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Sarah Wilson*

Law and Equity, and "Law and History" as a Resource of Critique

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Abstract: This article's support for the critical equity agenda can be found in proposing that scholarship on equity could benefit from embracing a distinctive "Law and History" approach. In doing so, it acknowledges that amongst "mainstream" areas of law, equity has been the subject of very extensive historical scrutiny, and suggests that further but differently focused historicization can complement what is already exigent within conventional legal history alongside critical legal history. In illuminating how "Law and History" might differ from traditional and critical legal histories, the analysis explains how "Law and History" embodies established approaches within both, but emphasises the work of historians to a much greater degree than either. In identifying its current hallmarks, it explains that the parameters of "Law and History" are still being worked through. It also suggests that this notwithstanding, setting out for lawyers how historians perceive themselves and their work, and approach their craft – drawing this from current and highly profiled debate within history itself – identifies the potential of history as a resource of critique across legal scholarship. In identifying historians' own perceptions of the importance of "mutual reinforcement" in social science scholarship, the analysis also explains how law can become a much more extensive resource of critique for history than is currently the case.

Keywords: law and history, legal history, Critical Legal Studies, equity, law and society

This analysis is looking to respond to concerns amongst "critical equity" scholars that hitherto Equity has not attracted the attention it properly deserves within the critical legal field, and that it is poorly represented more generally in legal scholarship. It is also looking to do so in ways which are premised on the proposition that it is possible to identify "equities … each with divergent histories, overlapping and intersecting – and perhaps passing one

***Corresponding author: Sarah Wilson,** York Law School, University of York, UK,
E-mail: s.wilson@york.ac.uk

another by – in complex ways, but holding them together is a relation to Law,"[1] and which are congruent with the aims of the critical equity movement in challenging scholarly approaches in which equity is not properly represented and actually marginalised in "overall conclusions"[2] drawn about it and its relationship with law. However its own agenda is primarily one of method and approach, in looking to draw attention to how the critical equity movement could usefully engage with history in seeking to celebrate equity "in all its multifariousness" and liberate it from a dominant discourse where it is treated as being largely tangential.[3] Here equity is thus not so much the focus of this analysis, but instead a reference point for exploring how legal scholarship more generally can benefit from greater engagement with history and historical approach. Here attention is paid to how legal scholarship currently engages methodologically with history, and how it might usefully engage more with history, and perhaps how it might do so differently from how is currently the case.

1 Background and context: the importance of history for the critical equity agenda

A hallmark of the critical equity agenda is of course that there are many faces of equity, if not actually different types of equity posited in equity's "protean nature," where equity is also seen to relate to "important jurisprudential questions concerning forms of judgment within and beyond law, and ethical modes of conduct(ing) and relating to law."[4] It is also the case that in recognizing this it is important to appreciate that analysis of equity as it is conventionally understood – as "the law" which has emanated "from the English Court of Chancery, and now inscribed within the architecture of modern law and legal governance,"[5] also rightly occupies critical equity scholars. Here the analysis readily agrees with criticism that equity can be too readily imprisoned within comparisons made and contrasts drawn between it and

1 Publicity from the University of Kent Equity & Trusts Research Network, 2015 https://www.kent.ac.uk/law/research/centres-and-groups/equity/html
2 Publicity from the Equity & Trusts Research Network.
3 Publicity from the Equity & Trusts Research Network.
4 Publicity from the Equity & Trusts Research Network.
5 Publicity from the Equity & Trusts Research Network.

law, notwithstanding that conventional analyses of equity do acknowledge its performative qualities within the English (and wider common law) tradition, both in how equity acts and operates in relation to the common law – through providing *support for* legal rights alongside militating some of law's purported rigidity,[6] and actually how it shapes law.[7] This instant analysis aligns itself with how the critical equity agenda importantly embodies the need for greater scrutiny of how these characteristics of equity should be acknowledged and treated conceptually.

In supporting scholarship which looks to establish equity as an important focal point in its own right, rather than part of an amorphous mass of what might be "bundled" together as "law"[8] – and looking to analyse it not as "law's accomplice"[9] but instead as being much more powerful in its own right, and actually undertaking the function of "antagonist"[10] – this analysis *does* recognize conceptions of equity associated with fairness justice and creativity, and also protection and stability. However it is first and foremost an advocacy for what will be termed a "Law and History" approach. Here, in introducing lawyers to "Law and History" thinking does recognize how legal scholars do currently engage with "history of doctrine,"[11] principally through reference to conventional legal history and critical legal history alike. It also requires acknowledging that within legal scholarship a great deal of attention has been paid to "history of equity" specifically. But in suggesting that "Law and History" is something which can be distinctly identified and distinguished from legal history – both conventional and critical – attention is paid to why this might be so, and to how lawyers might benefit from engaging with historical scholarship more extensively, and especially with that relating methodologically to society and broader social trends of continuity and change.

