

Conversations with Professor Sir John Hamilton Baker
Part 3: Published works

by
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Date: 31 March 2017

This is the third interview with the twenty-fifth personality for the Eminent Scholars Archive. Professor Sir John Baker is Emeritus Downing Professor of the Laws of England at the University of Cambridge. The interview was recorded, and the audio version is available on this website.

Questions in the interviews are sequentially numbered for use in a database of citations to personalities mentioned across the Eminent Scholars Archive.

Interviewer: Lesley Dingle, her questions are **in bold type**.
Professor Baker's answers are in normal type.
Comments added by LD, [*in italics*]. Footnotes added by LD.

178. Professor Baker, we now come to the point where we can discuss your scholarly works and the research that you have undertaken over the last half a century to produce them.

To say that you have been very productive and that your output has been impressive would be to understate your contribution to scholarly legal history. Your CV lists 38 books, 123 chapters in books, 183 articles and notes, 12 pamphlets, 35 book reviews and 97 invited lectures. Also, remembering that you have always had a full academic life of lecturing, administration and activity in learned societies puts these achievements even more clearly into perspective. It would have been impossible for me to have read more than a small percentage of this material and, consequently, I hope you will forgive me for having been very selective in the books and the papers that I have looked at in detail.

I suggest that we go through your works in the following categories. (1) General considerations, (2) comments on specific topics and (3) a few major texts.

Professor Baker, for many readers and listeners I suspect that putting the wide span of your intellectual activities into context will be of great interest, so could we start with some general discussion of your early and continuing goals as well as research strategies and methodologies?

At what point in your career did you decide that legal history was your main area of interest?

I don't remember ever making a conscious decision. Some of my earliest papers were on the law of contract, actually, because I thought that since I had been appointed a Lecturer in Law I should do some of that as well - but I was always interested in legal history from the start. I don't think I ever felt I understood anything legal unless I knew where it had come from, and why. No doubt agreeing to write a textbook on legal history was some sort of decision. So, quite early on.

179. I wonder how your interests evolved over the years - was it opportunistic, as you made various discoveries?

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Well, to some extent, although discoveries tend to be related to what you go out looking for. I have recently had to go over a lot of the same manuscripts as I looked at 30 years ago, looking for other things that I didn't note at the time because I wasn't working on those subjects then. Occasionally you make a discovery that is obviously going to be significant and takes you away from what you were thinking of, but mostly it's just a slog through the sources.

180. You have been prolific and I wondered what your technique was to pursuing a topic. Did you have periods of intense reading, perhaps during a sabbatical, or were you able to do your writing interspersed with a lecture programme?

Well, there are two stages, obviously. There is the collection of material, and then (when you think you have got enough) there is trying to write it up, and working out if you have got something worth saying. The collecting of material had to be spread out over odd moments and intervals, precious visits to the Public Record Office or the British Museum, or even the UL, (sometimes difficult to get to in term time), and one just did that whenever one could. For writing up, it is a good idea to have a bit of extended peace and quiet if one can get it so, vacations provided that. I didn't ever have that many sabbaticals, and they are not that conducive to the research stage, because one is always tempted to go far away so that one is away from the sources, though they are very good for writing up because it is an advantage to be away from the sources, so that you don't go away chasing footnotes when you should be concentrating on the main writing. The All Souls Fellowship was particularly helpful in that respect. I got a lot done there.

181. Many or most of your works describe how you needed access to particular materials, for example, plea rolls, yearbooks and a range of manuscripts, and I wondered how quickly you managed to master the Latin and the Law French to translate such texts?

I started with the printed yearbooks in the Inner Temple Library, as I mentioned previously. It's as much a matter of understanding the abbreviations as the language. Eventually you realise it's all standardized and you come to know what the forms are. My biggest learning period, I suppose, was editing Spelman³, when I had to grapple with Law French and with the Latin of the plea rolls. If you are editing something, you can't duck issues - you have got to translate every word, and so you have to keep at it until you have made sense of it. Eventually I ended up writing a little glossary of Law French because no-one had done one before. It even went into a second edition - though it doesn't have a vast readership.

182. A feature of your works is your constant use of original research, even in your introductory book. Many start with the discovery of a manuscript. This must have given you a strong intellectual base upon which to set your articles and your books. You were not just reinterpreting previous cases or other scholars' theories but presenting completely fact-based observations upon which to base new ideas and this placed much of your work beyond dispute. It seems to me a very scientific approach and I wondered whether this was a conscious strategy that you adopted throughout your career?

I'm not sure I have ever had any conscious strategies. I have just got on and done it, doing what seemed obviously necessary to gather the evidence. I have always tried to stick to the evidence. I get accused of sticking too close to it - being "internalist" and not taking

³ Sir John Spelman (1495?-1544), judge of the King's Bench.



enough account of what's going on outside the sources. But, yes, my work has been very largely based on manuscripts - what I find in them.

183. Having settled on legal history as your chosen subject, can we briefly look at the early years of your research. Could you tell us something about your first book, "An Introduction to English Legal History" which appeared in 1971? Presumably you spent several years at UCL working on the sources for this book. Do your earliest papers give clues as to your thinking and your approach, as they were written while the book preparation was ongoing? The earliest paper I found was published in 1968 when you were about 23 years old, "A sixth copy of Blackstone's⁴ Lectures," published in the *Law Quarterly Review*⁵.

No, that was just an announcement of a find in the law library. The law library at UCL had just moved from the rather stately Donaldson Library into this warehouse-like building. I think they probably decanted the contents of the store there as well - when this Blackstone manuscript turned up. It hadn't been in the old library. I just took it to the issue desk, and they stamped the return date inside it, and I took it straight to Professor Keeton⁶ (the Head of Department), who said, "You should put a note in the *Law Quarterly Review*". So that's what I did. It wasn't a piece of research at all.

184. It was the start of a long and enthralling journey that you began?

Well, it showed an interest in manuscripts, I suppose.

185. There were 12 other papers published during the gestation period of your book - *Introduction to English Legal History*. Did they represent parallel projects, or were they spinoffs from your research for the book. For example, "Counsellors and barristers, an historical study"⁷. This was a paper on an aspect of the legal profession and there is also a section in your book on barristers.

It's quite a short section, I think, about two pages. The truth is, I didn't do much research for the book - if any - because my object wasn't to set out the results of research but to try to summarise very briefly what was known, for the benefit of students. The research was going on in parallel and, of course, if I discovered something that seemed to be necessary in a brief outline, I put it in. But it wasn't designed to alter what I was saying. Later on, in subsequent editions, of course, one finds more of the results of research that I had done, that's inevitable.

186. Incidentally, in your *Irish Jurist* paper you made a youthful conclusion, you were 25 years old at the time, that the 16th century battle between Coke⁸ and Ellesmere⁹ was more about personalities than equity in law¹⁰. I wonder whether this conclusion has stood the test of time?

I think so, in that I don't suppose anybody now believes that that dispute was about

⁴ Sir William Blackstone KC SL (1723-1780), English jurist.

⁵ *LQR*, 84, 1968, 465-467.

⁶ George Williams Keeton, (1902-1989), Professor of English Law University College London (1937-69), Dean of Law 1939-54.

⁷ *CLJ*, 27 (2), 1969, 205-229.

⁸ Sir Edward Coke (1552-1634), Attorney General (1594-1606) to Elizabeth I & James I, Chief Justice of Kings Bench (1613-16).

⁹ Thomas Egerton, 1st Baron Ellesmere, 1st Viscount Brackley, PC (1540-1617), 1st Baron Ellesmere from 1603 to 1616, judge, Lord Keeper and Lord Chancellor.

¹⁰ The common lawyers and the Chancery: 1616. *The Irish Jurist*, 1969, 368-392.



the need for equity - which it wasn't. And it was certainly a clash of personalities. It was also, I think, a constitutional crisis of a kind. I have been exploring that in my latest book on Magna Carta.

I think that was actually one of the best articles I ever wrote: revisiting it 30 or 40 years later I wasn't able to add very much to it. What sparked it off was the discovery of Timothy Tourneur's¹¹ notebook in the British Museum [MS.Add. 35957] which had some very significant comments on what was going on in 1616. That was a happy discovery. I haven't found anything more telling since then, on that particular subject.

187. Just as an aside, your “Funeral Monuments and the Heir,” published in the *Irish Jurist* in 1970, seems quite an esoteric topic. What drew you to this in this early period of your research?

Well, that was another tangential piece of work. Obviously, it related to an early interest in monuments, but it wasn't an antiquarian piece. I was interested in the doctrine which Coke put forward, that the ownership of a funeral monument belongs to the person who put it up during their lifetime, and then it goes to the heirs of the person commemorated. That seemed to me one of the most extraordinary doctrines in the common law, because it's the only example of a remainder in real property by operation of law rather than by grant. I wanted to know whether Coke just made it up - that's what that was about. But it stood alone as a subject. It doesn't really relate to anything else.

188. Professor Baker, that brings us to the next section, where we can look at particular topics on which you have published widely. In addition to the 38 books listed in your extended CV, can we consider some of the more important aspects which you have covered in your 138 articles and 123 book chapters? I estimated that nine percent of your articles and 51 percent of your book chapters were on the papers and lives of legal personalities. In your previous interviews you talked about your prosopography work. Did your research output in this category underpin this prosopography project?

No, not really. The biographical essays, which are not really prosopography but individual biographies, were mostly from a later period. What sparked off *The Men of Court* - that is, the prosopography - was a chance discovery in the plea rolls in 1978. I found that almost every term in the 1450s and 60s there would be an action of debt (or consolidated actions of debt) against long lists of people described as being “of London gentleman” or “of Holborn gentleman” - occasionally the cat was let out of the bag by naming the plaintiff as the principal of Clement's Inn or something - and I realised these were lists of members of inns being sued for their dues. Since we don't have any other nominal lists from this period except for Lincoln's Inn, I thought, “Well, at last we have a chance of working out at least a cross-section of who belonged to this university.” So I started putting them on cards - and on slips cut from old examination scripts - until I had an enormous number of them and tried to work out who they were (if I could). Needless to say, since these actions went on well into the 16th century and I traced them back to 1440, it became quite a large exercise in prosopography rather than just a list of individuals.

189. Did you have a list that you were researching?

Well, not for that purpose, no, because I tried to find out who they all were. I would feed in the names of all the attorneys whose names appear in the plea rolls, and any other lawyer I knew about. So it was an attempt to find out what I could about everybody in the

¹¹ Sir Timothy Tourneur, SL JP (1585-1677), judge.



legal world at that time, whereas the biographies you mention were all a result of being asked to contribute to various publications.

190. Being Professor Simpson's *Biographical Dictionary of the Common Law and the Guide to American Law*?

Yes - although, in fact, a bigger commitment was the *Oxford Dictionary of National Biography*, of which I was put in charge of the 16th-century lawyers. Since I couldn't get many other people to help, I ended up doing most of them myself. I think in the end I did 120 entries for that, ranging from the 14th century to the 20th. The last one was my predecessor Hazeltine¹². Some of them were just revisions of the earlier entries but they were mostly rewritten.

