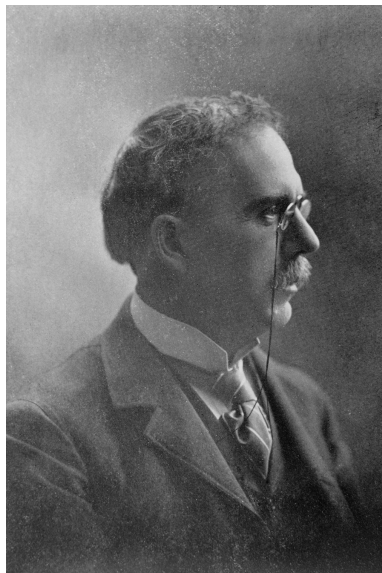

ARTICLES

MELVILLE M. BIGELOW: BOSTON UNIVERSITY'S NEGLECTED PIONEER OF HISTORICAL LEGAL SCHOLARSHIP IN AMERICA

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INTRODUCTION	2
I. THE HISTORICAL TURN IN LATE NINETEENTH-CENTURY AMERICAN LEGAL SCHOLARSHIP	3
II. JOINING A SCHOLARLY COMMUNITY IN BOSTON	7
III. THE HISTORY OF PROCEDURE IN NORMAN ENGLAND	11
IV. INTERNATIONAL CRITICAL RESPONSES	22
V. BIGELOW'S CLOSE RELATIONSHIP WITH MAITLAND	27
VI. FROM LEGAL HISTORY TO PROTO-REALISM	32
VII. LATE WORK IN LEGAL HISTORY: THE PERILS OF "UNDISCIPLINED INDIVIDUALISM"	38
CONCLUSION.....	41



Melville M. Bigelow

INTRODUCTION

Melville Madison Bigelow, together with Henry Adams, James Barr Ames, Oliver Wendell Holmes, Jr., and James Bradley Thayer, introduced the professional study of legal history to the United States in the decades following the Civil War. Emulating German standards of “scientific” historical research based on primary sources, and often relying on prior German scholarship on the history of Germanic law, they investigated the history of early English law. As English scholars recognized at the time, these Americans surpassed the English themselves in the study of English legal history. Frederic Maitland, the great English legal historian who began publishing in the mid-1880s, built upon their work, which he frequently praised and cited throughout his own. He corresponded with several of them, and maintained a close personal friendship with Bigelow. Maitland remains a towering figure, often admired as the best legal historian ever to write in the English language. The historical work of the Americans, by contrast, has been largely forgotten, Bigelow’s most of all. Yet Bigelow, a founding member of the law faculty at Boston University, where he taught from 1872 until his death in 1921 and served as Dean from 1902 to 1911, was the most productive of the late nineteenth-century American legal historians. He was even better known abroad, particularly in England, than in the United States. Stressing Bigelow’s pioneering contributions to legal history, this Article attempts to restore Bigelow to the major position he deserves in the history of American legal scholarship. Through its focus on Bigelow, the Article also directs attention to the general importance of history for late nineteenth-century legal scholars, which their twentieth-century successors unfortunately have obscured by inaccurately ascribing a timeless “deductive formalism” to “classical legal thought.”¹

Two decades after publishing the books on the history of English law that established his international reputation, Bigelow questioned the approach of the “historical school” of legal scholarship while acknowledging his own prior

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¹ I explore these broader themes in my forthcoming book, *DAVID M. RABBAN, LAW’S HISTORY: AMERICAN LEGAL THOUGHT AND THE TRANSATLANTIC TURN TO HISTORY* (forthcoming Cambridge University Press).

participation in it. By focusing on the history of law as a process of continuous evolution from the remote past, Bigelow came to believe, the historical school diverted attention from the pressing issues that law should address in the present. Like other scholars at the beginning of the twentieth century, most famously Roscoe Pound in his early articles promoting “sociological jurisprudence,” Bigelow asserted that the destructive individualism and related inequality in the United States threatened democracy, and urged legal scholars to undertake a “scientific” study of the social and economic forces to which law must respond.²

When he was Dean of the Boston University School of Law, Bigelow proposed, but never implemented, a broader curriculum designed to introduce students to external influences on law. As part of this “plan of legal extension,” Bigelow sponsored a series of lectures, including two by him, designed to illustrate the conception that “law is the expression, more or less deflected by opposition, of the dominant force in society.”³ Morris Cohen, the eminent legal philosopher, declared in the 1930s that these lectures, published in 1906 as *Centralization and the Law*, constituted the “first pronouncement” of legal realism.⁴ Though Bigelow questioned the value of the purely historical study of law to which he himself had made major contributions, he endorsed the use of history to evaluate whether or not survivals of past law served useful functions in the present.⁵ His final essays, published in 1920, invoked historical examples to warn against “undisciplined individualism” and to illustrate the more desirable social unity provided by religion and family.⁶ Bigelow’s proto-realism, though much less influential than Pound’s sociological jurisprudence or Bigelow’s own earlier work in legal history, illustrates in the career of one scholar the major transformation in American legal thought from the historical school that dominated in the late nineteenth century to the more socially conscious “law and society” orientation that prevailed during most of the twentieth century.

I. THE HISTORICAL TURN IN LATE NINETEENTH-CENTURY AMERICAN LEGAL SCHOLARSHIP

As law schools became integrated into emerging American research universities after the Civil War, the first generation of professional legal scholars in the United States, who had often studied in Germany, wanted to

² See *infra* text accompanying notes 277-280.

³ Melville M. Bigelow, *Preface* to *CENTRALIZATION AND THE LAW: SCIENTIFIC LEGAL EDUCATION*, at v (Melville M. Bigelow ed., Little, Brown, and Co. 1906).

⁴ Morris Cohen, *A Critical Sketch of Legal Philosophy in America*, 266, 304, in 2 *LAW: A CENTURY OF PROGRESS 1835-1935* (Alison Reppy ed., 1937).

⁵ See *infra* text accompanying notes 296-302.

⁶ MELVILLE M. BIGELOW, *Medieval English Sovereignty*, in *PAPERS ON THE LEGAL HISTORY OF GOVERNMENT* 71, 150-51 (1920).

replicate in their own country the commitment to excellence they associated with German scholarship.⁷ Identifying Friedrich Carl von Savigny, the preeminent German legal scholar of the first half of the nineteenth century, as their model, the Americans relied heavily on his understanding of law as organically connected to the continuous history of a particular people rooted in nation and race.⁸ Just as Savigny was interested in the history of Germanic law, they sought the historical origins of the English common law. And just as Savigny emphasized legal history as the foundation of legal science while opposing the abstract theories of the Enlightenment law of reason, the American scholars contrasted their emphasis on historical legal science with the prior theoretical schools of natural law and analytic jurisprudence. Yet even while admiring Savigny, American scholars distanced themselves from him. Perhaps most significantly, whereas Savigny aspired to become “a ‘Kant’ of legal science”⁹ by building a deductive, mathematical legal structure from initial empirical research in legal history, the Americans viewed the historical study of law as an inductive science devoted to observation and classification.¹⁰ Self-consciously emulating Bacon, the Englishman, rather than Kant, the German, they explicitly rejected the model of mathematics while comparing historical legal science to inductive sciences such as chemistry, physics, and botany. Contrary to the frequent claim by twentieth-century commentators, the nineteenth-century scholars did not endorse a timeless “deductive formalism.”¹¹ Rather, they stressed the continuous transformation of legal thought in response to evolving custom.

Although late nineteenth-century American legal scholars overwhelmingly viewed history as the key to legal analysis, only a small proportion of them engaged in original historical research.¹² Henry Adams became America’s first professional legal historian when he joined the history department at Harvard University in 1870.¹³ Sharing the commitment to scholarly research

⁷ See, e.g., Mathias Reimann, *A Career in Itself – The German Professoriate as a Model for American Legal Academia*, in *THE RECEPTION OF CONTINENTAL IDEAS IN THE COMMON LAW WORLD 1820-1920*, at 165, passim (Mathias Reimann ed., 1993).

⁸ See RABBAN, *supra* note 1 (manuscript at Chapter III, German Legal Scholarship); *id.* (manuscript at Chapter XI, The Historical School of American Jurisprudence).

⁹ FRANZ WIEACKER, *A HISTORY OF PRIVATE LAW IN EUROPE* 305 n.11 (Tony Weir trans., Clarendon Press 1995).

¹⁰ See RABBAN, *supra* note 1 (manuscript at Chapter XI, The Historical School of American Jurisprudence).

¹¹ See, e.g., DUNCAN KENNEDY, *THE RISE & FALL OF CLASSICAL LEGAL THOUGHT* 105, 260 (2006); ROSCOE POUND, *THE SPIRIT OF THE COMMON LAW* 155-56 (1921); Felix Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 844-45 (1935).

¹² See RABBAN, *supra* note 1 (manuscript at Chapter XI, The Historical School of American Jurisprudence).

¹³ *Id.* (manuscript at Chapter V, Henry Adams and His Students: The Origins of Professional Legal History in America).

emphasized by Harvard's recently appointed President, Charles W. Eliot, Adams recognized that he was "brought in to strengthen the reforming party in the University" ¹⁴ In his teaching, Adams drew on the two years he had spent studying legal history in Germany after his graduation from Harvard College in 1858. Former students recalled that they read original legal sources in Anglo-Saxon, Medieval Latin, and German as well as volumes of German secondary scholarship on the history of Germanic law. ¹⁵ In 1876, Adams financed the publication of *Essays in Anglo-Saxon Law*, which included his own essay *The Anglo-Saxon Courts of Law* as well as essays by his students on Anglo-Saxon land law, family law, and civil procedure. ¹⁶ These student essays earned the first history Ph.D.'s given by Harvard. ¹⁷

Claiming that prior writing in English on the history of English law had been amateurish, Adams stressed that the professional study of the history of Germanic law by German scholars, based on investigation of archival documents, demonstrated the Germanic origins of Anglo-Saxon law. ¹⁸ Adams and his students conceded that the Norman Conquest of England led by William the Conqueror in 1066 produced a major disruption in the history of English law. Yet they maintained that key features of the modern English common law, particularly its commitments to individualism, egalitarianism, and democracy, derived from the Germanic Anglo-Saxons, who settled England in the fifth century. ¹⁹ They challenged English writers who traced the common law to Roman law or, as Adams put it, "William the Conqueror's brain," ²⁰ somewhat snidely observing that the English had ignored the crucial German scholarship, which had not been translated. ²¹ Adams and his students did not offer much support for their broad statements about continuity. Only in passing did they provide a few examples of the survival of Anglo-Saxon law

¹⁴ Letter from Henry Adams to Charles Milnes Gaskell (Sept. 29, 1870), in *THE LETTERS OF HENRY ADAMS 1858-1891*, at 194 (J.C. Levenson et al. eds., Harvard Univ. Press 1982) (1930); see also HENRY ADAMS, *THE EDUCATION OF HENRY ADAMS* 293-94 (1918) (discussing Adams's ambivalence about accepting a teaching position at Harvard).

¹⁵ ERNEST SAMUELS, *THE YOUNG HENRY ADAMS* 215 (1948).

¹⁶ *ESSAYS IN ANGLO-SAXON LAW* (Henry Adams ed., Little, Brown, and Co. 1876); Letter from Henry Adams to Charles Milnes Gaskell (June 14, 1876), in *THE LETTERS OF HENRY ADAMS 1858-1891*, *supra* note 14, at 288.

¹⁷ Harold Dean Carter, *Introduction* to HENRY ADAMS AND HIS FRIENDS, at xxxix (Harold Dean Carter ed., Riverside Press 1947).

¹⁸ RABBAN, *supra* note 1 (manuscript at Chapter V, Henry Adams and His Students: The Origins of Professional Legal History in America).

¹⁹ *Id.*

²⁰ Henry Adams, *Maine's Village Communities*, 114 N. AM. REV. 196, 198 (1872) (reviewing HENRY SUMNER MAINE, *VILLAGE-COMMUNITIES IN THE EAST AND WEST* (1871); E. NASSE, *AGRICULTURAL COMMUNITIES OF THE MIDDLE AGES* (H.A. Ouvry trans., Cordon Club 1871); RUDOLPH SOHM, *DIE ALTDEUTSCHE REICHS-UND GERICHTSVERFASSUNG* (1871)).

²¹ Henry Adams, *Sohm's Procedure de la Lex Salica*, 118 N. AM. REV. 416, 417 (1874) (book review).

into the common law. They focused instead on uncovering the details of Anglo-Saxon law and on asserting its distinctiveness from Roman law.²²

Adams tired of academic life and resigned from Harvard in 1877, then moved to Washington, D.C. and wrote the books of general history and autobiography that made him famous. None of his students produced additional scholarship in legal history.²³ But Bigelow, Holmes, Ames, and Thayer, who all lived in the Boston area and knew each other well, continued the original research in English legal history inaugurated by the *Essays in Anglo-Saxon Law*, which they often cited. While these scholars agreed with Adams and his students that the English common law derived mainly from Germanic sources, they maintained that Norman law largely superseded Anglo-Saxon law after the Norman Conquest. Throughout their work, they emphasized the connection between Norman law and the common law of England.

Largely under the guidance of Henry Adams, Holmes became deeply learned in legal history during the 1870s and incorporated substantial historical content in his scholarship, including in his most famous work, *The Common Law*, published in 1881.²⁴ Yet as subsequent scholars have recognized, Holmes often manipulated historical evidence in order to support his analytical arguments and policy goals.²⁵ As legal history, his work is the weakest of the American successors to Adams. Ames, whose early research in legal history attracted the attention and respect of Henry Adams, joined the faculty of Harvard Law School in 1873, where he studied and taught legal history for decades. Diverted by teaching, preparing casebooks, and later by his duties as Dean of Harvard Law School, Ames did not produce much scholarship. Unlike Bigelow, Thayer, and Holmes, he never wrote a book. He did not even write many articles. Yet the articles he did publish, subsequently collected in a posthumous collection that also included his lectures on legal history,²⁶ were highly regarded, most impressively, by Maitland.²⁷ Upon joining the Harvard Law School faculty in 1874 after two decades of legal practice, Thayer immersed himself in the history of his two major subjects, evidence and

²² David M. Rabban, *From Maine to Maitland via America*, 2009 CAMBRIDGE L.J. 410, 415-19 (2009).