Many legal historians – conventional and critical – do engage with history in order to comprehend the complexities underpinning relationships subsisting between "law" and "society"; and indeed to "work out" whether "the secret of that relationship" lies in regarding law as a dependent or independent variable: "Is everything about law – norms, rules, processes,

6 See e. g. Sarah Wilson, *Todd and Wilson's Textbook on Trusts and Equity* (Oxford: OUP, 2015), where this text utilizes *Stack v Dowden* [2007] UKHL 17 in support of this proposition.
7 Wilson, *Todd and Wilson's Textbook on Trusts and Equity*.
8 Publicity from the Equity & Trusts Research Network, 2015.
9 Publicity from the Equity & Trusts Research Network, 2015.
10 Publicity from the Equity & Trusts Research Network, 2015.
11 Robert W. Gordon, "Critical Legal Histories," *Stanford Law Review* 36 (1984): 57–125.

and institutions – determined by society, or does law have 'autonomous' internal structures or logic?"[12] What can be identified as "Law and History"[13] is evolving to suggest that how the discipline of history itself configures past alongside present in understandings of society and social change could itself be a valuable resource of critique for legal scholarship. Drawing principally on the work of John Tosh and William H. Sewell Jr. as illustration of a more extensive reflection from historians on their craft and overall approach,[14] it will be suggested that this thinking not only has the potential to enhance a broad spectrum of legal scholarship – critical and more traditional alike – but that in the spirit of "mutual enforcement"[15] advocated within this current trend in historical thinking, that engaging with historians' reflections on the importance of history could also present an opportunity – and a rare one perhaps – for lawyers to communicate the importance *of* law *for* historians' analysis of society and social change. Here the analysis sets out key ideas from historical scholarship which are integral to a nascent "Law and History" approach, situating this alongside how legal history has engaged with history, and how both legal scholarship and the discipline of history both recognize that in being used, history can also be *abused*.[16]

Whilst this analysis' interest in equity is more methodological than substantive, identifying how legal history within legal scholarship has always provided a rich and fertile ground for analyses of equity as conventionally understood by lawyers does serve to illustrate the potential value of a "Law and History" approach for legal scholars. More is said directly about the elements of "Law and History" shortly, but much can be said about its essence also from considering contextually the hallmarks of conventional legal history within legal scholarship. Here tradition of regarding equity as part of an "amorphous mass" of law is evident in Sir John Baker's classic work, presenting the "equity of the Court of Chancery," as being premised on the common law

12 Gordon, "Critical Legal Histories," 58.

13 Working from ideas initially set out in Sarah Wilson *The Origins of Modern Financial Crime: Historical Foundations and Current Problems in Britain* (Abingdon: Routledge (Criminology), 2014).

14 See also Richard John Evans, *In Defence of History* (London: Granta Books, 1997, 2000), which also contextualises the impetus for such reflections from historians on their craft, its methods and its significance.

15 See William Hamilton Sewell Jr., *Logics of History: Social Theory and Social Transformations* (Chicago: Chicago University Press, 2005), 1.

16 Borrowing from the seminal Friedrich Nietzsche, *On the Use and Abuse of History for Life* (first published 1874; Whitefish: Kessinger Publishing, 2010).

being "immutable," and where the "just remedy was provided not by changing the law but by avoiding its effects in the special circumstances of particular cases."[17] Although Baker continues through explaining how English law can be seen to have been "changed" through permanent additions of equitable instruments, doctrines, and remedies; continuing "childbearing"; and even through "judicial discretion, without precedent" being fashioned into statute, Baker's views on equity present these developments as making "the regular law function more effectively."[18]