I should add that, although numerically these biographies seem to represent a large part of my work, they are far from being at the heart of what I do as a legal historian. A few of the longer ones made significant historical points, but they were mostly rather basic factual contributions to works of reference.

191. "Famous English Canon Lawyers" was the subject of ten papers from 1988 to 1997, published in the *Ecclesiastical Law Journal*. What the particular interest was here? Was this is a specific project related to church matters and who were these ten personalities?

No, again, I was pressed into it. It wasn't my decision. It was Graham Routledge¹³, who had been a practising barrister - I think in Liverpool, who took Orders and then became both chaplain and a Law don at Corpus. He founded the *Ecclesiastical Law Society* and asked me to write something for its new journal on a famous canon lawyer. Then he said, "Can we have another one?" - and so it went on until there were about a dozen. Then they said, "Can we make this into a book?" And so I found myself writing a little book - which I had never planned to write, on a subject which wasn't really my true area of expertise - although the canon lawyers have mostly been very kind about it, perhaps because I was looking at the topic from a common lawyer's viewpoint.

192. Another of your topics which I identified was an interest in church topics and I wondered whether this interest in the ecclesiastical personalities and artefacts stem from your boyhood fascination with exploring the Essex churches?

No, I don't think it's got anything to do with churches with a small c. I just think a legal historian must know a bit about ecclesiastical law and the Church, because of its former importance. I don't claim to know much about canon law - my knowledge is very superficial, though I did give a few lectures on its history at the behest of Chancellor Garth Moore¹⁴ when we had a Tripos half-paper on canon law. But I have never studied it in depth and it would take many years to acquire expertise in it.

193. Your interest in church topics is seen in several publications about brasses and monuments in churchyards and I wondered why it was that you chose these?

Well, that was a different kind of interest, of course. That's nothing to do with canon law. You might well call that an antiquarian interest - it's not really of intellectual

¹² Professor Harold Dexter Hazeltine (1871-1960), Professor of Law, University of Wisconsin, 1908, Downing Professor of the Laws of England (1919-42).

¹³ Canon Kenneth Graham Routledge (1927-89), barrister, later Canon and Treasurer of Peterborough Cathedral, and then Canon and Treasurer of St. Paul's Cathedral.

¹⁴ Reverend E Garth Moore, DCL (1906-1990) Corpus Christi College, canon lawyer.



importance. I tried as a sideline, to find and photograph monuments of judges and lawyers wherever I could find them. It related to another long-term project - but one which probably never will see the light of day - to produce a catalogue of English judicial portraits. I collected several thousand engravings in my younger days, when they could be had for a few pence each. I have a very large collection of photographic images as well. These will all end up in the Centre for Legal History in due course, I hope. Again, it's not important. I'm just curious to know what my characters look like, because I see them when I am writing about them. At home in the dining room I have got original paintings of Coke and Ellesmere and Bacon and Walmsley - who all appeared in my early articles. It brings them to life a bit.

194. Professor Baker, could you sum up essentially what the relationship was between the possible role of the canon law and the development of the common law?

Well, I am not persuaded there was much influence at all. Others may take a different view. It provided a model of a system of justice and of legal procedure, and some of that procedure was adopted by the Court of Chancery but I don't really think many substantive principles can be traced to the canon law - not even equity, which was largely created by common lawyers - even though the chancellors were canonists in the 15th century. The reason is because most of the common law was about real property and commercial law, and those weren't the proper concerns of church lawyers. You won't find anything in the *Corpus Juris Canonici* about feudal tenure, as far as I know. I suppose my principal contribution to that subject was in showing the influence of the Cambridge lawyers in the 14th century on the development of law reporting. I didn't discover the reports myself, but I joined up various bits of information which hadn't been joined up before and certainly hadn't been related specifically to Cambridge. I did that when a congress of canon lawyers came to Cambridge and I thought they ought to be given a bit of local information - I discovered it was actually rather more interesting than I thought it was when I started.

195. I noticed that you were criticised by Dr Lovatt¹⁵ in his 1987 *CLJ* review, re *The Legal Profession and the Common Law 1986*, for your emphasis on the Inns being secular while universities were organs of the church and regulated by it. "Gateways to the church," you called them, and I wondered whether you thought his criticism was justified?

Up to a point, probably. His larger criticism was that I made too much of a contrast between the systems of learning, and I've accepted that (in my later writing anyway). I accept that probably more students went to university before they moved on to the Inns of Chancery at the age of 18 than we shall ever know - because the universities just didn't keep records of undergraduates. We know less about the universities than we do about the Inns of Court in the 15th century, at undergraduate level. But I stand by my main point, that the universities saw themselves as being mainly concerned with the education of the clergy, just as the Inns saw themselves as being mainly concerned with the education of lawyers, even though both universities - all three universities, I should say - attracted lots of students who weren't going into the professions.

196. Professor Baker, that brings us to the next topic which is "Migration of Manuscripts", and manuscripts in general. 41 percent of your articles fall into this category and I wondered to what this cryptic title refers?

Well, I wouldn't call them articles at all - and that shows the dangers of statistics - it

¹⁵ Dr Roger Lovatt, archivist, Peterhouse College, Cambridge.



makes it look as though I have written more than I have. It was just an attempt to log items which were coming onto the market, mostly at auction, some of which were important and some were simply ephemeral. I am not sure how many people read it. I have kept it up now for a good many years, ever since the *Journal of Legal History* began - which I think was in 1980. I hoped they might have some educational value, or spark off interest in different subjects. A high proportion of the items listed were acquired by either Anthony Taussig¹⁶ or me. Actually I would have a rather more interesting collection if Anthony hadn't outbid me on most of the interesting ones.

197. So you stated in the preface to one of the books, your collected reprints for 2013, that “Every legal historian should edit manuscripts.” They have been an integral part of your research regime. Perhaps this was another schoolboy hobby that served you well, and you said that you became familiar with the script at this early stage and I wondered how long it took you to master the Law French and the Legal Latin?

Well, I've touched on that already. The first stage obviously is just working out what the abbreviations mean and the vocabulary. But palaeography and translating aren't just a matter of learning the shapes of letters and having the vocabulary - that's a necessary start, but you can't make sense of hieroglyphic abbreviated text unless you develop a sense of what the text really means. That obviously improves over time, as you get more familiar with legal procedures and concepts, because editing a legal text means you have got to understand the procedures that they are talking about and the lines of argument. It's quite hard, and I expect that explains why not many people care to take it up.

198. Yes. Three percent of your articles and about 26 percent of your books seem to have been based on specific manuscripts or documents that you have unearthed, which makes me think that perhaps you are constantly on the lookout for such items. Do you come across many in bookshops or are the bulk of them in recognised collections?

I don't think I ever found one of significance in a bookshop, though in the old days I used to visit bookshops when you could still buy 17th-century law books, many of which are on my shelves now. Those days are long gone, of course. The only important one that came up at auction in my time was the Port Notebook¹⁷, which I mentioned earlier - though I have just edited some manuscript statutes of Clifford's Inn, which I bought via the internet for £4.99 a few years ago. Everything else is in libraries, some of them private, but most of what we know about has trickled into institutional libraries over time, a great many through the sales of the great Phillipps Library.

Most legal history isn't about single discoveries, because - insofar as it's based on case law - case law is cumulative, and you just have to keep looking at as many manuscript law reports as you can get to. I tried to facilitate that with my microfiche project years ago, but that technology now seems a little cumbersome. It will become a lot easier if more legal manuscripts can be digitised. So far that's only happened seriously with the plea rolls - a project started by Professor Robert Palmer¹⁸, with transformational consequences - absolutely amazing. No travelling with a notebook to Kew - which takes two hours there and two hours

¹⁶ Anthony Taussig, Member at Barristers Chambers Wilberforce Chambers.
No. 8 New Square, Lincoln's Inn, His collection of manuscripts was acquired by Yale in 2013.
<http://beinecke.library.yale.edu/about/news/yale-acquires-anthony-taussig-collection>

A Catalogue of the legal manuscripts of Anthony Taussig Selden Society, 2007 - Law - 351 pages

¹⁷ Sir John Port (?1472-1540), judge, was the son of Henry Port of Chester. Involved in the trials of Sir Thomas More, John Fisher and Anne Boleyn. Reader in Inner Temple 1507.

¹⁸ Robert C Palmer, Cullen Professor of History and Law University of Houston.



back from here - anyone can now read the plea rolls at home online, even if they are in Arizona. A wonderful advance, and if that could be done with law reports then it really would be tremendous.

199. That brings us to the very important topic, the Inns of Court, what you frequently refer to as the “third university” and which have figured prominently in your career and your writings. You have been deeply interested in their history and the role that they have played in shaping our law. Five books, nine articles and 31 chapters deal with this. In your 1971 book *An Introduction* you have a section on the Inns, written fairly early in your research career and I wondered how much of this was original research while you were at UCL or was it mostly culled from published sources?

I think only pages 69 and 70 were on the Inns, so it wasn't a very long section actually. I hadn't then done much original research - it was mostly done later.

200. Professor Baker, has there ever been a serious attempt to incorporate the Inns as a formal university?

I believe there was a Victorian scheme for an imperial law school in London which didn't come to anything in the end. I don't think it went down very well with the Inns themselves, who didn't fancy the idea. There has never been a serious attempt. No, it is quite remarkable that the Inns have managed for 600 years without the formality of incorporation. All their property is vested in trustees. It very nearly happened by accident in 2008 when the two societies in the Temple obtained a new charter from the Queen on the anniversary of the grant by James I in 1608 of the freehold. The 1608 charter was granted to all the Benchers by name, because they had to be trustees. The new charter - which was drafted by Chancery counsel - confirmed the 1608 charter to the Societies of the Inner and Middle Temple and I pointed out that that would incorporate them because there was no other way they could take the benefit of the grant. So I drafted a clause which was put into the charter saying that it was not Her Majesty's will and pleasure that the charter should incorporate the societies. It wouldn't have mattered if they were, but I didn't think it should be done by accident.

201. You had joined the Inner Temple by at least 1965, as you were President of University of London Inner Temple Society 1965 to '66. When did you start serious research on the Inns?

Well, I actually joined in 1963. I still remember going down to my first dinner in Hilary term. It was a dark evening with snow gently falling, and it was just amazing to step out of busy Fleet Street into this completely different world - a gas-lit lane, with the glittering stained glass windows in the hall, which was nice and warm inside.

202. Lovely.

So I was captivated as an impressionable youth. But my first serious research was on the serjeants and I didn't work on the Inns until somewhat later.

203. So other than the reference in your 1971 book, the earliest paper I could find was the 1974 article about songs at the Inns which seemed to indicate that you were very keen to record any detail that you could unearth.

Well, that was another little *jeu d'esprit* really, rather trivial. Nowadays it might well be serious cultural history - things change. But I hope no-one thinks that I regarded that as serious legal history. What motivated me to write it was a note written quite a long time



earlier in the *Law Quarterly Review* by Lord Justice McKinnon¹⁹ saying that the song had been lost and he hoped that some day it might be found. I couldn't resist the temptation to say it had been.