²³ *Id.* at 419-20.

²⁴ OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* (Mark DeWolfe Howe ed., Harvard Univ. Press 1963); Letter from Henry Adams to Oliver Wendell Holmes, Jr. (Dec. 5, 1876), *microformed on reel 276*, 672-75 (Univ. Publ'ns of Am., Oliver Wendell Holmes Papers [hereinafter Holmes Papers]); *see also* Rabban, *supra* note 22, at 422.

²⁵ *See, e.g.*, GRANT GILMORE, *THE AGES OF AMERICAN LAW* 52, 128 (1977); Robert W. Gordon, *Holmes' Common Law as Legal and Social Science*, 10 HOFSTRA L. REV. 719, 719 (1982); Mark DeWolfe Howe, *Introduction to HOLMES*, *supra* note 24, at xi; David M. Rabban, *The Historiography of The Common Law*, 28 LAW & SOC. INQUIRY 1161, 1190-93 (2003).

²⁶ JAMES BARR AMES, *LECTURES IN LEGAL HISTORY* (1913).

²⁷ Rabban, *supra* note 22, at 433.

constitutional law. He spent 1882 to 1883 in England investigating the history of the jury.²⁸ He published the results of his research in a series of articles in the *Harvard Law Review* between 1889 and 1893, which he expanded into his most important work, a long book entitled *A Preliminary Treatise on Evidence at the Common Law*, published in 1898. Thayer called his treatise “preliminary,” despite its more than 500 pages, because he had concluded that it was not possible to write a complete account of the modern law of evidence without examining the early law of trials.²⁹ He treated this “preliminary” history in detail, citing extensively the prior work of Bigelow and the great German scholar, Heinrich Brunner.

Bigelow himself wrote on a broad range of legal subjects, and made particularly important contributions to tort law, but his international reputation was based on his two substantial books on English legal history: *Placita Anglo-Normannica*, published in 1879, and *History of Procedure in England*, published in 1880. In a tribute to Bigelow shortly after his death in 1921, Edward Avery Harriman, a professor at Northwestern Law School and a former student of Bigelow’s at Boston University, identified him as among the small group of Americans who, beginning around 1870, developed historical jurisprudence based on the history of the English common law.³⁰ After calling Holmes “the most brilliant and original” of this group, Harriman astutely concluded that Bigelow was the “most active in giving to the world the results of his studies in published works”³¹ Indicating that Harriman’s praise of Bigelow was not simply eulogistic exaggeration, Herbert Albert Laurens (H.A.L.) Fisher, Maitland’s brother-in-law and literary executor, wrote that Maitland’s *Pleas of the Crown for the County of Gloucester*, published in 1884, was the first major work on English legal history written by an Englishman. “All the really important books,” Fisher wrote, “were foreign – Brunner’s *Schwurgerichte*, Bigelow’s *Placita Anglo-Normannica* and *History of Procedure in England*, the *Harvard Essays on Anglo-Saxon Law*, Holmes’ brilliant volume on the *Common Law*.”³² Fisher thus put Bigelow, the only author of two books among his list, in very eminent company.

II. JOINING A SCHOLARLY COMMUNITY IN BOSTON

Born in Michigan in 1846, Bigelow graduated from the University of Michigan, A.B. 1866, LL.B. 1868, A.M. 1871.³³ His father was a Methodist minister. Bigelow attended public schools throughout Michigan, often in frontier country, as his father received various assignments from the Detroit

²⁸ Jay Hook, *A Brief Life of James Bradley Thayer*, 88 NW. U. L. REV. 1, 5 (1993).

²⁹ JAMES BRADLEY THAYER, *A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW* 1 (1898).

³⁰ Edward Avery Harriman, *Melville M. Bigelow*, 1 B.U. L. REV. 157, 159 (1921).

³¹ *Id.*

³² H.A.L. FISHER, *WILLIAM MAITLAND: A BIOGRAPHICAL SKETCH* 26 (1910).

³³ Harriman, *supra* note 30, at 158.

Conference of the Methodist Church.³⁴ After practicing law in Michigan in 1868 and Tennessee in 1869, Bigelow, who already had strong interests in the historical evolution of the law, moved to Boston in 1870 with the intention of becoming a legal scholar.³⁵ Brooks Adams, Henry's brother and Bigelow's close friend, claimed that "[h]e was not fit for a practicing lawyer" because he lacked the instincts for litigation, business, or money.³⁶ "He was a scholar, if ever a pure scholar was born on earth."³⁷ Bigelow soon became involved with others in Boston who in 1872 founded the law school at Boston University, a Methodist institution, as a response to their shared dissatisfaction with existing standards at American law schools.³⁸ He helped prepare the report that led to the establishment of the law school and read it to the trustees.³⁹ The new law school was the first in the United States to require three years of attendance, graded courses, and systematic examinations as conditions of graduation, requirements other American law schools soon adopted.⁴⁰ From the beginning of his career, Bigelow explored English legal history, an interest that extended both to English history in general and to genealogical research into his own family, which he traced to Edward I.⁴¹ For Bigelow, links to the English past were personal as well as intellectual.

While teaching law at Boston University, Bigelow completed a Ph.D. in history at Harvard in 1879. Ames was one of the Harvard professors who approved Bigelow's thesis,⁴² which was published as *Placita Anglo-Normannica*, first in England in 1879 and then in the United States in 1881.⁴³ Based on the quality of his thesis, a committee at Harvard chose Bigelow to read an essay based on it, "Legal Results of the Norman Conquest,"⁴⁴ during the Commencement at which he received his Ph.D. In writing Bigelow about his selection, Thayer reported that as the legal scholar on the committee, he

³⁴ *Id.* at 157.

³⁵ *Id.* at 158.

³⁶ Brooks Adams, *Melville M. Bigelow*, 1 B.U. L. REV. 168, 169 (1921).

³⁷ *Id.*

³⁸ Homer Albers, *Melville M. Bigelow*, 1 B.U. L. REV. 154, 154 (1921); George R. Swasey, *Boston University Law School*, 1 GREEN BAG 54, 58 (1889).

³⁹ Albers, *supra* note 38, at 154.

⁴⁰ *Id.*; Swasey, *supra* note 38, at 58.

⁴¹ Harriman, *supra* note 30, at 160-63; *see also* Bigelow, *Melville Madison*, in 2 DICTIONARY OF AMERICAN BIOGRAPHY 260 (Allen Johnson ed., 1964) [hereinafter DICTIONARY OF AMERICAN BIOGRAPHY].

⁴² The original copies of all doctoral theses are on file at Harvard University.

⁴³ DICTIONARY OF AMERICAN BIOGRAPHY, *supra* note 41, at 260.

⁴⁴ Melville M. Bigelow, Address at Harvard History Ph.D. Commencement Ceremony: Legal Results of the Norman Conquest (June 25, 1879) (manuscript available in the Howard Gotlieb Archival Research Center, Boston University, Bigelow Collection, box 1, Bigelow Commencement folder [hereinafter Bigelow Collection]).

“was able to recognize the great value and interest of your researches.”⁴⁵ That summer President Eliot wrote Bigelow that his “essay lent weight and dignity to the exercises of Commencement.”⁴⁶

Bigelow and Holmes knew each other well during the 1870s. Holmes later recalled that he “saw a good deal of” Bigelow “in those early days”⁴⁷ “How much I was impressed,” Holmes wrote, “by the disinterested love of scholarship that led to his counter emigration eastward to get access to the materials that he wanted. Without riches he accumulated a part of those materials and gave to the world his very valuable *Placita Anglo-Normannica*.”⁴⁸ At a dinner honoring Bigelow in 1913, Brooks Adams remarked that in the early 1870s Bigelow and Holmes often worked in the library of the old Boston courthouse. Adams was confident that they “retired to some secret place there to read German law.”⁴⁹ In late 1875 and early 1876, Holmes read Bigelow’s casebook on torts.⁵⁰ In the preface of this casebook, Bigelow graciously acknowledged that Holmes’s 1873 article on “The Theory of Torts” had “a controlling influence” on his own “division of topics.”⁵¹ Mark DeWolfe Howe speculated in his biography of Holmes that the discussion of history and policy in Bigelow’s casebook in turn probably “stimulated Holmes’s interest” in these topics “to a new curiosity.”⁵²

Throughout the last decades of the nineteenth century, Bigelow remained in contact with Ames and Thayer, his neighbors in Cambridge. They shared and commented on each other’s drafts and publications and those of their mutual friends in England.⁵³ Thayer’s son, Ezra, wrote Bigelow in 1910, gratefully

⁴⁵ Letter from James Bradley Thayer, Professor, Harvard Law Sch., to Melville Madison Bigelow (May 3, 1879) (on file with Bigelow Collection, box 2, Thayer folder).

⁴⁶ Letter from Charles W. Eliot, President, Harvard Coll., to Melville Madison Bigelow (Aug. 9, 1879) (on file with Bigelow Collection, box 2, Eliot folder).

⁴⁷ Harriman, *supra* note 30, at 159 (quoting Holmes).

⁴⁸ *Id.*

⁴⁹ *Id.* at 158 (quoting Adams).

⁵⁰ Eleanor N. Little, *The Early Reading of Justice Oliver Wendell Holmes*, 8 HARV. LIBR. BULL. 163, 191 (1954).

⁵¹ MELVILLE M. BIGELOW, *LEADING CASES ON THE LAW OF TORTS DETERMINED BY THE COURTS OF AMERICA AND ENGLAND: WITH NOTES*, at vii (1875) [hereinafter *LEADING CASES ON THE LAW OF TORTS*].

⁵² MARK DEWOLFE HOWE, *JUSTICE OLIVER WENDELL HOLMES: THE PROVING YEARS, 1870-1882*, at 187 n.8 (1963).

⁵³ See, e.g., Letter from James Barr Ames, Dean, Harvard Law Sch., to Melville Madison Bigelow (Feb. 16, 1901) (on file with Bigelow Collection, box 2, Ames folder); Letter from Melville Madison Bigelow to James Barr Ames, Professor, Harvard Law Sch. (Apr. 20, 1889) (on file with the Harvard Law School Library, in James Barr Ames Papers, box 1, folder 5 [hereinafter *Ames Papers*]); Letter from Melville Madison Bigelow to James Barr Ames, Professor, Harvard Law Sch. (March 27, 1888) (on file with Ames Papers, box 1, folder 5)); Letter from Melville Madison Bigelow to James Bradley Thayer, Professor, Harvard Law Sch. (Oct. 4, 1892) (on file with Harvard Law School Library, in James

remembering that his father and Bigelow had a “valued friendship of many years.”⁵⁴ Bigelow and Holmes also maintained their relationship. After becoming a judge, Holmes asked Bigelow to cite him a case dealing with waiver of contractual conditions. “Of all beneath the Star Spangled banner,” Holmes wrote Bigelow, “you I assume know most touching the doctrine of Waiver.” Mentioning one of his own decisions, Holmes complained that “I grieve not to see it” in Bigelow’s “noble work” on estoppel.⁵⁵ When Bigelow’s son died, Holmes sent a condolence, prompting a long letter of thanks from Bigelow, who reminisced appreciatively about a lunch for his son that Holmes once gave.⁵⁶ In response to a letter from Bigelow congratulating him on his appointment to the Supreme Court, Holmes expressed delight at this “natural expression of mutual friendship”⁵⁷: “Among many pleasant letters yours is one of the altogether pleasantest and nicest. We have been alongside for many years, always with great pleasure to me. And time has only increased my respect and warm regard.”⁵⁸

Addressing the appropriately named “Bigelow Club” at Boston University School of Law in 1920, the year before Bigelow died, former President Eliot of Harvard spoke about Bigelow the person as well as the scholar.⁵⁹ Eliot gave the impression of knowing Bigelow quite well, referring to various conversations with him when Bigelow was a graduate student at Harvard in the 1870s. Eliot called Bigelow’s personal history and experience – presumably his years growing up in Michigan – “remarkable.”⁶⁰ Already a scholar when he came to Harvard, Bigelow was “a persistent, industrious, and devoted student.”⁶¹ Among Bigelow’s prodigious scholarly output, Eliot highlighted his book on torts as having had “lasting value” and *Placita Anglo-Normannica* as “his most scholarly work,” which “has given him his widest distinction as a

Bradley Thayer Papers, box 19, folder 7 [hereinafter Thayer Papers]); Letter from Melville Madison Bigelow to James Bradley Thayer (Feb. 5, undated) (on file with Thayer Papers, box 18, folder 1); Letter from Melville Madison Bigelow to James Bradley Thayer (Nov. 22, undated) (on file with Thayer Papers, box 21, folder 2); Letter from Melville Madison Bigelow to James Bradley Thayer (Nov. 21, undated) (on file with Thayer Papers, box 17, folder 4).

⁵⁴ Letter from E.R. Thayer to Melville Madison Bigelow (Apr. 14, 1910) (on file with Bigelow Collection, box 2, E.R. Thayer folder).

⁵⁵ Letter from Oliver Wendell Holmes, Jr., Justice, Supreme Judicial Court of Mass., to Melville Madison Bigelow (Feb. 1, 1894), *microformed on reel 28, 0417* (Holmes Papers).

⁵⁶ Letter from Melville Madison Bigelow to Oliver Wendell Holmes, Jr. (Apr. 30, undated), *microformed on reel 28, 0414-16* (Holmes Papers).

⁵⁷ Letter from Oliver Wendell Holmes, Jr., Justice, U.S. Supreme Court, to Melville Madison Bigelow (Aug. 15, 1902), *microformed on reel 28, 0424* (Holmes Papers).

⁵⁸ *Id.*

⁵⁹ Charles W. Eliot, *Melville M. Bigelow and the Legal Profession*, 2 B.U. L. REV. 17, 17-18 (1920).

⁶⁰ *Id.* at 17.