Such perceptions of equity are also evident in Michael Lobban's illumination of pre-Judicature Acts attempts during the 1820s to replace established "fictions" of law with a system of rules promoting usability and accessibility, underpinned by belief in that "one uniform system of laws [to] regulate the whole" in an aspirational commercial society, "instead of vainly seeking, by equitable inference, to adapt [...] crude and scanty institutions."[19] These perspectives – which in turn typify much of what is regarded as "legal history" in the English legal tradition – have prompted critical equity scholars to critique dominant views of equity, which are regarded as underlying equity's significance. However, in suggesting that embracing a "Law and History" approach to legal scholarship might help to redress the shortcomings identified by critical equity scholars, it must also be acknowledged that equity attracts, and arguably always has attracted, a great deal of historical attention. This is evident in the work of Baker and Lobban, and also in that of Ibbetson,[20] as well as more "law and society" focused works of legal history.[21] It has also arguably permeated the abundant literature written around Chancery and conscience.[22] It has even permeated legal study, where academic texts on equity have traditionally commenced with reference to history,[23] in a way which is almost exceptionally

17 John Hamilton Baker, *An Introduction to English Legal History* (London: Butterworths, 4th ed., 2002), 202.

18 Baker, *An Introduction to English Legal History*, 203-204.

19 Michael Lobban, *The Common Law and English Jurisprudence 1760-1850* (Oxford: Clarendon, 1991), 195.

20 David Ibbetson, *A Historical Introduction to the Law of Obligations* (Oxford: Clarendon, 1999).

21 E. g. William R. Cornish and Geoffrey de N. Clark, *Law and Society in England 1750-1950* (London: Sweet & Maxwell, 1989).

22 E. g. Margaret Halliwell, *Equity and Good Conscience in a Contemporary Context* (London: Old Bailey Press, 1997), and Timothy Haskett, "Conscience, Justice and Authority in the Late-Medieval English Court of Chancery," in *Expectations of the Law in the Middle Ages*, ed. Anthony Musson (Ipswich: The Boydell Press, 2001), 159.

23 E. g. Jill E. Martin, *Hanbury & Martin Modern Equity* (London: Sweet & Maxwell, first published 1935).

amongst studies of law. Thus, in looking to make the case that the critical equity agenda could benefit from equity's further historicization, attention is paid to giving history a different kind of emphasis within legal scholarship from that which currently pertains to traditional scholarship and even critical legal studies.

2 "Law and History" – countering perceptions of too much [legal] history

In suggesting that equity scholars should engage further with history than is currently the case, it has already been noted that the sphere of equity does traditionally hold an interest in historical perspective to a much greater degree than is found elsewhere in studies of main areas of law; namely those conceptualized as the foundations of legal knowledge and understanding. In this vein, the study of equity might appear least to manifest views that engaging with law's own past is an essential pursuit, rather than one which is specialist, and has come to be regarded as "antiquarian," and is becoming marginalized as a result of this.[24] The perceived importance attached by legal history to studies of law's own past is premised on how in the common law tradition, the structure of modern law is "heavily dependent on the legacy of the past," with this ensuring that making sense of law today requires us to understand its history if we are to approach law reform with confidence.[25] This confidence required for law reform is itself built on the view that the very integrity of law is at risk without engaging with its past: legal history is the study of legal change, and without this law can easily become reduced to being "a body of randomly changing rules," rather than a cogent and rational system of rule-making and governance.[26]

Stressing that these views characterize the doctrinal tradition within legal scholarship is important for identifying key dimensions of this analysis, and how it could serve to increase legal scholars' historical engagement with equity through illuminating a "Law and History" prism. Any proposition that equity requires greater historical scrutiny requires explaining what might be missing from scholarship where equity has, as alluded to, been

24 Ibbetson, *A Historical Introduction to the Law of Obligations*, vi.

25 Ibbetson, *A Historical Introduction to the Law of Obligations*, v–vi.

26 John Hamilton Baker, "Why the History of English Law Has Not Been Finished," *Cambridge Law Journal* 59.1 (2000): 62–84, 63.

subject to a great deal of historical engagement. This includes of course great works of legal history from F W Maitland, notably the *Equity* lectures[27] and his seminal thinking on the social importance of the trust,[28] alongside works of Baker and Lobban aforementioned, and also alongside more recent interpretations of legal history placing greater emphasis on interactions between law and society whilst actually remaining very faithful to the conventional legal history tradition of emphasizing the importance of law's own history.[29] Here Maitland's work remains very significant for exploring the potential of a "Law and History" approach for continuing critical engagement with equity found within English law to ensure its contributions are properly conceptualized and understood. Here Maitland's overall approach, exemplified in his work on equity, helps to draw out intellectual commonalities across law and history underpinning what is now being termed "Law and History." Indeed this analysis presents more extensive integration of the "pursuit of history"[30] into studies of law as a worthwhile pursuit, focusing on the essence of "Law and History" and inviting further endeavor considering its applications for the pursuit of critical equity.