204. Were the Inns originally inns or boarding houses where law students lodged?

Well, it used to be thought that they began simply as lodging houses and the education came later. Professor Thorne²⁰ put that forward in a famous lecture he gave in Gray's Inn in the 50s. But I have shown, I think, that they were educational from the start - as indeed, were the colleges in the universities. The university was there first, before the colleges came along.

205. Do you know when the earliest Inn was established?

We will never know exactly because they weren't incorporated, so there is no charter of incorporation. But all the evidence converges on 1339 and '40, when the profession returned *en masse* from the long exile in York - thousands of them - and they had to find accommodation. The Temple had a "to let" sign on it, as it were, because the Hospitallers were looking for tenants and so they moved in there. Gray's Inn, too, was no longer needed by the Lords Grey. Lincoln's Inn went to its present site a bit later - I think it used to be Strange's Inn, in Shoe Lane, but that's another story.

206. Professor Baker, would you say that the Inns are really the cradle of the common law, in contrast to the Oxbridge Universities, which were centres of civil or canon law until relatively recently?

Yes, I agree. The universities contributed nothing to the common law before Blackstone in the 1750s - and even then it was basic teaching aimed at gentlemen students who might need to know a bit of law to run their estates, preside as magistrates, or whatever. Legal scholarship even after Blackstone still belonged to the Inns of Court - that's where the serious work was done. The holders of my chair before Maitland²¹ didn't write very much of significance. One of them even gave up lecturing because no-one seemed interested enough to trek out to Downing to hear him.

207. Who was that, Professor Baker?

Professor Amos²², I think - who had been immensely successful at UCL, where he started. He was one of the first professors of law there, and apparently students flocked to him. He had a very strange method of teaching - he just zoomed off at all sorts of tangents, whatever came into his head, without any particular plan. He told them about cases he had just been involved in, which students always like. They presumably learnt quite a lot from this, but it didn't seem to work at Cambridge - I think partly because it didn't lead to a degree, which at London it did. Students don't like to go to lectures if they don't lead to a degree, no exam.

208. So apropos references to the Inns in your chapter 78 in the compilation *Collected Papers* of 2013. In the piece "The common law in 1608", you said the Civil War destroyed the ancient system of education of the third university. You also commented

¹⁹ Sir Frank Douglas McKinnon, Lord Justice (1871-1946), only High Court judge appointed during the First Labour Government.

²⁰ Samuel E Thorne, (1907-94), Professor of Legal History, University of Harvard (1956-78).

²¹ Frederic William Maitland (1850-1906), Downing Professor of English Law (1888-1906).

²² Andrew Amos (1791-1860) Professor of English law, University College London (1826-37), Downing Professor of Laws of England (1849-60).



that, “This nevertheless laid the foundations of those great constitutional principles which are again under severe strain four centuries later.” This was written in 2011 and I wondered what principles you were referring to that are now under strain?

Well, I actually wrote it in 2008, I think, for a symposium at the time of the charter which I was talking about a few moments ago. That’s why I was asked to write it - I wouldn’t otherwise have picked on that particular year. I was referring to the treatment of the constitution by the Blair²³ government, which was beginning to worry me. It was a theme that I explored in detail in my Maccabean lecture in 2010. That’s the most recent legal history I have ever attempted.

209. Also in the *Collected Papers* chapter 83, “Why the history of English law has not been finished,” (your Downing inaugural lecture in ’98), you said, “The learning exercises came to an abrupt end,” (page 1564). How precisely did the Civil War destroy this flourishing common law university?

Well, everyone left. The members all went to join the colours or to defend their homes so there was nobody left in London and they couldn’t keep the learning exercises going. So the Inns more or less closed down for four years - 1642 to 1646 - and there were no lectures during the Cromwellian period at all. They kept very rudimentary moots going, because the only way you could be called to the Bar was to perform a moot, but they didn’t have serious exercises. They were never properly revived, because when the Restoration came all the people who were due to lecture thought they had got away with it 18 years earlier and they were very resistant to the idea of having to give lectures in their forties. It struggled on for a little bit and then collapsed, partly because the students didn’t want it either.

They lost an opportunity to rethink legal education. Unfortunately, they decided that they would simply go back to what it had been - understandably enough, after the disruption - but they went back to the medieval system of legal education, as if that was somehow part of the common law that you couldn’t ever change. It meant they couldn’t lecture on the common law, or on things that students might have found interesting, so the students didn’t really want to go to these lectures. They would only go if a nice big dinner was laid on, and I think in the end there was really only one lecture on the occasion of the dinner - which became the “Grand Day”, which we still have (without the lecture).

The lecturers were chosen solely by order of seniority. There was no payment. So it wasn’t a matter of interviewing candidates and picking somebody who knew something about the subject - it just went to Bloggins because he was called to the Bar next after the one who previously did it. A lot of them just didn’t do it, and were fined. Then, at some moment in the 1670s or 1680s, the Inns decided that these fines were actually far more useful than the lectures, and so it became the tradition not to lecture but to pay the fine instead. We still elect a Reader every year, but they don’t read.

210. Professor Baker, much of what you have to say about the Inns is contained in your 1986, *The Legal Profession and the Common Law: Historical Essays* published by Hambledon. It was reviewed *inter alia* by Dr Lovatt at Peterhouse, who mentioned the need for what he calls “A biographical register of the thousands of lawyers practising in late mediaeval England,” and you were the person to lead such an enterprise. Has this ever been one of your ambitions?

Well, that is what I tried to do with “The Men of Court” - from 1440 onwards. I

²³ Anthony Charles Lynton “Tony” Blair, (b. 1953), UK Prime Minister (1997-2007).



could have made that much longer because there were lots of sources I wanted to go through but I didn't. I just feared that my thousands of hieroglyphic slips would be thrown away by my executors and so I had better get on and draw a line under it. It couldn't be done like that before 1440, because these actions that I found in the plea rolls - which are the main source - don't seem to exist before 1440. I don't know why, but I couldn't find any earlier - I looked at quite a lot of rolls before then. That's why I started it relatively late. Somebody else could produce something similar for an earlier period provided it wasn't connected with the Inns of Court - listing attorneys, for instance. But the class that we now think of as a barrister class is very difficult to define. It doesn't leave a trace in records. It would be difficult to decide who to include.

211. Referring to your essay “English Law and the Renaissance,” (a chapter in *The Legal Profession and the Common Law* 1986), you write of the substantial reformation in the Renaissance period and Dr Lovatt comments, page 156, apropos, and I quote your, “Continuous insistence on the intellectual life of the law that abstract discussions conducted within the Inns of Court were in part an explanation for legal change as much as political and social and economic factors.” Professor Baker, has this contention of yours stood the test of further research in the intervening 30-odd years?

Well, Dr Lovatt put it very kindly. I am sometimes accused of having ignored other factors completely. I have always found the connection between social change and legal change problematic. Social change certainly throws up new legal questions, which have to be dealt with, and therefore we need to know about it, but I don't see that it necessarily explains the answers that were given - unless the answers are given by Parliament as a conscious decision to change the law. This is because judges have to square their solutions with existing patterns of thought and judges aren't necessarily interested in modernization. Sometimes they can be intellectually conservative - some might say that's their duty. So it isn't as straightforward as I think social historians sometimes assume - that the law somehow, as if obeying the laws of economics, will change in accordance with society. I'm not absolutely sure about that. Maybe eventually law has to catch up, but it can sometimes take a very long time.

212. Interesting. Several items picked out by Dr Cavill²⁴ in his review of your 2013 *Collected Papers on English Legal History* touch on the Inns and I include them here just to consolidate the topic. Dr Cavill refers to how you appear to relish researching the learning undertaken in the Inns of Court in the cycles of reading and moots and reconstructing the contents of various manuscripts that recorded these, including those of Sir Edward Coke. He says you “scintillated”, but he makes the cryptic remark that, “In those times there had been a culture that did its best to erase, conflate or confuse the different activities at the Inns,” page 738. What do you think he meant by this?

I don't think he was referring to the Inns but rather to confusion in the sources - especially the law reports, which were copied out and edited in such a way that they can be very difficult to unravel.

213. He also made the point that you have detected a 16th century shift in the balance of authority of the Inns away from one based on collective wisdom to one that exalted judicial decision-making, that's page 739. Professor Baker, could you summarise this important change for us in the common law?

²⁴ P R Cavill, Pembroke College, university lecturer in early modern British history.



I may have exaggerated it. I mean, to some extent the law always was - and is - a kind of professional knowledge which is not necessarily to be found in books. But that sort of unwritten understanding was much more important in a world with few books, or books which focused on procedural matters rather than underlying principles. For instance, the year-books contain very few decisions on points of law. You have to read between the lines to try and work out what the legal assumptions are, whereas by the end of the 16th century law reports look much more intelligible to us. We seem to be in a different world, in which the law is assumed to be sought in judicial decisions, and the judges are willing to say what the law is in their decisions.

I began to wonder whether it was correct to assume that the common law was always thought of as case-law. I was intrigued by the large corpus of readings (or lectures) from the Inns of Court between about 1400 and 1640, which were mostly unpublished and had been little explored. I had the idea that they might be regarded as a source of law in their own right, like the continental *doctrine*. They may not have been as authoritative as judicial statements. But the medieval legal system was not designed to produce legal pronouncements, except in a very roundabout way, whereas the lecturers were trying to make sense of legal principles in a connected way. It seemed to me that a medieval law student would have found it almost impossible to learn the law from reported cases. I may have gone on about that too much and exaggerated the place of readings, which weren't often preserved very coherently, but I do think they can't be ignored by the legal historian.

214. Dr Cavill finally speculates (p. 739) that, “What was taught in the Inns may have reflected students’ interests,” and that, “The concerns of the majority of members who never became benchers may have been catered for in the same way as found in modern universities”. Do you think that was a viable hypothesis?

I am not very sure what he meant - whether that's a speculation that it might have happened, or whether he was thinking about anything specific. There was no attempt that I am aware of to address student needs, whether those of the studious or of the less serious majority, because there was no formal teaching beyond the lectures and moots - which, as I have said, were really stuck in the 14th century. They were still using 14th-century moot cases in the 17th century and there was an exercise in the Inner Temple until George III's reign which you had to pronounce in Law French. I suppose they all thought, “Well, we had to do it, so we'll make the next generation do it”. There was no tutorial supervision, and no attempt to teach people modern things of any kind. It's true that students learnt a lot about life in the Inns but it wasn't exactly encouraged - I think sometimes their dramatic performances got them into trouble.

215. Professor Baker, that brings us to the next topic, which concerns Professor Milsom. He was an inspirational figure in your early years at UCL and later you wrote a textbook with him. Could we dwell on a few points re your relationship with this very influential figure?

Was it Professor Milsom who introduced you to working with the plea rolls and the year books in the late 60s?

No, his influence was intellectual. In those days it was just assumed you could work out things like that for yourself. Milsom - and also Kiralfy²⁵ - had shown the importance of looking at plea rolls as well as yearbooks to find out information. So it just seemed a natural thing to do.

²⁵ Albert Kenneth Roland Kiralfy, (1915-2001) Professor at King's College London (1964-81).