⁶¹ *Id.*

scholar in Europe, as well as America.”⁶² Observing that Bigelow’s books were also used in Asia, Africa, and Australia, Eliot maintained that they had “a constant sale in more continents than any American law publication with which I am acquainted.”⁶³ Bigelow’s name, Eliot confidently but inaccurately predicted, “will live for generations in the history of legal authorship.”⁶⁴

Eliot’s address also gave rare insight into Bigelow’s private life and personality. Sickly and “of nervous temperament,” Bigelow led an isolated and reclusive life, had few intimate friends, and was difficult to contact even by his admirers.⁶⁵ Eliot called him “one of the most modest and retiring persons I have ever known” and claimed that Bigelow was uncomfortable when people praised him.⁶⁶ To illustrate, Eliot described a dinner in London at which many learned lawyers were eager to meet Bigelow and convey their respect for his excellent scholarship. For Bigelow, this dinner was “a positively painful operation” from which he “shrank,” “so much so that he did not adequately convey his thanks to those who congratulated him.”⁶⁷ Reflecting another aspect of Bigelow, as well as Eliot’s lifelong contact with him, Eliot told his listeners that Bigelow had recently come to his house with a book of Bigelow’s own poetry. Previously unaware of Bigelow’s “poetical side,” Eliot praised many of the poems for their high quality.⁶⁸

III. THE HISTORY OF PROCEDURE IN NORMAN ENGLAND

Bigelow’s scholarship in legal history focused on the history of procedure in Norman England. *Placita Anglo-Normannica* compiled all “known legal monuments” related to litigation in the period between the Norman Conquest in 1066 and the beginning of the reign of Richard I in 1189,⁶⁹ a period before law reports and legal treatises. Bigelow maintained that the Domesday Book, the survey of England undertaken by William the Conqueror in 1085-1086, was “the most valuable monument of the Norman time.”⁷⁰ He also relied on charters, “formulaic documents that often recorded legal actions in an epistolary form,”⁷¹ and chronicles, the histories of the period that typically read more like diaries assembling the facts of current events than works of modern

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.* at 17-18.

⁶⁶ *Id.* at 18.

⁶⁷ *Id.* at 19.

⁶⁸ *Id.* at 18.

⁶⁹ MELVILLE M. BIGELOW, *PLACITA ANGLO-NORMANNICA: LAW CASES FROM WILLIAM I TO RICHARD I PRESERVED IN HISTORICAL RECORDS*, at iii, vi (1881) [hereinafter *PLACITA*].

⁷⁰ *Id.* at xlix-l. For a complete list of Bigelow’s sources, see *id.* at xlvi-lv.

⁷¹ Emily Kadens, *Diplomatics*, in *DICTIONARY OF THE MIDDLE AGES* 160 (William Chester Jordan ed., Supp. 1 2004).

history,⁷² making clear that he did not include charters or chronicles that lacked information relating to litigation.⁷³ Remarking on the difficulty in finding “authoritative information” about the history of English law during this period, Thayer observed in his 1898 treatise that most existing knowledge derived from Bigelow’s “competent and careful hand” in collecting the materials in *Placita Anglo-Normannica*.⁷⁴

History of Procedure in England also covered the Norman period, extending the analysis through 1204. Reversing the proportion of text to original material in *Placita*, *History of Procedure in England* constituted Bigelow’s book-length treatment of the subject. The first part of the book focused on the courts, particularly the jurisdiction and procedure of the Ecclesiastical Court, the rise of the King’s Court, and the corresponding decline of the ancient popular courts, including the County, Hundred, and Manorial courts.⁷⁵ He also devoted a long section to the Exchequer, pointing out that it became purely a fiscal court.⁷⁶ The second part of the book dealt with the rise of trial by recognition, the judicial duel, the decline or transformation of previous modes of trial, and the conduct of causes from the initial process to the final judgment.⁷⁷

Bigelow’s work in legal history originated during the preparation of his casebook on tort law. Research for the casebook convinced him of “the importance of a careful study of the litigation, and especially of the writs, of the Norman and sub-Norman time”⁷⁸ Bigelow intended his *Leading Cases on the Law of Torts* to present the “essential doctrines” of tort law.⁷⁹ For many of the doctrines he identified, Bigelow included often extensive notes on historical aspects of the subject.⁸⁰ Bigelow confessed his own “partiality” for these historical portions of his book, though he acknowledged that “in this swift age” they would probably “pass unnoticed” by many readers.⁸¹ “The practicing lawyer of to-day,” he recognized, “has little time, and possibly less inclination, for historical study; and the old law, having lost much of its force as authority, is rapidly passing into oblivion.”⁸² Bigelow hoped, however, that his notes had rescued the historical sources from “the

⁷² N.F. Blake, *Chronicles*, in 3 *DICTIONARY OF THE MIDDLE AGES* 325, 326-27 (Joseph R. Strayer ed., 1989).

⁷³ *PLACITA*, *supra* note 69, at vi, lv.

⁷⁴ *THAYER*, *supra* note 29, at 50.

⁷⁵ MELVILLE M. BIGELOW, *HISTORY OF PROCEDURE IN ENGLAND FROM THE NORMAN CONQUEST: THE NORMAN PERIOD (1066-1204)* 19-103, 131-46 (1880) [hereinafter *HISTORY OF PROCEDURE IN ENGLAND*].

⁷⁶ *Id.* at 103-31.

⁷⁷ *Id.* at 147-349.

⁷⁸ *PLACITA*, *supra* note 69, at iii.

⁷⁹ *LEADING CASES ON THE LAW OF TORTS*, *supra* note 51, at v.

⁸⁰ *Id.* at vi.

⁸¹ *Id.*

⁸² *Id.*

crabbed books” in which they previously existed and made them accessible even to busy lawyers.⁸³ More importantly for Bigelow, and reflecting the emergence of the modern American law school staffed by full-time scholars and teachers, he identified “a growing class of persons devoted more or less to the *study* of the law, rather than to its practice; and for such the historical notes are especially intended.”⁸⁴ The notes, he explained, “will show how those subjects first took form in the English Courts, after the Norman Conquest, and their subsequent growth and development.”⁸⁵ In only one of these notes, on assault and battery, did Bigelow refer to earlier Anglo-Saxon law.⁸⁶

By the time he wrote *Placita Anglo-Normannica* and *History of Procedure in England*, Bigelow came to believe that the history of procedure was the key to understanding the relationship between Norman law and modern English common law. He made this crucial point most clearly in his unpublished commencement address at Harvard. “The legal results produced by the Norman Conquest,” he declared at the beginning of his address, “touch mainly on the subject of procedure.”⁸⁷ Through the reign of Richard I, who died in 1199, there had been no “material change” in laws relating to property, contracts, or domestic relations.⁸⁸ Even criminal law remained largely unchanged.⁸⁹ In legal procedure, by contrast, the “far-reaching effects” of the Norman Conquest “have extended down the course of time to the present-day, and have not yet spent their force.”⁹⁰

Bigelow claimed scholarly originality for his *History of Procedure in England*. Anticipating similar comments by Frederic Maitland in his great work on the history of English law,⁹¹ Bigelow asserted in his preface that constitutional historians, while dealing with aspects of the subject, had ignored the “technical processes of law” on which he would focus.⁹² German scholarship, he acknowledged, had made enormous contributions to understanding Germanic procedure, but had not explored “the conduct of causes in England.”⁹³ Bigelow was more pointed in the unpublished

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.* at 222.

⁸⁷ Bigelow Address, *supra* note 44 (manuscript at 1).

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ See FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, 1 THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I, at xxxvii (2d ed. 1899); *see also infra* note 251 and accompanying text.

⁹² Bigelow Address, *supra* note 44 (manuscript at v).

⁹³ HISTORY OF PROCEDURE IN ENGLAND, *supra* note 75, at v. Bigelow did not further identify the previous scholars. Among the constitutional historians, he surely was thinking of the English Bishop, William Stubbs, whose Constitutional History of England was

manuscript version of his preface.⁹⁴ He recognized that his treatment of the courts went over ground covered by previous writers, but emphasized that he was the first to do so from the perspective of a lawyer, which, he observed, required “a fresh examination of the whole subject.”⁹⁵ He hoped this part of his book would appeal to the general student of history as well as to those interested in the technical system of law. The second part of his book, Bigelow maintained, consisted of entirely new ground. German scholars had touched incidentally on English procedure while addressing the law of the continent. But they had not reconstructed the English procedural system during the Norman period “as a consistent whole,” which Bigelow attempted in his book.⁹⁶ He called this “undertaking far more arduous . . . than the reconstruction of a general system of Teutonic procedure without regard to its actual existence as a whole in any one country.”⁹⁷

Bigelow’s historical scholarship addressed two major themes that engaged transatlantic scholars then and since: (1) the extent to which the modern English common law derived from Anglo-Saxon or Norman sources, and (2) the extent to which English law in the century after the Norman Conquest followed the previous law of Normandy or emerged independently in England. In his introduction to *Placita Anglo-Normannica*, Bigelow challenged the frequent assertion that the English common law originated in “ancient” or “primitive” Germanic law.⁹⁸ Although Henry Adams and his students had endorsed this assertion in their *Essays in Anglo-Saxon Law*, Bigelow did not direct his criticism at them, but instead cited Heinrich Brunner, the eminent German legal historian, as his example.⁹⁹ More specifically, Bigelow rejected the claim that ancient Germanic influences remained as evident in the English common law as they did in the English language. “Every page of our literature,” Bigelow observed, “bears the stamp of early German origin.”¹⁰⁰ The common law, by contrast, “is essentially different” from Anglo-Saxon law, though he conceded the existence of a “few scattered remains” that could be traced “in unchanged lines to find their origin in the primitive times of the

published in three volumes between 1873 and 1878. Maitland specifically identified Stubbs when explaining why his great work on the history of English law did not include constitutional history. See *infra* note 251. Among the German scholars, Bigelow surely was thinking of Heinrich Brunner, with whom he debated how much the law of Normandy influenced subsequent English law.

⁹⁴ Melville M. Bigelow, Preface to *History of Procedure in England* 1-2 (May 1, 1880) (unpublished manuscript) (on file with Harvard University Archives).

⁹⁵ *Id.* (manuscript at 1).

⁹⁶ *Id.* (manuscript at 2).

⁹⁷ *Id.*

⁹⁸ PLACITA, *supra* note 69, at ix.

⁹⁹ *Id.* at ix n.1.

¹⁰⁰ *Id.* at ix.

Germanic or Anglo-Saxon procedure.”¹⁰¹ Even these remains, he added, have been obscured by numerous subsequent influences that have formed modern English law, including Norman feudalism, Roman law, and the development of commerce.

The existing law, whether of contracts, torts, real property, equity, or even of crimes, disconnected from intermediate stages in history, would fail, in its characteristic parts, to reveal ‘the very form and features’ of ancient German law, – Salic, Saxon, or Anglo-Saxon. Nor do the old codes of the German nations contain the ‘promise and potency’ of the present common law of England.¹⁰²

Maintaining that it is impossible to speculate how the Germanic law of Anglo-Saxon England would have developed on its own without these subsequent influences, Bigelow was confident that “it could not have resulted in the common law and procedure of the nineteenth century.”¹⁰³

Bigelow conceded that most, though far from all, external influences on English law had been Germanic. Yet he immediately qualified this concession by stressing that “the most potent by far of all external Germanic influences, the Norman, had itself been modified, to a considerable extent,” by what he called “non-German” or “broken German” law, particularly the “semi-Roman law and civilization” of southern France.¹⁰⁴ The “pure” German law of Anglo-Saxon England, Bigelow concluded, received “a fatal blow at the hands of the Normans.”¹⁰⁵ As described by Bigelow, this “fatal blow” occurred gradually between the Norman Conquest of 1066 and the end of the reign of Edward I in 1307.¹⁰⁶ During this transitional period, Anglo-Saxon and Norman law existed side by side, with most Anglo-Saxon law gradually disappearing. Evidence of the decline of Anglo-Saxon procedures, Bigelow observed, was often “entirely negative.”¹⁰⁷ Although, such evidence could not be found in direct statements of the chronicles and laws, Bigelow considered the absence of Anglo-Saxon procedure in civil litigation during later Norman and subsequent times, in contrast to its frequent use just after the Norman Conquest, “very marked and suggestive.”¹⁰⁸ The legal documents of the century and a half following the Norman Conquest, Bigelow concluded, made it possible to look both backwards and forwards. These documents revealed many elements of old

¹⁰¹ *Id.*

¹⁰² *Id.* at x.

¹⁰³ *Id.* at xi.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at xii.

¹⁰⁷ *Id.* at xiii.

¹⁰⁸ *Id.*

Germanic law of the past as well as “features, dimly outlined” of nineteenth-century English common law.¹⁰⁹

Throughout *History of Procedure in England*, Bigelow provided examples of the continuation and eventual disappearance of Anglo-Saxon law in Norman England. The Anglo-Saxon procedure of ordeal – which used physical tests such as hot and cold water, a hot iron, or swallowing a large morsel of bread or cheese as “a solemn invocation to heaven to decide the matter in dispute” – was gradually replaced by Norman procedures, including the duel as a trial by battle and fact-finding through the inquisition.¹¹⁰ The ordeal received a “fatal” but not yet terminal “blow” when the Lateran Council of 1215 ordered its discontinuance throughout Christendom, though it lasted in practice in England a while longer.¹¹¹ In his chapter on the summons to trial, Bigelow maintained that the Anglo-Saxon summons, which was “always a private, extra-judicial act,” persisted after the Norman Conquest, but “as time progressed, the custom of sending summons by an officer furnished with the king’s writ became established, and finally entirely superseded the ancient mode.”¹¹² Stressing the differences between popular and royal courts, Bigelow observed that in the popular courts of the county, hundred, and manor, Anglo-Saxon procedure “ran its course with little interruption – certainly with no sudden change – during the Norman period” before eventually disappearing, different specific procedures disappearing at different times.¹¹³

Although he stressed the extent to which Norman law superseded Anglo-Saxon law, Bigelow occasionally identified important features of Anglo-Saxon law that persisted beyond the Norman period and contributed to the development of the modern common law. He traced the fundamental distinction between contracts and torts in modern English common law to the early Germanic Salic law, which allowed the right of distraint, the seizure of personal property, as a remedy for a breach of contract, but not as a remedy for a tort.¹¹⁴ Bigelow concluded that this distinction in Salic law, “under modifications, has continued throughout the history of English law.”¹¹⁵ Most broadly, Bigelow emphasized that the earliest forms of action, through which the common law identified compartments of law, arose from the convergence of the count, the formal statement of the claim originating in Anglo-Saxon law, and the writ, the official authorization to begin legal proceedings introduced from the continent by the Norman Conquest.¹¹⁶ The count and the writ,

¹⁰⁹ *Id.* at xii.