3 The many faces of legal history – finding a place and meaning for "Law and History"

Legal history as it is conventionally understood occupies a broad spectrum. It embraces purist and more contextual approaches; whilst the latter will regard "external sources" such as Parliamentary Debate and "official" enquiries etc. as part of an analytical toolbox, the former will insist on analysing only "the law" itself. It can be "top down," by being focused on the narratives provided by judges and legislators and the wider legal community, or "bottom up," in

27 Frederic W. Maitland, *Equity: A Course of Lectures*, ed. Alfred H. Chaytor (Cambridge: Cambridge University Press, 1909).

28 E. g. Frederic W. Maitland, "The Corporation Sole," in *Maitland: State, Trust, Corporation*, ed. David Runciman (Cambridge: Cambridge Texts in the History of Political Thought, 2003), and also Adam Gearey, "'We Want to Live': Metaphor and Ethical Life in F.W. Maitland's Jurisprudence of the Trust," *Journal of Law and Society* 43 (2016): 105–22.

29 E. g. Cornish and de N. Clark, *Law and Society in England 1750-1950*.

30 Per John Tosh, *The Pursuit of History: Aims, Methods and New Directions in the Study of Modern History* (London: Longman, 5th ed., 2010).

regarding ordinary people as agents of legal change. What unites conventional legal history – which is regarded *as history* for the purposes of distinguishing it from law *as is*[31]– in this vein is its regard for law's own internal coherence, as a system with its own rationale and logic, and thus free from outside influences. In this regard, criticisms of conventional legal history are microcosmic for more general critiques of the doctrinal tradition from within legal scholarship itself, pursued notably through Contextualism, Critical Legal Studies and also Socio-Legal Studies. And from this, a veritable tradition for "Critical Legal Histories" has emerged. Given that its pioneers rightly observe that "Critical legal writers pay a lot of attention to history," and indeed "have probably devoted more pages to historical description ... than to anything else," clarifying what is novel about asking lawyers to engage more extensively with history through "Law and History" is essential.

More is said about the essence of "Law and History" shortly, but much about it can also be ascertained from what critical legal history has accomplished through exposing the characteristically conservative use of history by legal scholarship, and the sharp scholarly divisions drawn between "law and society" characterizing legal scholarship which it seeks to redress.[32] Indeed, both Peter Goodrich[33] and more recently Stephen Waddams[34] reference equity very specifically in showing how lawyers can use history in a more extensive and less conservative way, with these works alongside equally insightful more generally focused contributions from David Sugarman[35] showing how much emphasis there is of history within legal scholarship rather than how little. However these illustrations together with a core idea of writing a critical "history of doctrine"[36] can also be directed towards how the objectives of critical legal history could be served by lawyers also engaging with current movements *within* history itself. Here it is suggested that key methodological writings from within history pointing to the benefits for "the present" of engaging with "the past," emphasizing society's organic qualities of self-understanding and development

31 Baker, "Why the History of English Law Has Not Been Finished," 64.

32 See generally Gordon, "Critical Legal Histories."

33 Peter Goodrich, *Law in the Courts of Love: Literature and Other Minor Jurisprudences* (London: Routledge (Politics of Language), 1996).

34 Stephen Waddams, "Equity in English Contract Law: The Impact of the Judicature Acts (1873-75)," *Journal of Legal History* 33.2 (2012): 185–208.

35 David Sugarman, "Theory and Practice in Law and History: A Prologue to the Study of the Relationship between Law and Economy from a Socio-Historical Perspective," in *Legal Theory and Legal History*, eds. Maksymilian Del Mar and Michael Lobban (Farnham: Ashgate, 2014), 443.