216. Apropos legal history as a topic of study, Professor Milsom more or less said in his ESA interviews that he didn't care if no-one else was interested. He said he enjoyed it and he thought there must be more to it than what emerged from an undergraduate course in legal history. So, as he put it, "Self-indulgence really," but Trinity had given him a job and he didn't have to worry. In effect, he was paid to teach and research what he called his "self-indulgence" and I wondered if his attitude affected you in any way?

Well, I suppose I share a similar attitude, in that I have selfishly pursued things that have interested me. I suspect that's true of most academics - it's one of the few perks of the job. You are given a bit of freedom to look into things that interest you. But I'm not sure how far that remark was tongue-in-cheek. I mean, Toby certainly cared very much about what people thought of his work - and I suspect that, like me, he would have been happier if more people had shown an interest in legal history. He was certainly upset that the LSE closed down his chair when he resigned. He wrote a very cogent paper setting out why they should carry on with the Chair of Legal History and they just shut it down. That did not please him.

217. Very interesting. Professor Milsom also spoke about the annual NYU summer school for law teachers, where he lectured on legal history. He said, "These chaps knew nothing about legal history, but they were quite good at asking difficult questions so it was a useful experience," and I wondered if this equated with your experience at NYU?

Yes. The least knowledgeable students, whoever they are, always ask the hardest questions. I think what's distinctive about the Americans is partly that at law school they are graduates, so they are a bit older, but also that they are more forthcoming about asking questions, whereas our students just tend to be quiet and don't want to appear foolish by not knowing the answers. It's quite refreshing sometimes to have people ask questions to which they don't have the answers, because often I don't either.

218. Professor Baker, do you find a good deal of interest in the United States in common law history?

Yes, well, at any rate there was when I was going there. But I often detected an element of surprise that institutions and principles which they believed were American were actually a good deal older than they thought - they just weren't taught that. The interest does seem to be declining - as, indeed, it is here. It is regarded as too white and too male.

219. I wonder if you could give an assessment of the long-term importance of Professor Milsom's work on Maitland's views? For example, will he be seen in the future as charting a new course, or did he make interesting, but not fundamental, observations?

Oh no, they were fundamental. I mean, first of all he laid into Maitland's *Forms of Action* - which, to be fair, Maitland didn't publish himself. They were just elementary student lectures which got published posthumously but they had become dominant in teaching legal history, and Milsom showed how they gave a misleading impression of how the forms of action began and evolved. Maitland's account, as Milsom put it, presented English legal history as the outcome of some sort of struggle for existence between the forms of action, as if it were a Darwinian process of natural selection.

Then he went on to revise in a very fundamental way Maitland's account of the early land law, I suspect that if Maitland had lived he would have accepted almost all of it - he would have seen the sense in it. Nevertheless, it sparked off a lot of controversy, and Toby



was very upset in later life that he thought historians who weren't lawyers hadn't really understood what he was saying and that his work was being ignored. I don't think he was right on either count. I think he is widely respected, and even those who disagree with him can't possibly go back to Maitland's version - which now seems anachronistic and leaves out a very important dimension.

Then there was his 1969 paper on "Law and Fact in Legal Development". Legal development in the common law - that is, increasing sophistication in working out the detailed application of legal principles - could only occur when procedures were developed which required courts to consider more facts than the forms of action allowed them to or required them to. It was blindingly obvious when pointed out, but nobody ever had. That influenced a lot of my work.

So his work was fundamental, yes.

220. I asked Professor Milsom a question that he couldn't answer and I wondered if you had an opinion on it, Professor Baker. It was question 271 and I mentioned that I had come across a reference to an article by a Professor Makdisi²⁶ then at Loyola University in New Orleans who suggested that perhaps some of the institutions of the common law can be traced back to Islamic foundations. I wondered if Professor Milsom had come across these notions and whether he had any comments and he said that, "Yes, there was a possibility even if only because of Spain and Islamic law does have tremendous influence," but, honestly, he had no idea and I wondered if you had any thoughts on this?

I would be rather more positive and say "No", but it depends what you mean by tracing back. It's always difficult to say where things come from if there's no immediate source. But the only possible connection I can see would be so tenuous as to be almost meaningless. There probably was a line of academic influence from Beirut to Bologna and then to Oxford and Cambridge - but then, as we have said, Oxford and Cambridge didn't have anything to do with the common law anyway. I have heard it argued that the Crusaders perhaps brought back concepts of trusts with them from the Middle East. I find that rather extraordinary. I don't see any evidence for that at all.

221. That brings us to the final topic which is the Magna Carta at 800 years. Two books and one book-chapter were written in your retirement to coincide with 800 years of its signing. I wonder whether you discovered anything new, if that's the right word, on Magna Carta during your research for these commemorative works?

Well, I think I did. Not about 1215, because a great deal was written about that by people who know more about the period. I was interested in the later importance of Magna Carta - if it weren't for what the common lawyers did with Magna Carta in the 16th century it would now be known only to a few specialists. I was really struck in 2015 by reading in the newspapers that when Hereford Cathedral sent across its Magna Carta to be displayed in Beijing, the authorities banned it from public display. I thought, "How can this 800-year old document, written in Latin, worry people on the other side of the world?" It still has the capacity to alarm a totalitarian regime - they didn't want the people to get wind of it. I thought, "There has got to be some explanation for that." There is no other medieval document that has that sort of force.

I suggested to the Selden Society that we ought to do something to commemorate Magna Carta, and as usual I got the job of doing it. I thought, "Well, the one thing that's not

²⁶ John Makdisi, Professor of Law, St Thomas University, Miami Gardens, Florida.



been done before is to look at and edit the lectures given in the Inns of Court on Magna Carta in the later Middle Ages” - which I did. It was only a selection, but it was still almost a thousand pages - there was an awful lot of it. I made four discoveries in the course of doing that, which led on to the book. Firstly, that in all these lectures there was hardly any joined up constitutional learning - it wasn't seen as being a great constitutional statute. There was a lot of technical law about dower and so forth but not about the constitution.

Secondly, I found that there was a treatise - which originally I had thought was a reading in an Inn - but it was a treatise by William Fleetwood²⁷ of the Middle Temple in the 1550s, which was still very much in the same mould. So this gets us right up to the middle of the 16th century and they are still not thinking of Magna Carta as being a great constitutional document, or at least not a source of ideas that can be used. Not even the great chapter 29 - the readers, and Fleetwood, more or less say it has no effect because there were no remedies laid down and it doesn't mean very much anyway when you analyse it.

Then, thirdly, I discovered - having read ahead a bit beyond the readings - that there was a sudden surge of interest in the 1580s which seemed to be connected with the so-called “puritan” lawyer MPs. I also found also that Coke had written a treatise on chapter 29 in 1604 and linked it with *habeas corpus*. It was long before he even became a judge - he wrote this while he was a law officer to King James I. I thought, “These are all really rather remarkable facts that nobody has noticed before, and some sort of explanation needs to be found”.

At the same time I was being asked to give lectures all over the place, as we all were. The first one I was asked to give was in the Temple (in 2014) on Magna Carta and religious liberty. I said, “There is absolutely nothing in Magna Carta about religious liberty. It's quite the contrary. Chapter 1 in effect confirmed the Church's power to repress people and stop them believing things.” Anyway, they said, “Well, we still want you to do it - say anything you like. Better talk about the constitution and Magna Carta.” Anyway, in the course of doing that I came to the conclusion that actually religion did play a part because of the reaction against the very illiberal regime before the break with Rome - under which people were being tortured to death for not believing in transubstantiation and so forth - and that linked in with these puritan lawyers' concerns about the High Commission, which they thought was going back to the bad old days. So religion also came to feature in the story. Then I tried to draw it all together, with more detail in a book.

222. Fascinating. Professor Baker, that brings us to the third section of this conversation which is specific comments on some of your major books. Could we, starting with your first book in 1971, *An Introduction to English Legal History* look in some detail at comments on the various editions to see if this book's evolution over 30 years can teach us anything about your views and how you learned the art of keeping a book alive and relevant. Also, how you addressed points raised in the reviews, even if this was not necessarily consciously. This publication trajectory covered 31 years from 1971 to 2002, which was most of your publishing career from your UCL lectureship to midway through your tenure of the Downing Chair.

You mentioned in a previous interview, Professor Baker, that Butterworths suggested that you write this book. Could you elaborate on the circumstances of this?

Well, I don't exactly know what motivated them. I think Tony Thomas at UCL had suggested to Butterworths that they approach me because - as I suspect, reading between the

²⁷ William Fleetwood, (1535?-1594) lawyer and politician. Recorder of London (1571-91), a Queen's Serjeant in 1592.



lines - they told him that they had engaged Toby Milsom to write a book and it wasn't going to be a basic textbook, as they had rather hoped, but something (as I would see it) much more important - as indeed, it was. So they wanted someone to do an idiot guide, and with me they went to the other extreme and got a youngster who didn't know anything to write a very simple 200-page book.

223. You said in the Preface it was based on your UCL lecture notes. What type of students were doing legal history at UCL in the late 60s?

Well, I must have been referring there to the elementary English Legal System lectures in the first year - which we also had in Cambridge. I think everywhere at that time had a course called "English Legal System". It was thought then that Law students ought to know something about legal history. We've long since given that up - but that was then the belief. It wasn't much fun teaching people who didn't want to know, actually, so I'm not sure that I regret its disappearance. So, it was a very elementary course.

224. The later editions were much larger and more specialised. I wonder why you changed the format?

Well, I never changed the format, I don't think. I just added things. The book became larger as I tried to make it clearer, or less inexact, and every clarification means you put in another sentence and it gets longer. I am afraid each edition became 50 percent longer than the one before. But it wasn't a change of format - I never altered the basic structure, because it wasn't meant to be a result of research. It's always been a guide for the beginner, before they read something more serious.

225. In the Preface to the second edition you state that one of the faults of the first was that it was written with, "a clarity given only to those who have not come fully to appreciate the extent of their own ignorance. This gives it an illusionary strength." I thought that was harsh self-criticism. Isn't this perhaps true of most accounts of ongoing research, where the end is not in sight?

Well, I suppose so. But it wasn't (as I have just said), meant as a monograph putting forward some new individual approach to the subject, in the way that Milsom's *Historical Foundations* was. It had very modest aims indeed. Then I, as time went on, I thought that perhaps they were just a little too modest, and a bit more explanation was needed - that's why it got longer.

226. Several reviews came out, and one in particular, by Professor Simpson²⁸ in the *CLJ* of 1972, was very commending. He said it was, "Excellent, clearly written, lively and interesting." These must have been very satisfying comments from such a highly regarded scholar then at Lincoln College in Oxford?

Yes, Brian was very kind indeed, and an inspiration to me in the early days.

227. He said it was, "Particularly good on your special topics, procedure and sources of the common law."

Yes, well, I'm not sure that they were my special topics, but that was very kind of him.

²⁸ Alfred William Brian Simpson, (1932-2011), Charles F. and Edith J. Clyne Professor of Law University of Michigan (1987-2009), Fellow Lincoln College Oxford (1955-73).