¹¹⁰ *HISTORY OF PROCEDURE IN ENGLAND*, *supra* note 75, at 322, 325-26.

¹¹¹ *Id.* at 323.

¹¹² *Id.* at 217.

¹¹³ *Id.* at 1-2.

¹¹⁴ *Id.* at 201.

¹¹⁵ *Id.*

¹¹⁶ *HISTORY OF PROCEDURE IN ENGLAND*, *supra* note 75, at 147-48; *see also* J.H. BAKER, *AN INTRODUCTION TO ENGLISH LEGAL HISTORY* 53-54, 56 (4th ed. 2002); S.F.C. MILSOM,

Bigelow explained, existed side by side in Norman England, coming closer together over time and finally converging in the thirteenth century.¹¹⁷ The “count is unbroken,” he declared, “from Alfred to Victoria,” from Anglo-Saxon to nineteenth-century England.¹¹⁸ He repeatedly identified the forms of action of the common law as the “direct lineal descendents” of Anglo-Saxon Germanic law.¹¹⁹ A “gradual progress” without “any sudden change” marked the transition from the Germanic procedure to the forms of action, which assumed their modern characteristics during the reign of Edward I at the end of the thirteenth century.¹²⁰ By identifying these continuities, Bigelow tempered his more general rejection of the view that the common law derived from ancient Germanic origins. Despite some inconsistent language, he seemed most interested in denying the strong claim that the essential features of English common law were already contained, in embryonic and preordained form, in ancient Germanic law.

In discussing the extent to which English law after the Norman Conquest followed or developed independently from prior Norman law, Bigelow focused on the role of the King’s Court in the development of new writs, including the writ of novel disseisin, which led to the modern jury. His Harvard commencement address highlighted the growth of the King’s Court as the major legal development following the Norman Conquest.¹²¹ Whereas in Anglo-Saxon times the King had not been involved in the administration of justice, after the establishment of Norman power in England, the King became the “fountain of justice” as the King’s Court rose to “permanent power.”¹²² Of greatest importance, the King’s Court created “a remarkable innovation,” the use of writs to initiate law suits, which, in turn, led to modern forms of action and to the jury trial.¹²³ Commenting on this significant period of transition, Bigelow observed that “the most permanent impressions made upon civilization have generally been unpremeditated.”¹²⁴ Neither William the Conqueror nor his sons or grandson had consciously intended the major changes in procedure that occurred during their reigns from 1066 to 1154, yet “the changes actually produced by the advent of the Normans far exceeded in effect any of the purposely-wrought inventions” of their successors.¹²⁵

HISTORICAL FOUNDATIONS OF THE COMMON LAW 39 (2d ed. 1981).

¹¹⁷ HISTORY OF PROCEDURE IN ENGLAND, *supra* note 75, at 148.

¹¹⁸ *Id.*

¹¹⁹ *Id.*; *see also id.* at 247 (stating that “modern English forms of action are lineally descended from” Germanic law).

¹²⁰ *Id.* at 247.

¹²¹ Bigelow Address, *supra* note 44 (manuscript at 7).

¹²² *Id.* (manuscript at 7, 10).

¹²³ *Id.* (manuscript at 8).

¹²⁴ *Id.* (manuscript at 1).

¹²⁵ *Id.* (manuscript at 1-2).

Bigelow maintained in *History of Procedure in England* that the emergence of the King's Court was an important development in the gradual change from local to central authority that had begun long before. He described the King's Court and indicated how it prevailed over other courts that tenaciously tried to maintain their ancient privileges.¹²⁶ Through new writs, the King's Court acquired jurisdiction "by direct usurpation, in derogation of the rights of the popular courts and manorial franchises."¹²⁷ The dominance of the King's Court, he concluded, was completed during the reign of Henry II between 1154 and 1189, who succeeded in establishing his courts throughout his kingdom and in providing them with jurisdiction over all causes – civil and criminal, legal and equitable.¹²⁸ The basic machinery of these courts, Bigelow asserted without any attempt at proof, continued in essentially unaltered form into the nineteenth century, with only a few additions until the 1870s, just before Bigelow published his book.¹²⁹

Bigelow emphasized that the writs developed by the King's Court had Norman origins but developed in distinctive English ways. In his introduction to *Placita Anglo-Normannica*, he asserted that the writs manifested a "gradual growth" after the Norman Conquest, at times receding but generally advancing to their permanent form by the late twelfth or early thirteenth centuries.¹³⁰ Invoking the standard biological metaphor of nineteenth-century historical thought, he asserted that the "Norman germs have had their natural development on English soil," and denied any "transplanting of developed forms" from Normandy to England.¹³¹ Just as a characteristically English church architecture arose during this period, "there appears in history of the English law a distinctively English writ procedure."¹³² Most importantly for Bigelow, these writs "became the fixed precedents for the peculiar forms of action which have characterized the English law from the time of Edward the First to the present day."¹³³ Noting that some early forms of these writs may have previously existed in Normandy, Bigelow asserted that Brunner's argument for this position was not well supported, rising "little above conjecture," and even if accurate, did not contradict Bigelow's central point about the significant development of writs in England before reaching their "final, settled form."¹³⁴

Bigelow elaborated his analysis in *History of Procedure in England* while discussing the history of writs that had reached a fixed form by the time of

¹²⁶ HISTORY OF PROCEDURE IN ENGLAND, *supra* note 75, at 75.

¹²⁷ *Id.* at 78.

¹²⁸ *Id.* at 101.

¹²⁹ *Id.* at 101-02.

¹³⁰ PLACITA, *supra* note 69, at xxvi.

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.* at xxvii.

¹³⁴ *Id.* at xxvii & n.1.

Glanvill in the 1180s,¹³⁵ whose treatise on the laws and customs of England became a major landmark in the history of English law. Bigelow emphasized that these writs “were not created by a stroke of the pen, or imported into perfect form from Normandy” by Glanvill or anyone else.¹³⁶ Rather, “though of continental origin, they were gradually developed on English soil, out of rough and even shapeless material.”¹³⁷ They lacked any formal language until they reached a definite framework prior to Glanvill, who subsequently wrote about the writs that had already been put into final form.¹³⁸ Before the reign of Henry I, who ruled between 1100 and 1135, writs typically did not indicate the type of action involved in the case or even the subject matter.¹³⁹ The connection of the writs to the forms of action, he added, mostly occurred after the Norman period.¹⁴⁰

The inquisition introduced from Normandy, Bigelow maintained, was the “great feature of procedure in the Norman period” and had a “direct lineage” to the modern jury.¹⁴¹ It developed through the writ of novel disseisin, dealing with disputes over property.¹⁴² Though differing little in formal language from previous writs, the writ of novel disseisin importantly added a procedure, the summons that led to a jury trial.¹⁴³ The recognition was a “species of the inquisition.”¹⁴⁴ In an inquisition, the court itself served as the inquisitors, whereas the recognition was a chosen group of men who were not part of the court. Both inquired into the facts in dispute, but the recognition had to report (*recognoscere*) its findings.¹⁴⁵ The recognition was “a body of impartial men, summoned by an officer of the law, to speak the truth concerning the matter in dispute, of which body the officer was never a member. That body in the end was the modern jury.”¹⁴⁶ Bigelow conceded that the recognition developed from common Norman and English materials and may have been used for a short period in Normandy before being introduced in England.¹⁴⁷ Yet he challenged Brunner’s claim that the transformation of the recognition into a matter of right from a matter of grace had already occurred in Normandy, when future King Henry II of England was still Duke of Normandy.¹⁴⁸

¹³⁵ HISTORY OF PROCEDURE IN ENGLAND, *supra* note 75, at 149.

¹³⁶ *Id.* at 147.

¹³⁷ *Id.*

¹³⁸ *Id.* at 191.

¹³⁹ *Id.* at 156.

¹⁴⁰ *Id.* at 147.

¹⁴¹ *Id.* at 334.

¹⁴² *Id.*

¹⁴³ *Id.* at 172-73.

¹⁴⁴ *Id.* at 335.

¹⁴⁵ *Id.* at 175 n.4.

¹⁴⁶ *Id.* at 334.

¹⁴⁷ *Id.* at 186 n.1.

¹⁴⁸ *Id.* at 186.

Claiming that Brunner's position "cannot be sustained," Bigelow insisted instead that the change occurred more than sixty years after Henry II had become King of England and attributed this major reform to Stephen Langton, the Archbishop of Canterbury, who "at the head of the clergy, baronage, and people . . . struck the effective blow at the vicious practice (prerogative) of selling justice" through varying the fees charged for obtaining the recognition.¹⁴⁹ The key step from the recognition to the modern jury, Bigelow observed, was the developing view that it was inconsistent for the same person to be both a juror and a witness.¹⁵⁰ Jurors became people unfamiliar with the facts, who were informed about them by the testimony of witnesses, who did know the facts. This differentiation of juror and witness, which occurred after the Norman Period, ended the long tradition of judicial examination of jurors, except as to competency.¹⁵¹

More generally, while introducing *History of Procedure in England* with the "principles of criticism" that would inform the book, Bigelow warned against the assumption that records from Normandy provide "infallible suggestions" about the details of English law after the Norman Conquest.¹⁵² Although Bigelow believed that "procedure in Normandy offered general types of procedure in England," he maintained that the details often varied.¹⁵³ Only in those relatively rare circumstances when the details of procedure were uniform among all Teutonic nations in continental Europe did Bigelow feel comfortable inferring that those details also prevailed in England. Bigelow added that no English borrowings from Normandy occurred after 1204, and that there was little or no borrowing during the prior third of a century.¹⁵⁴

In the course of analyzing the history of procedure, Bigelow displayed historiographical sophistication that refutes the condescension of twentieth-century legal historians toward their nineteenth-century predecessors. Contrary to twentieth-century claims that the nineteenth-century scholars were so focused on the origins of modern legal categories that they misunderstood how legal concepts actually operated in the past,¹⁵⁵ Bigelow repeatedly warned against the anachronistic danger of mistaking apparent similarities between the law of the Norman Period and modern common law for actual influences. He maintained that his classification of writs should remove the prior confusion caused by treating writs only in chronological order and by mistaking

¹⁴⁹ *Id.* at 186-90 (footnote omitted).

¹⁵⁰ *Id.* at 336.

¹⁵¹ *Id.* at 336-37.

¹⁵² *Id.* at 1, 4.

¹⁵³ *Id.* at 4.

¹⁵⁴ *Id.* at 6-7.

¹⁵⁵ See, e.g., D.J. Boorstin, *Tradition and Method in Legal History*, 54 HARV. L. REV. 424, 424-32 (1941); Robert W. Gordon, *J. Willard Hurst and the Common Law Tradition in American Legal Historiography*, 10 LAW & SOC'Y REV. 9, 27 (1975).

resemblances between earlier and later writs as proof of a direct lineage.¹⁵⁶ To trace lineage, he declared, “each class must be kept by itself, or its connection with another carefully pointed out.”¹⁵⁷ He warned that even when an earlier writ contains language similar to the technical terminology of a later writ requiring a particular mode of trial, it would be dangerous to infer that the earlier writ anticipated the mode of trial of the later writ.¹⁵⁸ The earliest writs for the redress of trespasses did not exhibit “in any settled form” the characteristics of the “familiar writ of trespass of later times,” though an “approach to the modern form” could be detected in the last quarter of the twelfth century.¹⁵⁹ He also pointed out that, despite their verbal similarity, the writ of the right of debt was not the source of the modern writ of debt, whose “parent” was instead the writ for money loaned. Yet the old writ of the right of debt was the source of the very differently named modern writ of entry.¹⁶⁰

Nor did Bigelow view history as progressive, a fault twentieth-century scholars frequently ascribed to their predecessors. In his introduction to *Placita Anglo-Normannica*, Bigelow made clear that he did not consider the subsequent history of English law to be a story of progress. During the Anglo-Norman period, he maintained, the administration of justice was simple but efficient.¹⁶¹ Legal knowledge was minimal, but sufficient for “an age before rights had become complicated by the results of commerce and invention.”¹⁶² He especially lamented the loss of the King’s prerogative to issue new writs even as he acknowledged that kings had used them to sell justice. “Within proper limits, to guard against abuse, the right to issue writs whenever a case proper for redress or relief was presented was salutary, and its continuance,”¹⁶³ he added using the same phrase as in his commencement address, “would have saved the English law from centuries of constant and deserved reproach.”¹⁶⁴ As a result of depriving the King’s Chancellor of this right, actions on the case emerged, producing “the endless train of subtleties reaching down to the present day, which have so often resulted in the perversion of justice.”¹⁶⁵ Like many of his contemporaries, Bigelow clearly favored law reform that would provide more justice by eliminating these subtleties. His regrets about the history of English law and his desire for legal reform challenge twentieth-century assumptions that late nineteenth-century American legal scholars

¹⁵⁶ HISTORY OF PROCEDURE IN ENGLAND, *supra* note 75, at 148.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* at 156.

¹⁵⁹ *Id.* at 160.

¹⁶⁰ *Id.* at 165.

¹⁶¹ PLACITA, *supra* note 69, at xxxix.

¹⁶² *Id.*

¹⁶³ *Id.* at xxx.

¹⁶⁴ Bigelow Address, *supra* note 44 (manuscript at 10).