36 Gordon, "Critical Legal Histories," 57.

would appear to be highly congruent with critical legal scholarship's regard for "Law as a living thing."[37]

In this regard, a "Law and History" approach can be seen as part of the critical legal movement's embrace of history, in how the former looks to expose scholars to how historians configure history's importance for society. Critical legal scholars have arguably been encouraging lawyers to think as historians, evident for example in the regard within this tradition for the work of FW Maitland. What can be added to this is a more explicit recognition of how current writings within history capture how historians see themselves as contributors to understandings of society as a "living thing."[38] What is interesting here is how Maitland is regarded within the doctrinal tradition alongside within the critical tradition which celebrates his work on the "art of writing *history*."[39] Within the doctrinal tradition, Maitland's regard for "social and intellectual history" ideas is noted as an approach which stands out in contrast to much legal history scholarship. This is attributed within it to Maitland approaching legal history "as an historian," by virtue of finding a body of evidence relating to a particular matter or period of time, and then to interpret this according to the social and intellectual settings in which the documentation arose.[40] Baker's explanation of Maitland's call for the separation of "two logics" in the study of law – namely the logic of authority (as used by practising lawyers) and the logic of evidence (as characterising the work of historians)[41] – does take us closer to ascertaining what might be meant by "Law and History" in a number of ways.

4 Lawyers, legal scholarship and the essence of "Law and History"

Identifying Maitland's work with that of an historian helps to signpost the significance attached to history by "Law and History," and to explain the necessity of drawing on historians' work when there is evidence of legal historians themselves working "as historians." An important clue for this lies

37 Gearey, "'We Want to Live,'" 110.

38 Gearey, "'We Want to Live,'" in the spirit of what is posited about law, precisely on account of how Gearey envisions law.

39 Gearey, "'We Want to Live,'" 122, emphasis added.

40 Baker, "Why the History of English Law Has Not Been Finished," 64.

41 Baker, "Why the History of English Law Has Not Been Finished," 64.

in the view that "the history of English law must also be an essential dimension in the social and intellectual history of this country,"[42] helping to illuminate how whilst Maitland did work in many ways as an historian, his pursuit lay strongly in deepening understanding of law.[43] "Law and History" like critical legal history does regard the history of English law as an essential dimension for the social and intellectual history of Britain. Its key contribution to intellectual debate rests on emphasizing the value of current writings from within history itself for illuminating the nuances of society and social change for legal audiences; and also for enhancing historians' own appreciation of law which is characteristically under-represented in even seminal writings of history.[44] These writings from within history are thus important markers for what legal scholarship could gain from engaging with historians and their approaches across a broad spectrum of legal research interests, and for how in doing so, the spirit of "mutual reinforcement" can enable lawyers to emphasize far more the value of legal research as a resource of critique *for history*.

There is much more which law can do to stress to historians both the reliance which historical research places on sources which are underpinned by law and legal processes, and also the commonalities between how both disciplines approach scholarly endeavour. The latter is considered shortly, with attention firstly paid to what it might actually mean for lawyers to work "as historians." Illuminating what this might mean for and indeed to historians, starts with how for Tosh, the term "history" has two meanings – with these attached both to what actually happened in the past and to the representation of that past in the work of historians.[45] This is where agreement amongst historians ends, in ways which will be instantly recognisable amongst lawyers: "Anyone who imagines that an introduction to the study of history will expose a consensus of expert opinion needs to be promptly disabused."[46] One area of contention within a discipline characterised by "heated arguments concerning the objectives and limitations of historical study,"[47] provides the next step in understanding what might be meant by "Law and History."

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42 Baker, "Why the History of English Law Has Not Been Finished," 64.

43 This is certainly a very plausible reading of Baker's retrospective as well as of Maitland's own work, but see also an altogether more imaginative and multi-faceted offering of Maitland's work in Gearey, "'We Want to Live.'"

44 E. g. Harold Perkin, *The Rise of Professional Society: England Since 1880* (London: Routledge, 1990).

45 Tosh, *The Pursuit of History*, viii.

46 Tosh, *The Pursuit of History*, ix.

47 Tosh, *The Pursuit of History*, ix.

This flows from Tosh noting that whilst some historians remain committed to "discovering what happened in the past and what it was like to live in the past" as an end in itself, others are increasingly regarding this as a starting point for illuminating the present,[48] through having regard for "historical awareness."[49] In turn, Tosh sets out his understanding of "historical awareness" and its capacity for helping societies better understand themselves from what their evolutionary journey hitherto might reveal about their likely and aspirational future directions – and ultimately *as* "living things." From this, "Law and History" would then suggest that the dynamics of social and legal change can reveal a great deal about legal stasis and legal change, and the importance of law as an instrument of societal governance which both *reflects* societal stasis and change and also *effects* this. For Tosh, whilst "historical awareness" is a slippery term,[50] it helps to explain why human beings should value history so greatly, and where our historical awareness – which can be regarded as a "universal psychological attribute" – arises from positing that all of us are, in a sense, historians:

> Because our species depends more on experience than on instinct, life cannot be lived without the consciousness of a personal past … As individuals we draw on our experience in all sorts of different ways – as a means of affirming our identity, as a clue to our potential, as the basis for our impression of others, and as some indication of the possibilities that lie ahead. Our memories serve as both a data bank and as a means of making sense of an unfolding life story. We know that we cannot understand a situation without some perception of where it fits into a continuing process or whether it has happened before. The same holds true of our lives as social beings. All societies have a collective memory, a storehouse of experience which is drawn on for a sense of identity and a sense of direction.[51]

From this, Tosh considers history the most important cultural resource for society, with this applying particularly in situations which are unfamiliar or alien to us, and in times of challenge.[52] This is so by offering an indispensable albeit imperfect sense of "the heights to which human beings can attain, and the depths to which they may sink, the resourcefulness they may show in a crisis, the sensitivity they can show in responding to each other's needs."[53]

48 Tosh, *The Pursuit of History*, 1.
49 Tosh, *The Pursuit of History*, Chapter 1, 1–12.
50 Tosh, *The Pursuit of History*, 1.
51 Tosh, *The Pursuit of History*, 1–2.
52 Tosh, *The Pursuit of History*, 33.
53 Tosh, *The Pursuit of History*, 33.

Through history we can draw on the experiences of societies from the past without actually experiencing them ourselves, and thereby have access to a resource of societal critique which is not within the purview of our own experiences. Through "nourishment" provided from what has been "thought and done in the very different contexts of the past,"[54] rather than through purporting to provide a "blue print" or precedent for responding to situations which are perplexing, or for reinforcing optimism, history reminds us that there are usually multiple ways for "interpreting a predicament or responding to a situation."[55] In critiquing "meta history" which suggests that "history tells us most of what we need to know about the future,"[56] Tosh's vision of enrichment through history is one of a self-discovery and understanding which alerts us to possibilities, and even potentially empowerment through "choices [being] open to us are often more varied than we might have supposed."[57] Tosh's message is that it is possible to configure even very anxious times with hope and optimism, through regarding history as an "inventory of alternatives,"[58] from which a sense of what is possible arises through being mindful not simply of the present we find ourselves in.

5 Law and society: uncovering the "secret of that relationship"

The opportunities for societies to learn about themselves and to achieve greater self-awareness can also be seen expressed more as an imperative in the work of William Sewell Jr. Here Sewell both professes the expertise historians have in the sphere of "the temporalities" of social life and social change through their "complex and many-sided understanding" of this,[59]and shows exasperation that this has "scarcely found its way into social theoretical debate" in social science.[60] Moreover, Sewell's suggestion that bridging this disciplinary divide through dialogue between history and social science is likely to be "mutually enlightening"[61] on account of what historians and social scientists can offer one

54 Tosh, *The Pursuit of History*, 33.
55 Tosh, *The Pursuit of History*, 33.
56 Tosh, *The Pursuit of History*, 30.
57 Tosh, *The Pursuit of History*, 33–34.
58 Tosh, *The Pursuit of History*, 33–34.
59 Sewell Jr., *Logics of History*, 1.
60 Sewell Jr., *Logics of History*, 1; see also 6–14.
61 Sewell Jr., *Logics of History*, 1.

another, is highly salient for what "Law and History" suggests is significant about law for understanding society and social change. The importance of recognising the interconnectedness of law and society through "Law and History" analysis can now be explored through considering how lawyers might approach law using history as a resource of understanding and critique. "Law and History" highlights the similarities which appear to pertain in ways in which lawyers and historians work alongside bright line distinctions which could be drawn between "working as a lawyer" and "working as an historian" within legal history itself.