228. His comments were proactive, and he suggested a new format, and that future books should include a section on how to find out what the law was at certain periods. Secondly, he suggested a discussion on general issues, for example, do legal doctrines reflect current social conditions? Were these some things you felt that you should address in later editions?

Well, I didn't really. I absolutely take his point that it would be very useful to have a book designed to guide people who are intending to do research in legal history but that wasn't what this book was meant to do. It was just an introductory guide at that time for first-year law students. It's actually used by people taking legal history courses now, I think, for lack of an alternative. I didn't think that could be done in the same book. It would have to be a different sort of book which I didn't write myself, nor has anybody else, I am afraid.

As to the second, I have already mentioned my difficulty about law and society. And there was already a good book by Alan Harding on the social history of English law. So I felt it wasn't necessary to try to cover that territory.

229. Another of the reviewers, Professor Hand²⁹, writing in the *Irish Jurist*, liked your book very much. He said it, "Filled a glaring gap." So your aim must have been fulfilled, Professor Baker, in writing the book?

Yes, that was very pleasing too.

230. He said on page 185 that, "There was a certain Whiggishness about your approach." I wonder what he meant by that?

Well, I'm not sure what in particular he was referring to there. Perhaps I am a Whig, though not in the original sense. But I have never assumed that outcomes happened just because they happened. I have always been interested in the losing arguments. For instance, my early article on *Slade's Case* was very much about the losing arguments.

231. Professor William McGovern³⁰, at the time at University of California, did a review for the *American Journal of Legal History* and commenting from a US academic's viewpoint he said, "It was of limited usefulness as an introduction to further study," and that its best role "was as a brief outline." Was this, do you think, Professor Baker, because the requirements in the United States were so different to the UK?

Well, I don't read that as a criticism. I think that's absolutely accurate. It was meant as a brief outline, and it wasn't meant as an introduction to the further study of legal history. I don't think there were many courses in the United States that went much further than that. I used it for my courses there, and I know it has been used by others. What Bill McGovern also said was that students should read the original materials instead. That was the real context of his remark. I agree entirely with that - and, indeed, dealt with it by producing the source book with Toby Milsom.

232. He said that the discussion was clear, but he found your style, "so concise as to be obscure." Was this because you covered so much in such a compact text?

Well, it was, indeed, an exercise in précis. Of course, style does vary, and its effect on other people varies with the reader. I have looked again at the review, and I must admit I

²⁹ Geoffrey Hand (?-2016) Professor of Legal and Constitutional History Dublin (1972-76), Professor of Law European University Institute, Florence (1976-79), Barber Professor of Jurisprudence at the University of Birmingham (1979-?).

³⁰ William M. McGovern, Emeritus Professor of Law University of California, Los Angeles, Dean of the School of Law (1983-84).



don't know how I could have made clearer the particular sentence he criticises without repeating much of what is set out elsewhere in the book. Maybe it should have had a cross-reference or two, but I always try to put in lots of cross-references.

233. Both Professors Hand and McGovern commented favourably on your use of previously unpublished evidence, even in a student text. Was this a feature to which you aspired even at this early stage of your writing career, makes a work unique? I know that your later works followed this pattern.

It wasn't a conscious policy. I just use the best evidence I know, whether it's printed or manuscript. Much more is now in print than was the case in the 1970s. If I came upon something that seemed to illuminate what I was writing about I put it in - though conscious that it's not very fair on the students, because they are not likely to go to the British Library and look it up. Again, that was another reason for a having source book.

234. Coming to your second edition, it was reviewed, again, by Professor McGovern. At this point he was a visiting professor at Minnesota, and he was very praising. He said that it was, "The best book currently available. Useful even to specialists." I imagine this must have been very gratifying?

Yes, that was very kind of him. He obviously liked it being longer.

235. He said (p. 76), however, it concentrated too much on English law, so that in the United States the book has flaws. Although the common law has evolved in parallel in many areas, in others it hasn't. For example: tort liability without fault, use of juries and legal education. He also felt that judges in the United States "have not been cowed by not embroiling themselves in politics", and "It must be in the type of judges, not to constant sweeping change in the law," that you claim. Did you consciously omit the US viewpoint?

Well, it was, as Bill said, true to its title. It was an introduction to *English* legal history - so it's a little bit unfair to say it's a "flaw" that it doesn't deal with American legal history. I was certainly conscious of a possible readership in the United States, and quite a few copies have been sold there, but I wasn't equipped and am not equipped to write a history of American law. Indeed, at the time when I wrote the book I don't think there was an accessible history of American law. It's quite a difficult thing to do - with lots of different states, it becomes very complicated. If I had tried to do it, the book would have been twice the length, and it would have been very much less useful in England - which was the main object.

236. It was liked very much by the Vice-President of the Selden Society, Col. Frederick Wiener³¹. He said there were, "timely warnings for the United States," and points out the dangers of changing law in the United States, mistakes made in the UK, and he mentions the abolition of civil juries, fusion of law and equity, no more assizes and the abolition of admiralty law. Do you think this is valid, Professor Baker? Do you think these changes were for the worse?

Well, Fritz Wiener obviously did. My intention was to draw attention to the effects of the changes rather than to pass judgment on them. He may have drawn that conclusion from what I had written.

³¹ Frederick Bernays "Fritz" Wiener, (1906-1996), American jurist specializing in military justice and constitutional law.



237. One of the reviewers, Professor Duncanson³², he is now Associate Professor at Brisbane, complained that your book was too rooted in Oxbridge and Inns of Court. Do you think that was fair?

I'm not sure what he meant about Oxbridge, unless he was referring to Doctors' Commons - but you could only be a member of Doctors' Commons if you had a doctorate from Oxford or Cambridge (no doubt, wrongly, but that was the historical fact). As to the Inns of Court - spot on. The story is rooted in the Inns, as far as I am concerned. I don't know why that was a source of complaint.

238. What do you think of his point that your views were right-wing?

I remember being puzzled at the time. I have no idea what prompted that.

239. He complains of your silence on various topics, that “the law was remote and out of ordinary people’s reach.” He says, “These produced a particular view of the social world then and now.” I wondered whether you had any comments, Professor Baker?

Well, I wasn't writing about ordinary people's views - which are extremely difficult to get at anyway. And, as I said, there is a good book by Alan Harding³³ on the social history of English law, which digs up whatever one can dig up from that aspect. I was writing the kind of book which law schools used, treating the history of law as an intellectual system. In that sense it is somewhat internalist necessarily. It's just that that was the kind of book I was writing. Maybe one could have written a different book on the law being out of touch, but that wasn't my subject.

240. Even he commented on your including new research results as being very positive.

Well, that was kind of him.

241. Did his comments have any influence on the next edition?

No - you can't please everyone.

242. Which brings us to the third edition published in 1990. Professor Van Caenegem³⁴ at Ghent University in the *Journal of Legal History* was very praising. He said that by now it had, “become a classic textbook.” I imagine this was an assessment that you welcomed?

Yes, that was much nicer, and I particularly appreciated it since it came from such a distinguished scholar - and from the continent.

243. He commented, as others had done, on what made your book exceptional, the use of direct sources rather than secondary literature and he said that it's particularly difficult when one is writing what you still called “an elementary introduction,” although he said, “this description must be taken with a large pinch of salt.”

³² Author of: C. L. Tomlins and I. W. Duncanson (Eds), *Law and history in Australia*. La Trobe University Press, Melbourne, 1982. His review was in *Soc. Public Teach. of Law*, 1980, 94-95.

³³ Alan Harding, Emeritus Professor of Medieval History, University of Liverpool. *A Social History of English Law*. **Error! Main Document Only.** Penguin Harmondsworth 1966. Also *Medieval Law and the Foundations of the State*, Oxford Scholarship Online, 2002. Alan Harding (ed.), *Law-Making and Law-Makers in British History*. Papers presented to the [Third British] Edinburgh Legal History Conference, 1977 (Royal Historical Society Studies in History 22), London 1980.

³⁴ Raoul Charles Joseph van Caenegem, Professor of History University of Ghent, Goodhart Professor 1984-85.



Well, I think it *is* actually elementary, compared with the sort of thing we are now doing in the *Oxford History*, for instance, which is to go into a bit more detail. It is meant as a summary for those who don't know anything. As far as the manuscripts are concerned, as I said, I just use those sources which seem most apposite, whether they are published or not.

244. Professor Van Caenegem said (p. 161) that the book did “lack attention to the European background.” He said you gave it less attention than, for instance, Plucknett³⁵. He also comments that on the ecclesiastical reports that were essentially just apropos English ecclesiastical courts. Do you think this was a fair comment?

Yes, it's absolutely true - but I wasn't writing about the European dimension, and I don't think it would have helped the story that much. There are very interesting contrasts with the continent, particularly when similar developments seem to be occurring, but in different procedural frameworks, on both sides of the channel. I tried to explore that in my essays on “English Law and the Renaissance”. But direct influences are very hard to detect, and I thought in an elementary textbook this would be a diversion.

245. He said the three main qualities that he liked in your third edition were, “abundant information,” (particularly material not easily available elsewhere), and a feeling for what he called “the brief and telling phrase.” Finally, “a good nose for the essential elements of a problem. This must have been pleasing, Professor Baker?

Of course. One of the best reviews I ever had.

246. For your fourth edition I could find no reviews. This was published in 2002. In the Preface you said that, “Writs and plaintiffs and Latin maxims had been done away with as trappings of the past.” What caused this - you imply it was related to Lord Woolf's³⁶ comments that you quoted on page 6 and 7 of your “Collected Papers.”

Well, on the whole historians should keep quiet about the present. It certainly isn't their role to complain about change. But I think abolishing words which everyone understands, like “plaintiff”, is pointless and actually confusing. And it was patronising to suppose that lay people didn't understand “plaintiffs.” They understood “claimants,” who were people associated with social security claims. And lawyers have to know what plaintiffs were, because they have got to read cases going back to the days when there were plaintiffs. I think that the most absurd example of this patronising attitude was the decision of the parliamentary draftsmen a few years ago to stop using the words “shall” and “may” on the grounds that ordinary people can't understand them. The result is utter confusion in the statute book. The statute introducing the Supreme Court says, “There is a Supreme Court.” Well, that's a false recital, because there wasn't one until Parliament said there should be one - it just makes no sense at all. It's made statutes much more difficult to understand.

247. Also you said that City law firms were taking on history graduates in preference to law graduates because the latter's education was too narrow. What did you mean, Professor Baker, and has this trend continued?

Well, that's what I was told by solicitors when I was a Director of Studies. And legal education is now actively discouraged by some eminent judges such as Lord Sumption³⁷ -

³⁵ Theodore Frank Thomas Plucknett (1897-1965), Professor of Legal History, LSE (1931-63). Literary Director of Selden Society (1937-63).

³⁶ Harry Kenneth Woolf, Baron Woolf (b. 1933), Master of the Rolls (1996-2000), Lord Chief Justice of England and Wales (2000-05).