¹⁶⁵ PLACITA, *supra* note 69, at xxx.

shared naïve beliefs in historical progress and displayed smug satisfaction with existing law.¹⁶⁶

IV. INTERNATIONAL CRITICAL RESPONSES

The publication of *Placita Anglo-Normannica* and *History of Procedure in England* brought Bigelow international acclaim. They were reviewed in Germany and England as well as in the United States. Both American and English reviews described *Placita Anglo-Normannica* as a continuation of the work of Adams and his students in *Essays in Anglo-Saxon Law*.¹⁶⁷ One English review observed that *History of Procedure in England* “fulfilled the promise” of Bigelow’s previous casebook on torts, which was widely respected in England.¹⁶⁸ The reviews often highlighted the enormous amount of work necessary to produce these volumes, praising Bigelow for his “indefatigable industry”¹⁶⁹ and his “heroic love of learning for its own sake.”¹⁷⁰ Brunner wrote the longest and most critical review, though his detailed attention to Bigelow’s books itself reveals that Brunner took him seriously.¹⁷¹

Most broadly, commentators observed that Bigelow’s books contributed to the recent flourishing of interest in the historical study of law in both the United States and England.¹⁷² An English review of *Placita Anglo-Normannica* asserted that the prior work of the leading English scholars Henry Maine and William Stubbs had enlarged the potential audience for Bigelow’s book.¹⁷³ English reviewers commented, sometimes with embarrassment, that an American had published more detailed scholarship on early English law than anything yet produced by an Englishman. “It deserves the fullest recognition, however mortifying to our national vanity,” wrote an English reviewer of *History of Procedure of England*, “that America has challenged the title of German legal scholars to be the only thorough expositors in the present day of our more ancient law before anything of importance has been done in this direction in England itself.”¹⁷⁴ The reviewer also observed that together

¹⁶⁶ See, e.g., Morton J. Horwitz, *The Conservative Tradition in the Writing of American Legal History*, 17 AM J. LEGAL HIST. 275, 281-83 (1973).

¹⁶⁷ Æ.J.G. Mackay, *The History of Legal Procedure in England*, 19 THE ACADEMY 219, 219 (1881); *Placita Anglo-Normannica*, 29 THE NATION 298, 299 (1879) [hereinafter THE NATION].

¹⁶⁸ Mackay, *supra* note 167, at 219.

¹⁶⁹ *Id.*

¹⁷⁰ *Placita Anglo-Normannica*, 13 AM. L. REV. 737, 738 (1879) [hereinafter AMERICAN LAW REVIEW].

¹⁷¹ See Heinrich Brunner, *Litteratur*, 2 ZEITSCHRIFT DER SAVIGNY-STIFTUNG FÜR RECHTSGESCHICHTE 202 (1881).

¹⁷² *Placita Anglo-Normannica*, THE ATHENAEUM, July 19, 1879, at 74-75 [hereinafter THE ATHENAEUM]; THE NATION, *supra* note 167, at 298.

¹⁷³ THE ATHENAEUM, *supra* note 172, at 74.

¹⁷⁴ Mackay, *supra* note 167, at 219.

with the *Essays on Anglo-Saxon Law*, Bigelow's book afforded "a gratifying testimony to the zeal and learning of the school of legal history at Harvard."¹⁷⁵ In thanking Bigelow for sending him a copy of *Placita Anglo-Normannica*, Stubbs began a decade of extensive correspondence with Bigelow by observing the American contribution to the study of the legal history of England. "It is very pleasant," Stubbs wrote, "to find that on your side of the Atlantic there is so much interest felt and so much good work done in a department of history which at present in England is a little neglected for more exciting political questions."¹⁷⁶ Stubbs also admired *History of Procedure of England*.¹⁷⁷

By comparing Bigelow's conclusions to those of previous scholars, reviewers helpfully placed his work in historiographical context. One review pointed out that Bigelow stepped outside the ongoing debate between Germanists and Romanists in England.¹⁷⁸ Bigelow corrected the view that modern English common law derived primarily from ancient Germanic sources, which itself was a reaction against the earlier position that the basic principles of English common law originated in Roman jurisprudence established before the Norman Conquest. For Bigelow, the Norman period in English law constituted a transition between Anglo-Saxon and modern English law in which numerous influences mingled to varying degrees.¹⁷⁹ Reviews observed that Bigelow effectively challenged specific positions of English scholars. Contrary to Edward Freeman's claim that there was no clear evidence of military tenures during the reign of William the Conqueror, Bigelow demonstrated their existence.¹⁸⁰ And contrary to Kenelm Digby's claim about the freedom to alienate property in Norman England, Bigelow cited many cases in which freeman were unable to do so.¹⁸¹ Bigelow thus saw less freedom in the English past than did the English scholars, a point the reviewers did not make explicitly but that was implicit in both of their examples. Another review cited Bigelow's challenge to Brunner's view that the English writs were introduced from Normandy.¹⁸² Yet the review minimized the significance of this challenge by observing that Bigelow accepted Brunner's most important conclusions, which linked the origin of

¹⁷⁵ *Id.*

¹⁷⁶ Letter from William Stubbs, Regius Professor of Modern History, Oxford Univ., to Melville Madison Bigelow (June 12, 1879) (on file with Bigelow Collection, box 2, Stubbs folder).

¹⁷⁷ Letter from William Stubbs to Melville Madison Bigelow (July 2, 1880) (on file with Bigelow Collection, box 2, Stubbs folder).

¹⁷⁸ THE ATHENAEUM, *supra* note 172, at 74.

¹⁷⁹ *Id.*

¹⁸⁰ THE NATION, *supra* note 167, at 299.

¹⁸¹ THE ATHENAEUM, *supra* note 172, at 75.

¹⁸² AMERICAN LAW REVIEW, *supra* note 170, at 738.

inquisitions to the growth of royal power and viewed them as a more civilized form of procedure than the strict popular forms they superseded.¹⁸³

Though generally favorable, the reviews contained some significant criticisms. One suggested that Bigelow exaggerated the importance of the Norman Conquest in the history of English law.¹⁸⁴ Commenting on Bigelow's central claim that the Norman Conquest had delivered a "fatal blow" to Anglo-Saxon law, the review pointed out Bigelow's own acknowledgment that many of the changes in English law during the Norman period would have developed naturally even if the Conquest had not occurred.¹⁸⁵ Another review maintained that Bigelow slighted the importance of criminal law and especially of canon law in the development of English legal procedure.¹⁸⁶ A particularly negative review accused him of insufficient knowledge of the general history of the Norman period, which produced errors in dating and failure to recognize forgeries,¹⁸⁷ complaints echoed in a letter to Bigelow from Freeman.¹⁸⁸ In private correspondence, Stubbs informed Bigelow that many additional records "would have to be searched before anything like a complete repertory of 'Placita Anglo Normannica' could be made up."¹⁸⁹ While eager to talk with Bigelow in England, Stubbs also warned him that "when your book comes to a second edition I shall have a few small points to criticize."¹⁹⁰

Several reviews, moreover, suggested that Bigelow's admittedly heroic labors in *Placita Anglo-Normannica* had produced technical and even antiquarian work of limited appeal. One English reviewer observed that practicing lawyers in England "have neither time nor taste for antiquarian researches, and a law-book relating to the ancient procedure of the courts under the Anglo-Norman kings would be regarded as an eccentricity which was likely to do more injury than service to the writer in his profession."¹⁹¹ While conceding "that a philosophical understanding of law as it is, is impossible, without some well-directed researches into the history of law as it has been," an American review warned that "nothing is easier than to be beguiled from serious questions into curiosities; and it may be asked whether these reports do

¹⁸³ *Id.*

¹⁸⁴ THE ATHENAEUM, *supra* note 172, at 74.

¹⁸⁵ *Id.*

¹⁸⁶ Mackay, *supra* note 167, at 220.

¹⁸⁷ *Placita Anglo-Normannica: Law Cases from William I to Richard I*, [ser. 5] vol. 11 NOTES & QUERIES 519, 519-20 (1879) [hereinafter NOTES & QUERIES].

¹⁸⁸ Letter from Edward Freeman to Melville Madison Bigelow (May 30, 1879) (on file with Bigelow Collection, box 2, Freeman folder).

¹⁸⁹ Letter from William Stubbs, Regius Professor of Modern History, Oxford Univ. to Melville Madison Bigelow (Oct. 20, 1879) (on file with Bigelow Collection, box 2, Stubbs folder).

¹⁹⁰ *Id.*

¹⁹¹ NOTES & QUERIES, *supra* note 187, at 519.

not fall under the latter head.”¹⁹² Though *Placita Anglo-Normannica* fell “upon the border-land between antiquarianism and those studies which are of profit to the profession,” the reviewer concluded that it would be useful both to practicing lawyers and to scholars, though not to students.¹⁹³ More generously, another American review of *Placita Anglo-Normannica* described it as “designed to assist in the study of the history of law rather than general history,” adding that “it has at the same time great value for the student of constitutional and general history.”¹⁹⁴

Heinrich Brunner wrote the most detailed critical evaluation of Bigelow’s two books in *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte*, a leading German journal. While praising Bigelow’s work as very useful, Brunner joined the criticism that Bigelow often misdated and mistakenly accepted the authenticity of the sources he cited.¹⁹⁵ Brunner attributed these failings to Bigelow’s unfamiliarity with the history of continental Germanic law and to Bigelow’s reliance on printed materials rather than manuscripts for his original sources.¹⁹⁶ In favorable contrast to Bigelow, Brunner cited his German colleague, Felix Liebermann, who in 1879 had published for the first time previously unpublished original sources on Anglo-Norman law.¹⁹⁷ Substantively, Brunner engaged Bigelow most extensively on the relationship between the prior law in Normandy and the Anglo-Norman law following the Norman Conquest. Brunner observed that German and Anglo-American scholars understandably approached this relationship from different perspectives.¹⁹⁸ Germans, Brunner believed, were interested in the connections between Anglo-Norman law and the prior Germanic law of the Continent, whereas English and American scholars were interested in the Anglo-Norman roots of the subsequent English common law.¹⁹⁹ Brunner also agreed with Bigelow that it was dangerous to treat apparent similarities between the law of Normandy and Anglo-Norman law as reflecting continuities of legal ideas and institutions.²⁰⁰ Despite these concessions, Brunner stressed that much Anglo-Norman law can be traced in a continuous link back to the law of Normandy to a much greater extent than Bigelow realized.²⁰¹ While acknowledging the emergence of some deep differences between the law of Normandy and English law in the Anglo-Norman period, Brunner maintained that these differences were easily understandable. Only in

¹⁹² AMERICAN LAW REVIEW, *supra* note 170, at 738.

¹⁹³ *Id.*

¹⁹⁴ THE NATION, *supra* note 167, at 298-99.

¹⁹⁵ Brunner, *supra* note 171, at 204.

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ *Id.* at 202.

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ *Id.*

the thirteenth century, Brunner maintained, did English law become so distinctive that it seemed strange to continental jurists.²⁰²

Brunner specifically held his ground against Bigelow's claim that Brunner had incorrectly placed the development of the recognition in Normandy rather than in England.²⁰³ If Bigelow knew more about the law of Normandy, Brunner suggested, Bigelow would have noticed these continuities himself.²⁰⁴ Indeed, Brunner concluded his review by maintaining that it is dangerous to write about Anglo-Norman law without accurate knowledge of continental legal history.²⁰⁵ Intriguingly, Brunner described Bigelow's chapter in *History of Procedure of England* on the development of writs in Anglo-Norman England as the most valuable in the book, even though Bigelow stressed that the writs were not "imported into perfect form from Normandy," but mostly developed on English soil.²⁰⁶ Brunner claimed that Bigelow's own evidence reinforced Brunner's conclusion that they originated on the Continent.²⁰⁷

Interestingly, the substance of the debate between Brunner and Bigelow continued among American legal scholars in response to Thayer's subsequent work on the history of the jury. While complimenting Thayer on one of his early articles, Bigelow observed that his "only criticism," which he elaborated at length, was that Thayer had let himself "swallow Brunner too readily" in identifying Henry, either as Duke of Normandy or subsequently as King Henry II of England from 1154 to 1189, as a great law reformer.²⁰⁸ "Brunner, with his pro-Norman anti-Anglican feeling," Bigelow asserted, "can see nothing English of any account."²⁰⁹ According to Bigelow, the fragments of litigation that remain from Henry's reign reveal that he developed the inquisition as a fiscal reformer, not as a law reformer, which Henry no more resembled "than the man in the moon."²¹⁰ Bigelow also claimed that Henry threw the "sop" of the recognition to the people simply to "help fill his Treasury; and that was enough."²¹¹ Referring to the relevant pages of *History of Procedure of England*, Bigelow maintained that Stephen Langton more than sixty years later, not Henry, was the great law reformer. Bigelow's more general point was that the English, not the Normans, were the first reformers of the law, a process that could only take place "when at length the English feeling had

²⁰² *Id.*

²⁰³ *Id.* at 212.

²⁰⁴ *Id.* at 214.

²⁰⁵ *Id.*

²⁰⁶ HISTORY OF PROCEDURE IN ENGLAND, *supra* note 75, at 147; Brunner, *supra* note 171, at 211.

²⁰⁷ Brunner, *supra* note 171, at 211.

²⁰⁸ Letter from Melville Madison Bigelow to James Bradley Thayer, Professor, Harvard Law Sch. (Feb. 5, 1892) (on file with Thayer Papers, box 18, folder 1).

