journal* 60, no. 2 (2001), p. 265.

¹²¹ John Hamilton Baker, “Why the History of English Law Has Not Been Finished,” *Cambridge Law Journal* 59, no. 1 (2000), p. 64.

¹²² Rabban, *Law’s History*, p. 384.

¹²³ Hudson, *Formation of the English Common Law*, p. 19.

¹²⁴ Milsom, “Maitland,” p. 269.

¹²⁵ John Hudson, “Milsom’s Legal Structure: Interpreting Twelfth-Century Law,” *Legal History Review* 59, nos. 1–2 (1991), p. 65.

¹²⁶ Milsom, “Maitland,” p. 267.

¹²⁷ Geoffrey Rudolph Elton, *F. W. Maitland* (Weidenfeld & Nicolson, 1986), p. 97.

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