³⁷ Jonathan Philip Chadwick Sumption, Lord Sumption (b. 1948), Justice of the Supreme Court (2012-).



who himself read History, but he is hardly a typical example to hold up. We are the only country in the world, I think, which doesn't require lawyers to have a law degree. But the problem, and I accept it - and that's what I was referring to - is that law schools are more and more trying to concentrate on more practical subjects because that's what students want, and they think that's what the profession wants - and it isn't, because they say, "We will teach you all the company and commercial law you need to know. What we want are people who have got a good general background and know the techniques but can also think sideways sometimes and outside the box." If the remedy for that is to go and read History rather than Law, that seems a very serious indictment of what we are doing in the Law Faculty.

248. You said there had been no substantial rewriting between the third and the fourth editions, "Just heavy tinkering." What had this amounted to?

Just heavy tinkering. I can't quite remember exactly what I changed - I just went through it with a red pen.

249. Previously, Professor Baker, there had been a new edition every decade. Now, nothing for 15 years.

No, well, that's too long. It's time for a new one. And I think OUP will let me have another go, provided I don't change it too much - it is already quite long.

250. That's wonderful news, Professor Baker. To move to the next book. This was your 1986 publication with Professor Milsom, *Sources of English Legal History: Private Law to 1750* a collaborative effort. By this stage you were a reader at Cambridge and Professor Milsom was within four years of retiring from his chair. What circumstances persuaded you both to collaborate on this.

We both had the same idea simultaneously. Extraordinary though it seems, I think we had both approached Butterworths with a view to doing it, and they said, "Can't you do it together?" - There was a precursor in the form of Fifoot's³⁸ *History and Sources of the Common Law* - which we had been using in teaching - but it didn't include any land law and it didn't take account of research since 1949. So we both felt there was a need for a new one.

251. You said in the Preface that this is a book for all levels, undergraduates to professors and, I quote, "To sink deep enough into past discussions, to lose the misleading perspectives of hindsight." Can you elaborate?

Those were Milsom's words. I think he meant that, to understand legal developments one shouldn't just look at the outcomes but at the arguments, especially the losing arguments - and also the contemporary framework of discussion, because they seldom argued in our terms, and we can be misled if we go back looking for a modern kind of discussion. You have really got to get into the sources.

252. Right. In the Preface (page v), the problems of what the mediaeval "conditions of daily life" were like are just as important to sort out as what the law was. Do you feel that the book went about addressing this in the text?

Milsom's words again. No, we didn't address this directly, because we didn't include any commentary - I think he meant that this would be part of the usefulness of the book. Legal sources have much to tell us about the conditions of daily life, provided they are

³⁸ Cecil Herbert Stuart Fifoot, (1899-1975), Fellow Hertford College, Oxford (1925-59), Barrister Middle Temple.



properly understood.

253. Coming then to some of the reviews. In 1987, in the *CLJ* review by Professor Van Caenegem, picked up on this point and said the authors “abstained from helping their readers in any way to understand the meaning of a text or to interpret their significance.”

Well, it was partly because of space. Fifoot had added commentary but left out the land law. If you tried to do both it would probably end up as two volumes. But the real answer is that the commentary was in Milsom’s *Historical Foundations* - and to a much lesser extent in my textbook - so to have combined all that in one work would not only have produced a massive work but would have been unnecessary duplication.

254. Professor Van Caenegem also called for a glossary of obscure legal terms and he said that this would have made the book more accessible. Again, was this lack of space?

No, I think, again, the reason is that that’s really the function of a textbook. Glossaries can be very misleading if words are taken out of context. You can’t just translate technical terms - (especially from the past), into ordinary words without a lot of explanation and context. Many terms changed their meaning over the period covered by the book anyway. So you’d end up writing a little treatise on legal history to explain each term.

255. He was very praising of the “labour the editors have bestowed upon it,” (p. 339), and the care with which the texts have been selected and translated. He called it, “Solid and voluminous.” So were you happy overall with the book and the reception?

Yes, it was very well received by the reviewers. It hasn’t been used quite as much as one might have hoped.

256. Another reviewer was Professor Kiralfy at UCL. He said it was a companion to your two textbooks because some of the material in the current book is not self-explanatory. I think you have probably answered this question already, Professor Baker, but is that how you planned it originally?

Yes - more of a supplement to Milsom, I suppose. But, yes, indeed.

257. He made the point that the duplication of some cases is very useful because it would appeal to US teachers, where it could be used as a casebook. Was this planned with the United States market in mind?

Not particularly. I think we saw it being used the same way on both sides of the Atlantic. I’m not sure it has been.

258. He was very complimentary and he used terms such as “great pains” and “very detailed treatment” and overall, as you have said, Professor Baker, you must have felt very pleased with the reviews for this book?

Yes, indeed.

259. Which came out again 24 years later in 2010, no longer with Butterworths but with OUP. Could tell us why you decided to bring out a second edition?

We just found various shortcomings over the years things that had been left out, mistakes that needed correcting, material that needed adding. So it’s quite a bit longer. I am afraid it’s always the case that when you try to improve something it gets longer. It’s almost impossible to improve something by making it shorter. I wish I could.



260. You were on your own this time because Professor Milsom had retired and you stated that you had the following aims to: illustrate legal thinking, arguments of principle, lines of reasoning from case-to-case, innovations in forms of action, and statutory engagement with the common law. Did this approach differ from the first edition?

It wasn't meant to, no. Rather less elegant than Milsom's words in the preface to the first edition - but this was my effort.

261. I noticed that you didn't act on some of the criticisms of the first edition. Perhaps you felt that the readers hadn't in fact found them to be problems?

I haven't had much feedback from readers, but the real answers are those I gave earlier - that we thought that those matters belonged in other books, textbooks, rather than in this one.

262. Professor Sirks³⁹ in the *Comptes rendus/Tijd voor Rechts* in 1982 said that the first edition had become indispensable and he believed that the new edition would do the same. Do you feel it has been successful, Professor Baker?

It never sold very many, though they were kind enough to produce a second edition. I didn't ever produce the intended companion volume on public law. (It was subtitled "Private Law to 1750", with the object that one day there would be a Public Law volume). But that was partly because there wasn't any accepted type of course for it to accompany. I have never taught a course on the history of public law, and I wasn't altogether sure what to put into it. But it was also partly because Butterworths never came back and said, "Can we have the public law volume?" I think they were disappointed by the sales of the first one.

263. With your continuing editing and translation of manuscripts in the digital age, would it be feasible to bring out electronic supplements to a book such as this when you find new old cases?

Well, it would be. One isn't likely to find that many leading cases that aren't known about, but one certainly finds telling cases from time to time and one could put more and more online. If you start doing that, there is no stopping, of course, because you think everything might be interesting. You may as well put all the law reports online - as I said earlier, it would be nice to have everything online in due course.

264. Your 2003 *Oxford History of the Laws of England Volume VI 1483 to 1558* published by OUP is a monumental volume which has generated several reviews and it must represent one of the high points of your publishing career. It was part of a series of twelve volumes from 597AD to 1914. Your volume being volume VI, covered the last of the Yorks and most of the Tudors, although it was first published.

The series was devised by yourself and professors Milsom and Brian Simpson in 1986, but you were the General Editor. Can explain how this all came about?

Yes, I have looked it up and it was exactly 30 years ago, in early 1987. It was Brian Simpson's idea. He approached Oxford University Press, and we met with Toby Milsom - I think, at the Randolph Hotel - to discuss it. We all thought it was a good idea, but the other two didn't want to have to do any of it. So I was pushed into the general editorship. I found a

³⁹ Adriaan Johan Boudewijn Sirks (b. 1947) Dutch academic lawyer and papyrologist specializing in Roman law. Regius Professor of Civil Law University of Oxford (2006-14).



minute of 1987 saying that Toby would be a co-editor, but he insisted that I would be the “senior” of the co-editors - which was rather ludicrous. He helped me draw up an outline scheme. But already by May 1987 he had thought better of it, and I was appointed the sole general editor. Then the next year, in 1988, I signed the contract for my volume - so you can see how long that took to produce. By 1993 we had five signed up and it takes time to find authors.

265. As Editor, did you try to devise a similar format for each volume?

Yes, that has always been the intention. Of course, authors have their own ideas and each period has its own peculiarities, but we try to make it as uniform as we can.

266. Was it an onerous task, riding shotgun on this large group of fifteen different authors?

Yes, it's like trying to get blood out of a stone. After 30 years we are still not halfway. One author, tragically, died after 18 years of work - just about to retire and write it - leaving nothing to show for it. Two others withdrew for health reasons. I don't even know which will be the next one. Whenever you see an author they say, “Oh yes, we are working very hard on it,” but you don't really know how close they are to finishing. I'm sure I shan't live to see it all finished, which is rather sad. I had hoped I might.

267. What determined the chronological extent of your remit, 1483 to 1558?

Well, I have always been interested in that “dark age” of legal history, as I called it. We decided to divide by reigns for want of any better system, although it's very arbitrary: and although one usually starts in September 1485, I wanted to take in Richard III as well, because of his legislation - that fitted best into my part.

268. It was well reviewed, extremely well reviewed. David Yale⁴⁰ in the *Legal History Journal* gave it high praise and emphasised (p. 99) that even this tome is “largely based on his own researches”, translations of plea rolls, reports, readings of the Inns. The bulk of bringing all this together must have been done while you were a Downing professor. Did it consume most of the first half of your time in this chair?

No, it started long before that - it goes back to Spelman's reports, and the Yorke Prize essay. Just ongoing interest in the period.

269. Mr Yale made the point that readings at the Inns by the 1500s were no longer just on statutes and that Readers could choose their own topics, but that they were still unable to speak on the common law itself (which you point out on page 528). Why were these various restrictions in place at different times?

Well, the readings were still on statutes. They gave up the old cycle - if indeed, there was one - of lecturing on the 13th century statutes, and they could choose a more interesting recent one, like the Statute of Uses. But the reason why they could only give lectures on statutes was because of the ingrained medieval idea that a lecture is reading out and commenting on a text. That's what *lectura* means in Latin - it's what “reading” means in English, I suppose - and the only text that they could use was the Statute Book. *Bracton* wouldn't do, because that was an idiosyncratic textbook which was already out of date when the Inns came into being. So they just chose the statutes, and as far as we can tell the original

⁴⁰ David Eryl Corbet Yale FBA (b. 1928), Reader in English Legal History (1969-93), Christ's College (1950-), Inner Temple (1951-), President of the Selden Society (1994-97).



scheme was to start with chapter 1 of Magna Carta: every reader took over where the previous one left off until they got to the end of the 13th century, and then they zoomed back to Magna Carta. At some point that was given up.

270. David Yale commented (p. 99) on what you said on page 529, that you concluded that Tudor criminal law was made coherent and sophisticated by the intellectual discussions at the Inns. This harks back to the earlier question re Dr Lovatt, his query about the Inns. This was 17 years later, so you still held that view. Was this an example of the influence of the Inns during its golden age which coincides with the time-frame of this Oxford book?

Well, the criminal law was only a small part of the book. I certainly hadn't changed my views on that, and still haven't. The book as a whole is not really connected with my work on the Inns. As I say, it began with my curiosity about what seemed to be me to be a dark age of legal history, following the medieval period on which so many people had concentrated before.

271. I was interested to see David Yale's comment on page 100 that you concluded that even a vindictive king such as Henry VIII followed legal due process.