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ *Id.*

sufficiently revived.”²¹² Writing that he had “incurred Brunner’s displeasure” in making these points, Bigelow proudly proclaimed, “my only regret is that others have not incurred it also.”²¹³ Brunner, Bigelow complained, was “pig-headed.”²¹⁴ Apparently regretting the tone of this letter, Bigelow wrote Thayer again three days later, restraining his language while reiterating his basic point. “Of course Brunner’s scholarship is of the highest order, [and] his services are beyond praise,” Bigelow acknowledged after referring to his earlier “hasty” letter.²¹⁵ Bigelow added, “[i]t would have been enough to say that he is strongly pro-Norman, [and] that we must look out for that if there be occasion, as there is in regard to [Henry II] as a *law* reformer.”²¹⁶

The similar reaction to Thayer’s article by William Hammond, another important late nineteenth-century American legal scholar, reinforced Bigelow’s point. Hammond wrote Thayer in response to an invitation to contribute an article to the *Harvard Law Review* “in connection with yours on The Jury and its development.”²¹⁷ Commenting that he had just finished Brunner’s book before reading Thayer’s article, Hammond reported that the book “had not convinced me that the Norman share of the jury was so important as both B[runner] and you assume.”²¹⁸ “In fact,” Hammond added, Brunner’s “complete statement of the Norman case rather convinced me that it was not made out, especially in the important point of the legislation of Henry II, as Norman or English.”²¹⁹ In Hammond’s extensive unpublished manuscript on the history of the common law, he similarly and frequently criticized Brunner for overemphasizing the Norman and underestimating the distinctively English contribution to the common law.²²⁰

V. BIGELOW’S CLOSE RELATIONSHIP WITH MAITLAND

Just as Bigelow kept in touch with American colleagues, particularly Ames, Thayer, and Holmes, he regularly corresponded, sometimes extensively, with numerous English scholars. They included William Anson, James Bryce, H.A.L. Fisher, Edward Freeman, T.E. Holland, Frederick Pollock, and especially Frederic Maitland. Bigelow visited many of them on his trips to

²¹² *Id.*

²¹³ *Id.*

²¹⁴ *Id.*

²¹⁵ Letter from Melville Madison Bigelow to James Bradley Thayer (Feb. 8, 1892) (on file with Thayer Papers, box 18, folder 1).

²¹⁶ *Id.*

²¹⁷ Letter from William Gardner Hammond to James Bradley Thayer (Feb. 26, 1892) (on file with Thayer Papers, box 18, folder 2).

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ William Gardner Hammond, Notes of Lectures on History of the Common Law 35 (1894) (unpublished manuscript) (on file with the Harvard Law School Archives).

England, and they reciprocated when they traveled to Boston.²²¹ A friend who accompanied Bigelow to England in 1894 recalled visiting Maitland in Cambridge, having dinner with Pollock in London, and seeing many other eminent jurists.²²² According to Brooks Adams, Bigelow's reputation as a scholar, especially for *Placita Anglo-Normannica*, made him "known as our most learned man, the person beyond all others, to whom learned strangers such as Mr. Pollock . . . turned to at once when they visited America."²²³

That Maitland, the greatest English legal historian, throughout his career maintained a close professional and personal relationship with Bigelow itself provides impressive testimony of Bigelow's importance. Bigelow initiated their correspondence in 1885, at the beginning of Maitland's career. Responding that he taught torts at Cambridge, Maitland wrote Bigelow: "You therefore are no stranger to me for your books are constantly in my hands and your name in my mouth."²²⁴ Over the remaining twenty years of Maitland's life, he and Bigelow corresponded regularly and at length.²²⁵ "I have lately had occasion to use your *Placita Anglo-Normannica* and your *History of Procedure*," Maitland wrote Bigelow in 1887, "and see that when writing the Appendix for Pollock's *Torts* I ought to have referred to what you have said about the check put to the invention of writs by the Provisions of Oxford."²²⁶ Maitland added that he had read but did not remember Bigelow's important discussion of this check, which corrected English scholars, who "are too much given to thinking of the original writs as having existed from all eternity."²²⁷ In the same letter, Maitland wrote that Bigelow's "little book on *Torts* is now definitely established at the head of the books on that subject which we recommend to law students."²²⁸ Many copies, Maitland reported with pleasure, were at the local bookstore.²²⁹ Yet Maitland also reported that his friend R.T. Wright, a barrister and lecturer at Cambridge, had urged Maitland to ask Bigelow to prepare an English edition in which English rather than American cases would be given more prominence.²³⁰ Bigelow pursued this

²²¹ See Bigelow Collection, Box 2.

²²² Harriman, *supra* note 30, at 161-63.

²²³ Adams, *supra* note 36, at 169.

²²⁴ Letter from F.W. Maitland, Reader of English Law, Univ. of Cambridge, to Melville Madison Bigelow (Oct. 31, 1885), in Warren O. Ault, *The Maitland-Bigelow Letters*, 37 B.U. L. REV. 285, 287 (1957). I have not found a copy of the earlier letter from Bigelow to Maitland that prompted this response. Much of the text of this and the following two paragraphs overlaps with Rabban, *supra* note 22, at 431-32.

²²⁵ See Ault, *supra* note 224, at 287-326.

²²⁶ Letter from F.W. Maitland to Melville Madison Bigelow (May 13, 1887), in Ault, *supra* note 224, at 290 (footnote omitted).

²²⁷ *Id.*

²²⁸ *Id.*

²²⁹ *Id.*

²³⁰ *Id.*

suggestion,²³¹ eventually producing three editions of his English version to complement the eight editions of the original American version.²³² Bigelow dedicated the English edition to Maitland and Wright.²³³ A similar dedication in a subsequent edition prompted Maitland to respond that nothing could have given him “a pleasanter proof of our friendship” and to exclaim “what a good book it is!”²³⁴

Throughout their twenty years of correspondence Bigelow commented substantively on Maitland’s work, which Maitland accepted with gracious appreciation. On one occasion, Bigelow found a mistranslation in one of Maitland’s books. Maitland thanked him “for exposing the blunder” and promised to correct it.²³⁵ Maitland even praised Bigelow behind his back. Apparently referring to the same mistranslation, he wrote Thayer that a remark by Bigelow “will force me to an ‘erratum.’ How wonderfully keen he is.”²³⁶ Maitland wrote Bigelow that he had “adopted your opinion about distress for rent arrear”²³⁷ and would make use of his “valuable contribution” in a “note about the liability of townships.”²³⁸ On one occasion, Maitland found a letter from Bigelow about corporate liability so interesting that he read it during one of his lectures.²³⁹ While working with the *English Year Books*, Maitland wrote that he would soon send the finished volume, which he hoped would satisfy Bigelow.²⁴⁰

Maitland and Bigelow expressed mutual admiration in print as well as in correspondence. In the preface to *Bracton’s Note Book*, Maitland’s first major work, Maitland expressed his “best thanks” to Bigelow and Thayer “for the encouragement given me by friendly letters from a land where Bracton is at least as well known and at best as highly honoured as he is in England.”²⁴¹

²³¹ Letters from F.W. Maitland to Melville Madison Bigelow (June 23, 1887, Aug. 11, 1887, and Jan. 1, 1888), in Ault, *supra* note 224, at 290-93.

²³² Ault, *supra* note 224, at 285.

²³³ *Id.* at 294 n.19.

²³⁴ Letter from F.W. Maitland, Professor of the Law of England, Univ. of Cambridge, to Melville Madison Bigelow (Aug. 9, 1903), in Ault, *supra* note 224, at 318.

²³⁵ Letter from F.W. Maitland to Melville Madison Bigelow (Feb. 24, 1889), in Ault, *supra* note 224, at 294-95.

²³⁶ Letter from F.W. Maitland to James Bradley Thayer, Professor, Harvard Law Sch., (Feb. 16, 1889) (on file with Thayer Papers, box 18, folder 14).

²³⁷ Letter from F.W. Maitland to Melville Madison Bigelow (Feb. 24, 1889), in Ault, *supra* note 224, at 295.

²³⁸ Letter from F.W. Maitland to Melville Madison Bigelow (Feb. 1, 1891), in Ault, *supra* note 224, at 299.

²³⁹ Letter from F.W. Maitland to Melville Madison Bigelow (Apr. 19, 1891), in Ault, *supra* note 224, at 300.

²⁴⁰ Letter from F.W. Maitland to Melville Madison Bigelow (Aug. 9, 1903), in Ault, *supra* note 224, at 318.

²⁴¹ Ault, *supra* note 224, at 287 n.9 (quoting 1 BRACTON’S NOTE BOOK vii-viii (F.W. Maitland ed. 1887)).

Thanking Maitland for sending him a copy, Bigelow responded: “you are far too modest in your Preface. You have done a lasting service to students of the history of our law, and with such *sound* sense [and] scholarship as leave no chance for caviling.”²⁴² Eight years later, Maitland sent Bigelow his masterpiece, *The History of English Law Before the Time of Edward I*.²⁴³ Bigelow wrote a lengthy favorable review in the inaugural issue of the *American Historical Review*,²⁴⁴ prompting Maitland to express his “heartily grateful” thanks.²⁴⁵ In commenting on the book’s “fresh, ready, almost conversational” style, Bigelow drew on his personal friendship with Maitland.²⁴⁶ “To one who knows Mr. Maitland,” Bigelow observed, “it is his living voice, or at least his epistolary pen.”²⁴⁷ In a letter accompanying the copy of his book he sent Bigelow, Maitland expressed his own warm personal feelings: “With my share of the gift go pleasant memories of hours spent over the Placita Anglo Normannica and of pleasant talks with its author. I hope that when looking at the book you will remember Downing and Horsepools,” Maitland’s homes in England that Bigelow and his wife had visited.²⁴⁸ After one of Bigelow’s visits, Maitland wrote Bigelow “that to have had you and Mrs. Bigelow as my guests has been one of the greatest pleasures of my life.”²⁴⁹ Their subsequent letters, and the correspondence between their wives, are filled with intimate details of family life.²⁵⁰

Maitland generously referred to Bigelow throughout *The History of English Law*. In the preface, Maitland listed Bigelow among the eight scholars whose previous work he admired and did not intend to duplicate by “vain repetition.”²⁵¹ Demonstrating that this prefatory praise was substantive and not

²⁴² Letter from Melville Madison Bigelow to F.W. Maitland, Reader of English Law, Univ. of Cambridge (Dec. 19, 1887) (on file with Cambridge University Library, Frederic William Maitland Papers, add 7006).

²⁴³ Letter from F.W. Maitland, Professor of English Law, Univ. of Cambridge, to Melville Madison Bigelow (Mar. 30, 1895), in Ault, *supra* note 224, at 302.

²⁴⁴ Melville M. Bigelow, *The History of English Law before the Time of Edward I*, 1 AM. HIST. REV. 112 *passim* (1895) [hereinafter AMERICAN HISTORICAL REVIEW].

²⁴⁵ Letter from F.W. Maitland to Melville Madison Bigelow (Nov. 3, 1895), in Ault, *supra* note 224, at 304.

²⁴⁶ AMERICAN HISTORICAL REVIEW, *supra* note 244, at 113.

²⁴⁷ *Id.*

²⁴⁸ Letter from F.W. Maitland to Melville Madison Bigelow (Mar. 30, 1895), in Ault, *supra* note 224, at 302; *see also* Harriman, *supra* note 30, at 161 (stating that Bigelow visited Maitland in Downing in 1894).

²⁴⁹ Letter from F.W. Maitland to Melville Madison Bigelow (June 5, 1889), in Ault, *supra* note 224, at 295.

²⁵⁰ *See* Ault, *supra* note 224 *passim* (repeated personal references throughout letters).

²⁵¹ POLLOCK & MAITLAND, *supra* note 91, at xxxvii. The other seven scholars listed were Holmes, Thayer, Ames, Brunner, Liebermann, Vinogradoff, and Stephen. *Id.* As Pollock noted, “by far the greater share of the execution belongs to Mr. Maitland, both as to the actual writing and as to the detailed research which was constantly required.” *Id.* at vi. In a

merely polite, Maitland cited Bigelow for evidence that Henry II had a significant role in the King's Court,²⁵² to support the assertion that the use of the seal in contract law originated with the Frankish kings rather than ancient folk law,²⁵³ as authority regarding both the substantive and procedural law of theft,²⁵⁴ and in discussing the allotment of proof between litigants.²⁵⁵ While analyzing seisin in the chapter called Ownership and Possession, Maitland politely noted that he could not "wholly agree" with Bigelow's conclusion that questions of possession could easily be transformed into proprietary questions.²⁵⁶ More generally, Maitland agreed with Bigelow that by the death of Edward I in 1307 "the main outlines of the common law would . . . be drawn for once and all."²⁵⁷ Like Bigelow, Maitland also stressed the development of law in England from Norman roots following the Norman Conquest, and highlighted the introduction of new writs in the King's Court, particularly novel disseisin.²⁵⁸ Indeed, though Brunner's review of Maitland's *History of English Law* was much more favorable than Brunner's previous review of Bigelow's books, Brunner similarly maintained that Maitland, despite his "constant attention" to Norman law and its sources, should have "more strongly emphasized" its influence in England.²⁵⁹

letter to Holmes, Pollock emphasized "how little" of the book "is my writing." Letter from Frederick Pollock, Professor, Univ. of Oxford, to Oliver Wendell Holmes, Jr. Justice, Supreme Judicial Court of Mass. (Aug. 23, 1895), in 1 HOLMES-POLLOCK LETTERS 60, 60 (Mark DeWolfe Howe ed., 1941). I, therefore, refer to Maitland as the author in the text.

Just as Bigelow prefaced *History of Procedure in England* by asserting that he would write about the "technical processes of law" previously ignored by "constitutional historians," HISTORY OF PROCEDURE IN ENGLAND, *supra* note 75, at v, Maitland explained that his book would not cover constitutional history, largely because William Stubbs had already covered that field so well, POLLOCK & MAITLAND, *supra* note 91, at xxxvi. Maitland also pointed out that for a long time before Stubbs, many English writers had focused on "the history of parliament and of taxation and of all that directly concerns the government of the realm." *Id.* at xxxvii. Maitland wished that he and Pollock

could persuade a few of them to take a similar interest in the history of ownership, possession, contract, agency, trust, legal proof and so forth, and if we could bring the history of these, or of some of these, matters within a measurable distance of that degree of accuracy and completion which constitutional history has attained in the hands of Dr Stubbs, we should have achieved an unlooked-for success.

Id.

²⁵² POLLOCK & MAITLAND, *supra* note 91, at 158 nn.2 & 4, 159 n.2.

²⁵³ 2 *id.* at 223 n.4.

²⁵⁴ *Id.* at 496 n.3 (substantive law); *id.* at 579 n.4 (procedural law).

²⁵⁵ *Id.* at 602 nn.2-3, 603 n.3.

²⁵⁶ *Id.* at 59 n.2.

²⁵⁷ Compare 1 BRACTON'S NOTE BOOK 1 (F.W. Maitland ed. 1887), with PLACITA, *supra* note 69, at xxvii.

²⁵⁸ 1 THE HISTORY OF ENGLISH LAW, *supra* note 94, at 84, 195.

²⁵⁹ Heinrich Brunner, *Pollock and Maitland's History of English Law*, 11 POL. SCI. Q. 534, 535 (1896).

In addition to their mutual engagement about the history of medieval English law, Maitland and Bigelow shared their disappointment with the condition of legal education and legal history in their respective countries. "I am sorry to say," Maitland wrote Bigelow in a letter enclosing a list of law lectures delivered at Cambridge, "that at present we have a great deal of Roman Law and of what is called General Jurisprudence in our scheme – but I hope that a projected alteration may give English law a fairer chance."²⁶⁰ A few months later, Bigelow wrote Maitland that the publication of *Bracton's Note Book* should help the cause of legal history in the United States. No American law school, Bigelow informed Maitland, had a chair in legal history and "what we do in teaching we must smuggle in or get in as best we may in connection with other work."²⁶¹ Bigelow did not think that American law schools were hostile or even indifferent to legal history. The problem was that no funds existed to endow positions in the subject.²⁶² Bigelow believed that Maitland's book would encourage the "growing feeling" that such positions were needed.²⁶³ Bigelow specifically hoped that Harvard would establish a professorship in the history of English law. "A noble field of work," he added, "will the first incumbent have!"²⁶⁴

VI. FROM LEGAL HISTORY TO PROTO-REALISM

In the decades following *Placita Anglo-Normannica* and *History of Procedure in England*, Bigelow received professional acclaim and continued to publish steadily. He received the LL.D. from Northwestern University and the University of Michigan and became a fellow of the American Academy of Arts and Sciences.²⁶⁵ In addition to the English editions of his torts book and his lengthy review of *The History of English Law*, he published eight editions of *Bigelow on Torts*, six editions of *Bigelow on Estoppel*, three editions each of *Bigelow's Bills, Notes and Cheques*, *Bigelow on Equity*, *Bigelow on Wills*, and *Bigelow on Fraudulent Conveyances*.²⁶⁶ He followed Cooley as the editor of Story's *Commentaries on the Constitution of the United States*²⁶⁷ and also became the editor of Story's *Commentaries on the Conflict of Laws*.²⁶⁸ His

²⁶⁰ Letter from F.W. Maitland, Reader of English Law, Univ. of Cambridge, to Melville Madison Bigelow (May 13, 1887), in Ault, *supra* note 224, at 289.

²⁶¹ Letter from Melville Madison Bigelow to F.W. Maitland, *supra* note 242.

²⁶² *Id.*

²⁶³ *Id.*

²⁶⁴ *Id.*

²⁶⁵ Ault, *supra* note 224, at 285.

²⁶⁶ David J. Seipp, *Who Was Melville Madison Bigelow?*, B.U. SCH. OF L. ALUMNI MAG. (Office of Publ'n Prod., Bos. Univ., Bos., Mass.), Winter 1996, at 6, 7.

²⁶⁷ See Melville M. Bigelow, *Preface to the Fifth Edition* of JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES, at v (5th ed. 1891).

²⁶⁸ Seipp, *supra* note 266, at 6, 7.

articles appeared in the early volumes of the *Law Quarterly Review*²⁶⁹ and the *Harvard Law Review*,²⁷⁰ leading legal publications in England and the United States. Scholars from abroad solicited work from Bigelow. As organizer of the Cambridge Modern History series, Lord Acton asked Bigelow to contribute an article on early American constitutional history.²⁷¹ Bigelow wrote the article Acton requested,²⁷² but he apparently did not pursue a flattering invitation to contribute an article to the *Allahabad Law Journal* in India, whose editor wrote him that “there is probably at the present moment no American text-writer who is held in greater respect in India than yourself.”²⁷³

In 1902, Bigelow became Dean of Boston University School of Law, resigning when he turned 65 in 1911.²⁷⁴ Bigelow’s old friend, Brooks Adams, joined the faculty in 1903 and stayed for the remainder of Bigelow’s deanship.²⁷⁵ Bigelow and Brooks Adams collaborated on a series of essays published in 1906 under the title *Centralization and the Law*.²⁷⁶ In this book of proto-realism and in other writing, Bigelow emphasized the growing inequality in the United States produced by the rapid social and economic changes of the late nineteenth century.²⁷⁷ He maintained that law schools must develop a “scientific spirit” to understand and respond to these forces, for which traditional legal education was insufficient.²⁷⁸ In an article entitled *A Scientific School of Legal Thought*, published in 1905 and reprinted in *Centralization and the Law* as the chapter *Scientific Method in Law*,²⁷⁹ Bigelow elaborated his views in ways that questioned and modified his earlier interest in legal history while making many of the same points that Roscoe Pound was stressing more influentially in his contemporaneous early articles promoting “sociological jurisprudence.”²⁸⁰

²⁶⁹ Melville M. Bigelow, *Definition of Circumvention*, 5 L.Q. REV. 140, 140-48 (1889); Melville M. Bigelow, *Definition of Fraud*, 3 L.Q. REV. 419, 419-28 (1887); Melville M. Bigelow, *Mistake of Law as a Ground of Equitable Relief*, 1 L.Q. REV. 298, 298-313 (1885).

²⁷⁰ Melville M. Bigelow, *Alteration of Negotiable Instruments*, 7 HARV. L. REV. 1, 1-15 (1893).

²⁷¹ Letter from Lord Acton, Professor of Modern History, Cambridge Univ., to Melville Madison Bigelow (June 11, 1897) (on file with Bigelow Collection, box 2, Acton folder).

²⁷² Melville M. Bigelow, *The Constitution (1776-1789)*, in 7 THE CAMBRIDGE MODERN HISTORY 235, 235-304 (A.W. Ward et al. eds., 1903).

²⁷³ Letter from S.C. Banerji, Editor, Allahabad Law Journal, to Melville Madison Bigelow (Dec. 6, 1907) (on file with Bigelow Collection, box 2, Banerji folder).

²⁷⁴ Seipp, *supra* note 266, at 6.

²⁷⁵ *Id.* at 7.

²⁷⁶ See CENTRALIZATION AND THE LAW, *supra* note 3, at ix.

²⁷⁷ Melville M. Bigelow, *Introduction* to CENTRALIZATION AND THE LAW, *supra* note 3, at 4; see also *supra* text accompanying note 4.

²⁷⁸ *Id.* at 12-13, 17-18.

²⁷⁹ Melville M. Bigelow, *Scientific Method in Law*, in CENTRALIZATION AND THE LAW, *supra* note 3, at 165.

²⁸⁰ RABBAN, *supra* note 1 (manuscript at Chapter XIII, Pound: From Historical to

At the beginning of his article, Bigelow asserted that both in England and the United States two successive schools of legal thought had dominated. The analytic school, associated with Jeremy Bentham and John Austin, had been followed by the historical school, founded by Henry Maine.²⁸¹ The analytic school, Bigelow maintained, “threw aside the teachings of history, except such as were permanent in nature – and these could hardly be called historical – and planted itself on its own conception of the nature of rights and law.”²⁸² It could, therefore, “serve up codes and constitutions according to taste.”²⁸³ Though the analytic school enjoyed some “palmy days of *a priori* law,” it did not take root in either country and in both was superseded by the historical school, which still prevailed.²⁸⁴ The historical school studied legal history “as the true and main source of our present law.” As Bigelow elaborated,

The whole of the past, as far back as the Norman era, is to be placed before the student, not because all of this, or the greater part of it, may be necessary to explain the judicial law of our day, but because there is one continuous stream of law from the earliest times to our own.²⁸⁵

Bigelow acknowledged that he had been an “interested witness, and to a considerable extent a follower” of the historical school.²⁸⁶ But he wrote his article because he had become persuaded, probably in large part by Brooks Adams, “that there is something better than either the analytic or the historical school, better than both combined,” namely the “scientific school of legal thought.”²⁸⁷

Bigelow barely elaborated what he meant by the “scientific school of legal thought.” He spent most of his article maintaining that current law was “losing connection with life,”²⁸⁸ thereby creating an unhealthy though understandable public skepticism about the legal system.²⁸⁹ He used the law of procedure as an example. Just as he had complained in his introduction to *Placita Anglo-Normannica* that the “endless subtleties” of procedural law had produced “the perversion of justice” that continued in the present,²⁹⁰ Bigelow declared that procedure had become “a prison-house for the law. Many a crippled rule of

Sociological Jurisprudence).

²⁸¹ Melville M. Bigelow, *A Scientific School of Legal Thought*, 17 GREEN BAG 1, 1 (1905).

²⁸² *Id.*

²⁸³ *Id.*

²⁸⁴ *Id.*

²⁸⁵ *Id.*

²⁸⁶ *Id.*

²⁸⁷ *Id.* at 1-2.

²⁸⁸ *Id.* at 9.

²⁸⁹ *See, e.g., id.* at 3.

²⁹⁰ *See supra* text accompanying note 165.

substantive law traces its appearance back sooner or later to some phase of procedure – to set forms of action, jurisdiction, ‘niceties’ of pleading.”²⁹¹

The goal of the scientific school of legal thought, Bigelow apparently believed, was to regain the lost connection between life and law by studying “the actual conditions of life in our day.”²⁹² It should examine all the sources of law, “not merely the history of doctrine founded upon peculiar conditions of the past, which, notwithstanding all changes, still more or less prevails, but the direct and immediate sublegal sources.”²⁹³ For Bigelow, these “sublegal sources” included the activities of business and government and, more generally, “political, economic, psychological, and personal influences.”²⁹⁴ Legal education, he emphasized, should include all of these subjects.²⁹⁵

In pursuing his new “scientific” approach to law, legal history remained important for Bigelow, but only when it informed the study of current law. Legal history, he maintained, could help explain what otherwise seems obscure or meaningless in current law.²⁹⁶ It could also provide grounds for changing laws that made sense in the past but that have actually become meaningless or even dysfunctional in the changed conditions of the present. “If we govern ourselves to-day by laws laid down yesterday,” he reasoned, “it is or should be because those laws are suited to us; they are our own laws, not *a priori* laws made for us by another set of men.”²⁹⁷ Even if laws were effective in the past, why when they no longer work should they “have a posthumous life, to trouble men living under other conditions?”²⁹⁸ Any law, whether ancient or relatively modern, “which has been kept alive after the conditions under which it was laid down have essentially disappeared, has become from the time of the change an *a priori* rule, and so out of touch with sound theory.”²⁹⁹ Such laws should be left to die.³⁰⁰ As he wrote in the introduction to *Centralization and the Law*, “the law is handicapped in all its branches with historical survivals” and “should be constantly laying aside the grave-clothes of a dead past.”³⁰¹ Past law should remain only “so long as it is adapted to the purpose of maintaining the order for which it was intended.”³⁰² Bigelow’s friends and contemporaries, Holmes and Thayer, had been making similar points about the

²⁹¹ Bigelow, *supra* note 281, at 8.

²⁹² *Id.* at 2, 9, 16.

²⁹³ *Id.* at 14.

²⁹⁴ *Id.* at 14-15.

²⁹⁵ *Id.* at 12-16.

²⁹⁶ *Id.* at 14.

²⁹⁷ *Id.* at 13.

²⁹⁸ *Id.*

²⁹⁹ *Id.* at 11.

³⁰⁰ *Id.* at 13.

³⁰¹ Melville M. Bigelow, *Introduction* to *CENTRALIZATION AND THE LAW*, *supra* note 3, at 2.

³⁰² *Id.*

importance of uncovering and discarding dysfunctional survivals in current law.³⁰³

Based on this analysis, Bigelow concluded that legal history was valuable in assessing the extent to which the past should govern the present, but should not be taught simply as a continuous stream. To do so, he believed, would “be not merely waste – it would be positively misleading – it would be putting the chase on the wrong scent.”³⁰⁴ “A clear discrimination,” he immediately added, “should be made between what influences the declaration of law and what may be useful for other purposes.”³⁰⁵ When legal history “fails to shed light upon our own path,” he maintained, it should “be turned over to the historian,” to be studied for its intrinsic interest and for “broadening of the mind,” even of law students, but not for “teaching our law.”³⁰⁶ Bigelow seemed to feel that teaching legal history as a continuous stream would encourage people to think that past law should influence “the declaration of” present law simply because they both formed part of this stream. That, apparently, was the “wrong scent” he wanted to avoid.

Bigelow’s comments on the role of history in his new “scientific” approach to law echoed several points Holmes had made in his influential essay, *The Path of the Law*, first delivered at an address at the dedication of the new hall of the Boston University School of Law in 1897.³⁰⁷ While emphasizing “the part which the study of history necessarily plays in the intelligent study of law as it is to-day,” Holmes specifically referred to Bigelow, Ames, and Thayer as having “made important contributions which will not be forgotten.”³⁰⁸ Yet he also warned against “the pitfall of antiquarianism,” commenting that in their recent book Pollock and Maitland had lent the subject of early English law “an almost deceptive charm.”³⁰⁹ Just as Bigelow urged the study of legal history to uncover laws inherited from the past that should be left to die, Holmes had argued that history gets the “dragon” of law “out of his cave on to the plain and in the daylight.”³¹⁰ The next step “is either to kill him, or to tame him and make him a useful animal.”³¹¹ And just as Bigelow directed attention to economic and other “sublegal” sources of law in order to connect law with life, Holmes had maintained that “every lawyer ought to seek an understanding of economics” so that “instead of ingenious research we shall spend our energy

³⁰³ See, e.g., HOLMES, *supra* note 24, at 33; THAYER, *supra* note 29, at 523; see also Rabban, *supra* note 25, at 1174-84 (analyzing Holmes’s treatment of survivals).

³⁰⁴ Bigelow, *supra* note 281, at 14.

³⁰⁵ *Id.*

³⁰⁶ *Id.* at 13-14.

³⁰⁷ Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 457 n.1 (1897).

³⁰⁸ *Id.* at 474.