Well, it often seems to suit tyrants to do that, doesn't it? Hitler was much the same. Apart from the very worst things, that he tried to keep quiet, he generally tried to get legal sanction to do what he wanted to do. We now have this phrase "Henry VIII clauses" in the newspapers today, and oddly enough that was the one thing Henry didn't get away with. He wanted Parliament to give him power to change law by proclamation and the House of Commons put its foot down and said, "Absolutely not."

272. Interesting. Another review is by Professor Diarmaid MacCulloch⁴¹ in the *Ecclesiastical Law Journal*. He looks at canon law issues primarily and he raises several points related to the upheavals that affected the Church in Tudor time and about which you wrote. He commented on the surprisingly small overall effect on ecclesiastical law that Henry's Reformation had. As you said, page 252, "the medieval learning which they applied remained substantially in place." Why do you think this was?

Well, what Henry did was to remove the authority of the Pope over the English church - but he wasn't interested in a "reformation" of religion - he was very conservative. Certainly there was an intention to overhaul the canon law and review it, to remove what were thought to be Roman incursions which were undesirable, and so there was provision in the 1534 statute for a commission - half canon lawyers and half common lawyers - to review the ecclesiastical law as it applied in England and produce a code editing out those bits that seemed inappropriate, and until they produced the result the statute said that the old canon law should continue as before (so long as it wasn't directly contrary to English statute law). Since the commission never did do its work, that statute is still in force. So the Church of England is still in theory governed by medieval canon law which the Roman Church repealed long ago - though, in fact, most of it has since been altered by statute, of course.

273. Professor MacCulloch says that it was surprising that in the Statute of Wills 1540, jurisdictional rules was left in Church courts.

Well, that's only partly true. It's true that probate remained with the Church courts,

⁴¹ Diarmaid Ninian John MacCulloch, (b.1951), Fellow of St Cross College, Oxford (1995-), Professor of the History of the Church at the University of Oxford (1997-).



because that had always been their concern, but the interpretation of the statute of 1540 and its effects on the land law were solely for the Royal courts - the Church courts didn't have jurisdiction over that, and that was all new because before 1540 land couldn't be left by will (except by custom in towns).

I should perhaps have said in answering the previous question that most of the canon law that people came across in practice was about marriage and divorce and probate - it wasn't about matters that we now consider to be ecclesiastical - and there was no great pressure to change that. Everything went on much as before.

274. Another reviewer, Mr Christopher McNall⁴² at Cardiff, was very praising. He said (p. 521) that you produced “beautifully turned discussions,” but he did use the word “laconic,” as had David Yale, to describe your style. Did you find it difficult to write nearly 1,000 pages under the constraints of space apropos a period when the law developed at what McNall called “breakneck speed”?

Yes, indeed, I did. It may look to the casual observer very long-winded but I left out an awful lot that I wanted to put in. Indeed, one had to look at every sentence to think whether it could be shortened - that's how it becomes laconic. It's a pretty fat volume as it is. I could have left topics out, I suppose, - that's the only other way of dealing with it - but they are meant to be encyclopaedic, and so one tried to deal with most of the things that people are likely to look up in it.

275. He also said that you were “partisan” in your handling of the trial of Sir Thomas More⁴³, seeming to lay the blame on Parliament for the bad law rather than the judges. He obviously disagrees with you in being fair under contemporary standards, but do you think perhaps he is guilty himself of judging the situation through modern eyes rather than from a Tudor perspective. That's something that you have argued against in your *Collected Papers* book?

I am always getting into trouble over Sir Thomas More - who I don't think deserves the title of “saint,” frankly, with all due respect to the holy father who gave him that title. But I really don't see how the judges could have struck down the statute, however obnoxious it might have seemed. No-one is very sure what More's legal argument was or could have been. It's said that he might have relied on chapter 1 of Magna Carta, but that can be read however you want it to. It could be read as freeing the English Church from Rome. As to the evidence, as to whether it was a fair trial in that sense, and whether Richard Rich⁴⁴ was perjured, that was a matter for the jury. And the selection of the jury, which might have been packed, was a matter for the sheriff. There wasn't a tradition of judicial intervention in those matters. They thought, “Facts are not for us,” and they took refuge in that. As, indeed, More himself said in one of his writings, “The judges don't want to be involved in trying facts. They find it easier to say, ‘That's for the jury,’ and they just preside over the trial to make sure that the rules are observed” - which they were.

276. Another of the reviewers was Professor Brian Levack⁴⁵ who was at the

⁴² Christopher McNall, Barrister and Mediator, Lecturer, Cardiff Law School (2001-04), Lecturer in Land Law & Law of Trusts, Jesus College Oxford (1999-2001).

⁴³ Sir Thomas More (1478-1535), lawyer, scholar, statesman, Lord High Chancellor of England (1529-32). Executed for refusing to recognise Henry VIII's divorce and the English church's break with Rome.

⁴⁴ Sir Richard Rich, (1496-1567), Lord Chancellor to Edward VI (1547-1552).

⁴⁵ Professor Brian P. Levack (b. 1943), John E. Green Regents Professor in History, University of Texas at Austin, American historian of early modern Britain and Europe.



Department of History at Texas at Austin. He described in the *Law and History Review* your work as, “A remarkable achievement. A work of vast erudition, all based on exhaustive research,” and he called it, “A monument to your unrivalled contribution to legal history,” page 707. Do you think of this book as a monument to your life’s work, Professor Baker?

I suppose so. I’m not sure it’s the only one.

277. He also suggests that your, “Characterisation of many changes in the law that took place over this period were less revolutionary than perhaps you suggested, for example, land law, real actions and procedure.” He said, “They evolved.” Do you think he misrepresented your portrayal of these changes as more paradigmatic than you had intended?

Perhaps. I never meant to suggest they were sudden, just that the law in 1600 looks remarkably different from that in 1500 - and much closer to the present in many ways than anything in the medieval period. That’s what had intrigued me about it - why all these changes occurred in the 16th century. I became interested in whether the same sort of things were happening on the continent, and I thought I could see that similar things *were* happening on the continent. It also occurred to me that this was a period of intellectual change in other spheres as well - religion and science - people beginning to think more rationally. So I thought maybe there was a connection with humanism. I’m not sure quite how you deal with a zeitgeist, frankly. I don’t like “isms” very much. But I did try to write a little bit about whether these contemporary currents were affecting what happened at the time. If I suggested that it was revolutionary, I didn’t mean it in a sense of blood on the streets, but rather something that happened fairly profoundly but over a longish period of time.

278. He did actually question your linking in the introductory sentence of the book, “The new spirit of humanist rationalism and rationalistic spirit with changes in English and European culture,” because he says that, “Historians have abandoned the claim that the Renaissance was in any way rationalistic.”

Yes. I used the term “Renaissance” because it was used in a very famous lecture that Maitland gave called “English Law and the Renaissance” - the Reid Lecture. I was trying to show that he was mistaken in some of his assumptions, and so I gave a lecture with the same title at Oxford. I used the title again, I think, in the book, without giving a great deal of thought to what it might mean. It may be “humanism” would have been better - but I don’t like “isms” anyway. As I say, I was just aware that there was something going on - putting a label to it doesn’t explain what it is or why it happened. But it had been a topic of interest before, as a result of Maitland. That’s really the explanation for that.

279. Just as a general comment about this work, given the continued research into Tudor legal history. Do you think you would ever be tempted to update this book, perhaps by issuing supplements on particular sections electronically?

I don’t suppose I will have time. One certainly could in theory but I don’t see myself doing it somehow.

280. Professor Baker, that brings us to the final book which I have selected, your 2013 *Collected Papers on English Legal History*. I found this to be an absolute goldmine of law papers, while the introductory chapter was enlightening in the extreme in summing up your publishing career to date.

Some general comments on the very readable introductory chapter on



understanding the common law. There are two gems that help one make sense of mediaeval applications of the common law. “(1) Nothing can be understood unless one realises the dominance of form and procedure and the limitations these pose on the questions that could be asked and, (2) the need to switch one’s mind to the same thought processes as the lawyers of the period in which we are working.”. I wonder how these notions came to you, fairly early on in your career?

It was pure Milsom. It came from Milsom.

281. The language of the common law, Latin law, French and English. If some of the concepts in the common law as they were originally expressed in Latin are difficult to transpose into English, have there not been subtle changes to such concepts since the discontinuation in the use of Latin following Lord Woolf’s exhortations?

Well, I am not sure, because I no longer teach law. There wasn’t a great deal of English law still expressed in Latin, even before Lord Woolf’s reforms. It’s just the doing away with phrases like *res ipsa loquitur* and *certiorari* and so forth, which causes confusion - because you have to resort to circumlocution to achieve the same results. People knew what those words were instantly, and if you translate them into ordinary words you have got to make clear that you are using the ordinary words in a special sense. I don’t quite see the point of that: but whether it’s had any real effect, I don’t know.

282. The common law was taught at the Inns of Court, the third university. Why was it not taught at Oxbridge?

I think they took the view that what they taught had to be universal knowledge, and the common law was just a kind of local custom and beneath their notice - they didn’t bother with it. You should be able to go from Bologna straight to Cambridge and read the same subject and know what they are talking about and argue in the same language, in Latin.

283. Right. You follow this by saying, “Don’t just plug key words into Google but read cases which seem to be of no conceivable interest,” but what role does modern technology have in your researching legal history?

Well, it’s become absolutely vital. It’s very difficult to remember those early days with a manual typewriter and needing to use pencils in libraries without digital cameras and so forth. So it has become vital - in four ways, I think.

Firstly, word processing, and that’s where I started. I got my machine in 1987, primarily because I thought it was magic to have footnotes put in automatically. Until then you would renumber in ink and then (if you retyped them), you could retype the numbers: but then you would almost certainly want to put something in later, and so it became footnote 3a*, or some such. In those days the printers were marvellous at converting all that into consecutive numbers when they set up the type. But they wouldn’t know how to do it now in India. So just having word processing is a massive transformation of one’s working practices.

Then, of course, there is the internet. There are so many published materials online - rare books, recent books, articles and so on. Early in my career I bought a lot of 17th century books, but they are all online now. It’s still, I think, easier to read the originals but now we can access every single book whether we own a copy or not.

Then, thirdly, we can use the internet to search for information, quotations, persons, or relevant literature - you can just find things that you could never have dreamed of finding in a month of Sundays in the old days. Too much information, perhaps, to some extent. Those who haven’t been brought up the old way must find it hard to evaluate all the material that comes up at the mere click of the mouse. But it’s tremendously useful - and very difficult



now to remember the days before we had that. It's getting more useful every day.

Then, fourthly, the digital camera. Thanks to the pressure from genealogists, local record offices began to allow people to use cameras, and the Public Record Office soon followed suit. Then eventually, last year, the British Library caved in. So now - everywhere that I use anyway - you can take in was used to be a camera, it's now an iPhone. My iPhone is much better than my camera and sees much better than I do, so in the really dark conditions of the British Library I can take a photograph - my iPhone can read it - and then when I get home I can put it on a screen, and I can read it. Absolutely wonderful. We never dreamed of those things in the past. One thinks how much more work one could have done sensibly if one had been able to take all these shortcuts.

I envy the next generation.

284. You coined the term “legal archaeologist,” an analogy to digging away at layers of data, constructing a chronology of law’s evolution. Is this a throwback, do you think, to your schoolboy hankering for being an archaeologist?

Maybe it is.

285. Professor Baker, did you, as an aside, ever master Greek, which I remember you telling me your headmaster said you lacked?

No - not necessary.

286. Editing manuscripts and records, you said, “I have spent much of my career editing. Editing has been at the core of what I do. Every legal historian should edit something.” You return to this theme in several of the papers. Is this philosophy something that you have always taught your students?

No, because it's not something you do at the beginning of your career - it doesn't get you noticed. No-one credits editing as being particularly worthwhile. I don't think anyone who hasn't done it realises how exacting it is, and what it contributes to scholarship. So you need to have tenure before you start doing things like that. But you learn so much from editing - that's why I think people should do it.

287. Page 9 and page 12, Law French was mentioned several times, especially in the fascinating chapter 29 on the three languages of the common law. Is there an analogue in the Law French so recently used in the Channel Islands?

Well, it's similar - I don't think it's the same dialect. Obviously, it developed in different ways and for different purposes. The language experts don't regard Law French as being Norman French nowadays. It's a different sort of French, and it wasn't adopted in the law courts because of the Norman Conquest, but simply because it was a generally understood language at the time in the 13th century. I suspect if a Norman came into Westminster Hall they might not have understood it.

288. Apropos the plea rolls and searching them, how do you go about that? Is there some sort of an index system?

No there isn't. If you know the name of the case you are looking for - which you often don't - and it's a King's Bench case, then there are some docket rolls kept by the clerks which you can go through quite quickly and find the membrane number. But that doesn't work for anonymous cases which most of them are, or the Common Pleas, which is where most of the cases went. So, if you are editing year books or law reports, you have to scan miles and miles of plea rolls looking for a case of which you may not know the name or the



exact date, or exactly how the point arose – you just have to use some imagination in guessing what it will look like on the roll. That part of the editor’s work is much more difficult than reading the French.

289. The notebooks that you made from the plea rolls, you say you wrote papers and books based on them but since you would not have been sure of what you were about to discover as you ploughed through the rolls this must have thrown up some very strange things?

Well, you do notice things of interest. I sometimes jot them down, and sometimes I don't because I think, “Well, I will never use that, so I will let someone discover it.” I remember one day I was working in the old Public Record Office and a friend of mine, Janet Loengard⁴⁶, suddenly said with delight that - while she was looking at an Elizabethan plea roll – she had just found an action on a contract for building a round theatre in London, earlier than the Globe. I’m not sure whether she wrote it up herself or passed it on to someone. Of course, that became an article of great interest to theatre historians - and no way would they have found it if they had gone looking through plea rolls, because you would have to read several miles of abbreviated Latin before you came across it, without even knowing that it would be there anyway.

There is a lot of material like that, which is not even law related, and which there is no way of getting at. They will never be indexed - too much of them.

290. Apropos listing and cataloguing, you have made lists of words, people, manuscript holdings of libraries, catalogues of what institutes hold and so on. Why has there been so little cataloguing in the past, is it just too time consuming?

I don't know why I do it really - it's just a kind of obsession with making lists, I suppose. It's unrewarded and it doesn't earn you a job or promotion. It's just that I have so often found that I wanted a list of something for my own use, and so I produced one - and then I tried to polish it up a bit and make it available for others to use.

291. Professor Baker, there were reviews of your *Collected Works*, and Dr Cavill at Pembroke College described this compilation as, “A dazzling range of esoteric learning which defies generalisation. Even the footnotes are alluring and witty.” High praise. He sums up the collection saying that, “Legal history has an autonomous character in contrast to the progressivism that is prevalent in most branches of history.” Do you think that this could account for the necessity of your having to call over the years for recruits to step forward and take on editorial tasks to continue Maitland’s and your labours? Do you think that, in other words, progressivism is more trendy and more attractive a mode in which researchers prefer to operate these days?

I am not very sure what “progressivism” is. But in the history departments they are never going to do the kind of legal history that I have done - they don't regard it as significant, really. They think it's all gobbledygook. As far as Law faculties are concerned, it's purely economic, because there are no jobs in legal history. So you have to get an appointment as a Law teacher, and then do legal history once you are safely established.

292. Dr Cavill raises your, “Giving short shrift to foreign interlopers such as human

⁴⁶ Janet Senderowizt Loengard, Professor of history emerita at Moravian College, Bethlehem, Pennsylvania. See: Janet S. Loengard, 1983. An Elizabethan Lawsuit: John Brayne, his Carpenter, and the Building of the Red Lion Theatre. *Shakespeare Quarterly*, 34 (3), 298–310. KB27/1229 m30, printed and translated at Loengard 1983, 306–310.



rights,” page 740, which in your last chapter, that’s chapter 78 volume III, you emphasise has, in fact, been a feature of English law long before the European project got into its stride. Would you say to pessimists that after Brexit human rights will be in just as safe hands under English law as they are now?

I don't see why not. I'm not sure what “short shrift” I gave human rights, unless it was just the name. In my Magna Carta book [p. 450] I pointed out that two thirds of the provisions of the Universal Declaration of Human Rights in 1948 was English law by 1616. There is no plan at present to withdraw from the Human Rights Convention anyway - even if the public think otherwise. Even if we did, our judges would pay due attention to decisions from the continent, I am sure.

293. Dr Cavill in conclusion says that, “Overall, you were instinctively opposed to the possibility that legal history can be explained by social, economic and intellectual changes, making, in your view, the law enclosed within itself.” Is he being unfair to your views?

No. But I have already tried to explain how I have difficulty with the idea that social changes can explain legal changes - beyond explaining how questions came up. Sometimes the legal sources are the only evidence for the social changes anyway, so you can go round in circles. Where appropriate, I have always tried to put legal changes in the context of social change - but it’s difficult to explain in those terms why, say, the doctrine of consideration appeared in the mid-16th century (if it did), or why the law of privity or quasi-contract developed when it did. You can certainly sometimes show dissatisfaction with certain parts of the law, but it often continued for centuries before anything was changed - and that may be because the dissatisfaction wasn’t universal, and so there are difficulties there.

I think it’s partly a difference between the way historians with and without legal background approach legal history. For the lawyer, law is an intellectual system with its own history. Historians think that’s anathema, that the law is an observable phenomenon, and how the results come about is just technical gibberish, written in funny French which obscures what was really happening. So we just see things differently. I think they are both valid forms of history. There is just something of a gulf between us, very often. It’s partly because, if you haven't read law, and learnt to think like a lawyer, you may not see legal thinking as something which can have its own history.

294. Professor Baker, to conclude, drawing a line at any point in a discussion of your scholarly works would seem premature, so rich is its compass. There is always another intellectual vista beyond whichever horizon one has just scaled but it has to be done and we have to stop somewhere.

Perhaps a good place to end where we can stock is with the last paper in your 2013 *Collected Papers* compilation in which you take a general look at your subject and ask, “Why should undergraduates study legal history?” This was a lecture given at the University of Galway in 2006 and you said, page 1577, that, “Some law firms prefer students not to have specialised courses but be broadly based.” I know we have touched on this briefly but some judges would dissuade intending barristers from reading law at university. Do you think that this is an indictment of how universities teach?

Well, yes, I have already said that I think it is, yes.

295. As a result of the last point, you concluded that, “In an ideal teaching regime law would only be a postgraduate subject in UK universities, and you say that, “This is now unthinkable in the UK,” presumably because of the vested interest in putting on



undergraduate courses, but you say, “It is the way that law is taught in the United States.” This allows us to assess whether your conclusion has merit, at least in comparison with the United States. Do you have any comments?

I don't think it's vested interests so much as economics. American law students run up debts on a scale which would probably still be unacceptable here, in order to earn salaries which are very high and so they can pay them off fairly soon. We are heading in that direction here, of course, since student loans were introduced, but whether we could easily go further is doubtful. I'm not sure that it would be desirable anyway, because one of the problems about paying for education is that the institutions come under great pressure to provide what the customers think will enable them to earn their fortunes - and they are often wrong. As Lord Sumption and others rightly point out, that isn't what employers want. They want people to have been educated as widely as possible. You see the US law schools becoming narrower and narrower in the sorts of things that interest them.

296. Interesting. One of the reasons you give for teaching legal history is that, “Without it Parliament cannot commit legislative acts that can inadvertently or even by design undo centuries of parliamentary democracy,” and you give the example of the then *Legislative and Regulatory Reform Bill* that was going through Parliament, at page 1572, but unless most MPs are forced to have law degrees, isn't this ignorance of the law, let alone legal history, inevitable and going to result in mistakes, just being a consequence of the modern democratic process?

Unfortunately, MPs don't make the law - they just vote as they are instructed. The problem is the lack of belief in, or understanding of, constitutional principles by those in power and the sidelining of legal expertise - which I increasingly detect - because they see it as an obstruction to effective government.

This disregard for constitutionalism is well illustrated by the attempted abolition and subsequent decline in authority of the Lord Chancellor. It was obvious that was going to happen when you took away the requirement that the office should be held by a lawyer, and treated it as an office to be held by relatively junior government ministers who would have to do what they were told. The old-style Lord Chancellorship was an institution which was difficult to justify in abstract theory, but it worked very well because the holders were expected to have a certain stature which enabled them to stand up to the Government and uphold the rule of law. That I suppose is why Blair ended it. It wasn't ignorance of legal history, in the long-term sense, but an unwillingness to learn from the more recent past or think into the future.

297. You stress that, “There is currently an extraordinary contrast between leaders bred on Magna Carta who will fight in defence of their liberties and those members of parliament,” whom you have just mentioned, for example, Mr Blair, “who do not care of how much is at stake.”

Well, I was comparing the 17th century with the present. People fought a war over the sort of issues that people don't seem to care about any more - except when it comes to Brexit, perhaps.

298. Apropos the Brexit debate, what do you foresee and wish for in the future for both teaching practice and the future development of law in England and Wales after Brexit?

I am so old that I was teaching law before we entered the EEC, and so I know that it needn't make that much difference to *how* we do things - as opposed to the content of what is taught, which obviously will need adjustment. But I suspect students will still need to know



about EU law for at least a decade, and probably longer, while it is all being sorted out.

299. With Brexit, Professor Baker, will you mourn or rejoice in what is likely to be a legal and constitutional watershed of our times?

I don't suppose I will live long enough to find out.

300. Where do you think in the sweep of legal history Brexit will be viewed in a few hundred years' time, a major event or just another footnote?

I think it will be seen as a major event, perhaps in European as much as in British history - but the period of our membership has been comparatively short in historical terms, so it may be that those who work on its history in the distant future may be seen as narrow specialists working on the early 21st century. The interesting question for me is whether to mention it in my fifth edition.

301. Well, Professor Baker, all that remains is for me to thank you most sincerely for an outstanding account. I am extremely grateful to you for participating. I can only thank you again, thank you.

Well, thank you very much.