³⁰⁹ *Id.*

³¹⁰ *Id.* at 469.

³¹¹ *Id.*

on a study of the ends sought to be attained and the reasons for desiring them.”³¹²

In an interesting letter responding to Bigelow’s new approach, Paul Vinogradoff, one of the other scholars whose previous work in English legal history Maitland cited admiringly in the preface to *The History of English Law*, indicated his general agreement. “Law ought not to remain indefinitely behind life,” Vinogradoff wrote.³¹³ Yet his “only misgiving” about “scientific, that is, theoretical thought” was significant.³¹⁴ Vinogradoff expressed his “apprehension that the needs of today may make us forget that we are products elaborated by a long organic process, and that neither language nor laws can be altered like a set of clothes.”³¹⁵ Changing metaphors, Vinogradoff asked: “Should we not call a poor surgeon one who would look with contempt on the study of anatomy because he wants to operate on the living and not on the dead?”³¹⁶ He reminded Bigelow that medieval legal institutions had more to offer the present than “only dust.”³¹⁷ In these comments, Vinogradoff defended the assumptions of the traditional “historical school” to which Bigelow admitted he once belonged and from which from he was trying to differentiate himself in his work with Brooks Adams.

During the years Bigelow served as Dean, Boston University School of Law increased its admissions requirements, requiring a long list of courses in the liberal arts, and moved from an elective to a required curriculum. It also reduced the pedagogical choices of its faculty from “all approved systems and methods” to a prescribed combination of cases, problems, and exposure to the courtroom.³¹⁸ But the School of Law never implemented the broad study of the political, economic, and psychological “sublegal sources” of law that Bigelow advocated in his manifesto encouraging the “scientific method in law.” Nor did Bigelow’s proto-realistic scholarship take hold. Charles Eliot wrote that it was “more theoretical, more philosophical, and also less hopeful” than Bigelow’s other work, “and, therefore, not likely to live as long.”³¹⁹ Observing Bigelow’s close relationship with Brooks Adams, “his most intimate friend” at the time, Eliot added that Adams’s “eccentricities,” particularly his position as “a cynical critic of democracy and American

³¹² *Id.* at 474; *see also* Rabban, *supra* note 25 (analyzing Holmes’s treatment of history throughout his career).

³¹³ Letter from Paul Vinogradoff, Corpus Professor of Jurisprudence, Univ. of Oxford, to Melville Madison Bigelow (July 2, 1904) (on file with Bigelow Collection, box 2, Vinogradoff folder).

³¹⁴ *Id.*

³¹⁵ *Id.*

³¹⁶ *Id.*

³¹⁷ *Id.*

³¹⁸ Elizabeth Kahn, Dean Bigelow’s “Scientific School of Legal Education” 8 (1997) (unpublished student seminar paper, Boston University School of Law) (on file with author).

³¹⁹ Eliot, *supra* note 59, at 18.

society,” had hampered Bigelow’s own contributions to their joint project, *Centralization and the Law*.³²⁰

The emergence of Roscoe Pound as a major legal scholar probably contributed to the minimal impact of Bigelow’s pro-realism. A generation younger than Bigelow, Pound wrote a series of enormously influential articles in the decade before World War I that explored similar themes while developing what Pound called “sociological jurisprudence.”³²¹ Pound’s articles, which propelled him to academic preeminence, overshadowed Bigelow’s less scholarly, more polemical, and more pessimistic work with Brooks Adams. In contrast to Bigelow, who himself recognized his own prior participation in the historical school, Pound was a fresh scholarly voice who presented sociological jurisprudence as superseding the historical jurisprudence he criticized as a historian of legal thought.³²² Pound praised Holmes, Bigelow, Thayer, Ames, and Maitland as having “made us wiser with respect to law and history.”³²³ But by describing sociological jurisprudence as an amalgam of anti-formalist German legal thought, American philosophical pragmatism, and the emerging social sciences, Pound linked his views to an international movement in Western thought that turned from historical analysis to scholarship directed toward social reconstruction.³²⁴

VII. LATE WORK IN LEGAL HISTORY: THE PERILS OF “UNDISCIPLINED INDIVIDUALISM”

After he left the deanship in 1911, Bigelow returned to the study of legal history. In 1920, the year before he died, he published a collection of his historical essays in a book entitled *Papers on the Legal History of Government*. Much more overtly ideological than his early work in *Placita Anglo-Normannica* and *History of Procedure in England*, many of these essays invoked the “chastening page” of history to warn against the “undisciplined individualism” that he, like many scholars on both sides of the Atlantic in the early twentieth century, viewed as the central threat to democracy in his own time.³²⁵ He maintained that “the most stable and efficient government is found

³²⁰ *Id.*

³²¹ See Roscoe Pound, *The Scope and Purpose of Sociological Jurisprudence I*, 24 HARV. L. REV. 591 (1911); Roscoe Pound, *The Scope and Purpose of Sociological Jurisprudence II*, 25 HARV. L. REV. 140 (1912); Roscoe Pound, *The Scope and Purpose of Sociological Jurisprudence III*, 25 HARV. L. REV. 489 (1912).

³²² RABBAN, *supra* note 1 (manuscript at Chapter XIII, Pound: From Historical to Sociological Jurisprudence).

³²³ Pound, *The Scope and Purpose of Sociological Jurisprudence III*, *supra* note 321, at 512. Praising Bigelow’s scholarship at a dinner in Bigelow’s honor in 1920, Pound said that he had never previously met Bigelow but had been familiar with Bigelow’s work from the beginning of his own study of law. Harriman, *supra* note 30, at 165.

³²⁴ See Rabban, *supra* note 22, at 434-35.

³²⁵ BIGELOW, *Medieval English Sovereignty*, in PAPERS *supra* note 6, at 149-51.

where the individual is blended into a common or collective consciousness and will, in the hands of an executive fully backed by and responsible to the people.”³²⁶ His essays emphasized the historical role of religion and the family as sources of unity and bulwarks against “undisciplined individualism.”³²⁷ He simultaneously stressed that unity in a collective consciousness “cannot be rendered under guise or disguise of accredited privilege.”³²⁸

One of Bigelow’s essays in this collection, *Becket and the Law*, illustrated his central themes through a crucial episode in the historical period covered by the books that made his reputation forty years earlier.³²⁹ The conflict between King Henry II and Thomas Becket in the middle of the twelfth century, he believed, resulted in the defeat of an emerging and healthy collectivism by “self-centered individualism.”³³⁰ Bigelow sadly concluded that this defeat was a significant turning point that had devastating and continuing consequences for English law and society.³³¹

According to Bigelow, Becket was a collectivist who believed that morality, as expressed by Church canons, must be the basis of law.³³² For Becket, any distinction between law and morals encouraged undisciplined and self-aggrandizing individualism that would divide society.³³³ He maintained that canon law, which expressed principles of equity,³³⁴ had priority over all inconsistent secular law.³³⁵ Becket’s commitment to this general position took a concrete form in his dispute with King Henry II over the Constitutions of Clarendon in 1164, an attempt to resolve the respective roles of church and state.³³⁶ Bigelow stressed that the primary dispute between Becket and King Henry II concerned the division of jurisdiction between church and secular courts, not the substantive law to be applied in each court. The King knew and supported Becket’s commitments to equitable principles in all courts while helping him become Chancellor and Archbishop.³³⁷ In the actual controversy over the Constitutions of Clarendon, moreover, the King demonstrated his respect for canon law by sending them to the Pope for ratification.³³⁸ As to matters of substantive law, the King wanted only to exclude from the equitable

³²⁶ *Id.* at 148-49.

³²⁷ *See, e.g., id.* at 151.

³²⁸ *Id.*

³²⁹ BIGELOW, *Becket and the Law*, in PAPERS, *supra* note 6, at 186.

³³⁰ *Id.*

³³¹ *Id.* at 218-20.

³³² *Id.* at 193-94.

³³³ *Id.* at 200-01.

³³⁴ *Id.* at 205, 213, 217.

³³⁵ *Id.* at 212.

³³⁶ *Id.* at 199.

³³⁷ *Id.* at 215.

³³⁸ *Id.* at 217 & n.1.

principles of canon law matters directly related to his ability to raise funds.³³⁹ The King had no objection, by contrast, to the operation of equity in secular courts regarding private matters between men that did not involve the state.³⁴⁰

Becket's dispute with the King over jurisdiction, Bigelow maintained, could have been avoided by compromises on each side. But once the jurisdictional dispute was engaged, he indicated, issues of substantive law could not be avoided.³⁴¹ For Bigelow, the "pity" of the controversy over the Constitutions of Clarendon was that "the great moral idea of establishing the rule of equity in secular affairs was to be caught and broken on the wheel of an issue which did not involve the existence of Church authority and should never have arisen."³⁴² Bigelow believed that England faced a choice between collectivism and individualism during the period immediately before the Constitutions of Clarendon. This emergency "put an end to England's better hope," collectivism, "upon an issue that was not vital," the King's power to finance his ambitions.³⁴³ After Becket, Bigelow sadly observed, no other Englishman arose to champion his related causes of collectivism, morality, and equity. As an unfortunate result, England muddled along under the influence of selfish individualism "until muddling should come to be defended as the proper way."³⁴⁴

Bigelow elaborated the disastrous effects of the decline of equity in secular courts following the controversy over the Constitutions of Clarendon. Though principles of equity had considerable influence in secular courts at the time of Becket and the potential for substantially more,³⁴⁵ they were eliminated from virtually every area of secular law after the Constitutions of Clarendon.³⁴⁶ In particular, the developing secular law ignored equity's attention to subjective states of mind and focused instead on the objective effects of acts.³⁴⁷ Criminal law looked to the body, rather than to the mind, as the criminal agent, and, therefore, allowed brutal bodily mutilation and barbarous forms of capital punishment.³⁴⁸ Though the Church had come close to enforcing promises through principles of equity, the writ process that developed in the thirteenth

³³⁹ *Id.* at 214-17.

³⁴⁰ *Id.* at 238-39 n.1.

³⁴¹ *Id.* at 218.

³⁴² *Id.* at 218-19.

³⁴³ *Id.* at 217-18.

³⁴⁴ *Id.* at 219. Other discussions of the Constitutions of Clarendon are much clearer and more detailed about the jurisdictional disputes and historical background but do not focus on their implications for the role of equity in secular law, Bigelow's distinctive interest. *See, e.g.,* POLLOCK & MAITLAND, *supra* note 91, at 124-25, 137, 447-57; 2 *id.* at 198-99; G.O. SAYLES, *THE MEDIEVAL FOUNDATIONS OF ENGLAND* 342-51 (A.S. Barnes & Co. 1961).

³⁴⁵ BIGELOW, *Becket and the Law*, in *PAPERS*, *supra* note 6, at 202, 206.

³⁴⁶ *Id.* at 219-26.

³⁴⁷ *See id.* at 230.

³⁴⁸ *Id.* at 220-21.

century “drove equity out of the common law courts”³⁴⁹ and postponed the development of contract and tort law.³⁵⁰ The courts became immersed in “technicalities concerning matters of mere form,” such as debt and covenant, and justice became “hopelessly ensnared” in “an interminable web of subtle and useless refinements and distinctions.”³⁵¹ The situation became so intolerable that, at the end of the fourteenth century, the Court of Chancery was established as a “stop-gap” court of equity,³⁵² which for centuries provoked “the marvel of judges of rival courts flinging jurisdictional fictions at each other with all the effect of reality.”³⁵³ In America, issues of justice were severed entirely from the law.³⁵⁴

If only Becket had prevailed! “All this long-drawn-out waste”³⁵⁵ would have been avoided. Legal collectivism would have granted equitable powers to all courts, allowing them to take subjective as well as objective factors into account.³⁵⁶ Bigelow conceded that even if Becket had won or avoided the controversy over the Constitutions of Clarendon, his legal collectivism might not have taken hold.³⁵⁷ But if it had become permanent, the legal history of England “would have changed for the better.”³⁵⁸

Bigelow ended his paper by bringing his story and lesson up to the present. He claimed that legal collectivism, and, more specifically, the equitable emphasis on states of mind, were “steadily gaining ground” in legal analysis.³⁵⁹ Yet he warned that the utilitarian doctrines of Jeremy Bentham and John Stuart Mill were “a modern reaction against tendencies to consider states of the mind, or equity, in all courts, as the true test of conduct.”³⁶⁰ Thus, “the great struggle of legal history,” in which Becket, the leader of one camp, fell to a side issue of jurisdiction, continued for Bigelow and his readers.³⁶¹

CONCLUSION

Though Bigelow remained productive throughout his career, *Placita Anglo-Normannica* and *History of Procedure in England*, his original work in English legal history written in his first decade as a law professor, constitute his major scholarly legacy. As reviewers observed at the time, they built on the work of

³⁴⁹ *Id.* at 225.

³⁵⁰ *Id.* at 223-24.

³⁵¹ *Id.* at 223.

³⁵² *Id.* at 226.

³⁵³ *Id.* at 227.

³⁵⁴ *Id.*

³⁵⁵ *Id.* at 225.

³⁵⁶ *Id.* at 228.

³⁵⁷ *Id.* at 220.

³⁵⁸ *Id.*

³⁵⁹ *Id.* at 229.

³⁶⁰ *Id.* at 230.

³⁶¹ *Id.*

Henry Adams and his students in *Essays in Anglo-Saxon Law*. These two books were widely respected on both sides of the Atlantic, most impressively by Frederic Maitland, the great English legal historian. Maitland praised them in his own scholarship and maintained a lifelong friendship with Bigelow that combined professional engagement and personal intimacy. Bigelow was the most prolific of the late nineteenth-century scholars who initiated the professional study of legal history in the United States through their research on early English law. Attention to Bigelow's pioneering contributions underlines the general importance of the turn to history by American legal scholars in the decades after the Civil War. This turn to history suggests rethinking the conventional view that a timeless "deductive formalism," often tied to political conservatism, was the most salient characteristic of late nineteenth-century American legal thought. Bigelow's later proto-realism, moreover, anticipated major themes in twentieth-century legal scholarship.³⁶²

³⁶² I develop these points in my forthcoming book, *supra* note 1.