As conventional legal history itself notes, whilst this is a term of potentially wide import, a lawyer's interest in legal history is commonly attached to the "history of legal categories, concepts and doctrines; the mechanisms used by lawyers to organize their thoughts."[62] A characteristic focus of illuminating law itself, even when this is contextualised by social, economic and intellectual "interest," is perhaps the clearest difference between "working as a lawyer" and "working as an historian" but one of many similarities between historians and lawyers engaging with legal history is that both work across extended timeframes. There are also more generally cast similarities between legal scholarship and historical endeavour flowing from how both involve engaging with what social science would term "research questions," whether or not this is undertaken explicitly, and then with primary and secondary sources in the light of this. Both lawyers and historians will identify and locate primary sources which are believed to support ideas they wish to explore, and will examine and seek to interpret these assisted by an intellectual "tool box" derived from a combination of ideological preference with formal education, and where guidance and support for primary source interpretation and for developing propositions and methodology is also sought from secondary sources. This occurs within an intellectual setting which gives validity and freedom to ideological preference through learning and understanding clustering around what might be termed irreducible rules of engagement.

For lawyers undertaking analyses of the English and wider British legal systems and traditions, these rules of engagement cluster around the doctrine of judicial precedent, the hierarchy of the court system, and the rules of statutory interpretation. This is also regarded as requiring understanding of interactions between law and equity, and whilst "critical equity" is actively challenging what has traditionally been concluded about this, stating this here simply points

62 Ibbetson, *A Historical Introduction to the Law of Obligations*, v.

to the broadest parameters for undertaking what the legal academy would recognise as "good scholarship." In turn, irreducible rules of engagement for historians relevant for lawyers looking to enrich legal analysis through utilising history, and situating the past alongside the present, are embodied in three central principles of historical enquiry. Principles of historical *context* and historical *process* illuminate ways in which events of the past can be "read" in current times, and initially their ability to be meaningful is premised against the complimentary one of historical *difference*. Historical difference embodies the regard which must be had to this is regard for how working with long timeframes makes it inevitable that a period of time will separate our current existence from our ancestors. Here those who work with long timeframes are responsible for recognising that the passage of time has profoundly altered ways of life, and to take account of these.[63]

Respecting this autonomy of the past means taking account of differences in behaviour and outlook which have become formed over time, and where this can be seen manifested not only in considerably altered broader trends of society and economy, but also different value and belief systems (and differences in the ways in which these became translated into different priorities, fears and hopes) across time as well as at different points in time.[64] The regard for differences which will inevitably subsist even in situations which might appear to be very similar promoted through historical difference is continued through what is termed historical *context*. Having regard to historical context is the way in which the past and its strangeness (from our own time and place, as promoted by reference to historical *difference*) is placed in its own historical setting, so as to be interpreted as a manifestation of the period of study concerned. Here, single particular events can be positioned alongside wider beliefs and understandings about the past social and economic "state" of being to understand how it might be viewed as a manifestation of the fears and concerns, and hopes and ideals *of* the society concerned, and of course its envisioned future. What underlies the justification for historical *context* is the belief that in all historical work, events and occurrences which are the subject of enquiry must not be wrenched from their proper setting, and must be understood as experiences of the time: they must not be imbued with current mind-set and value systems before being understood on their own terms.[65]

63 Tosh, *The Pursuit of History*, 33–36.
64 Tosh, *The Pursuit of History*.
65 Tosh, *The Pursuit of History*, 36–38.

The principles of historical difference and historical context allow us both respectively to uncover the strangeness of the past (respecting its separation in time and character from any point ante and post-dating it) and explain it by placing it in its "historical setting." Historical *process* is concerned with making use and application of the past, by acknowledging the continuing nature of broad societal processes (human, economic and political alike). It relates to points in time as part of a trajectory which is still unfolding, and one which can even help to explain current states of play. Indeed, subject to having regard for historical difference and context, situating events in such a way can, according to Tosh promote "purchase on the future and allows a measure of forward planning."[66] In other words, historical process posits that lessons *can* be learned from the past, and applied to current issues and concerns. In showing what is possible through the articulation of historical process Tosh provides lawyers with a new prism through which to see law and its importance for society, in terms of being an agent of effecting social change, and also actually driving social change. This in turn provides a very exciting dimension for the pursuit of law reform which is effective by virtue of being confident, and where this confidence comes from "knowing ourselves" as well as we can, through appreciation of our resourcefulness and creativity – and of the society which we are part of as a "living thing." This might have significant value as the earliest years of the twenty-first century are already forecasting a future of uncertainty in a context of rapid and not entirely welcome "change." But it is also the case that even focusing on the emergence of *modern* Britain from c 1750 to the present – as favoured by many conventional and critical legal historians, and acknowledged by historians as being "radically different" from previous times[67] – manifest differences from today become readily apparent, with this raising questions of what significance should be attached to similarities which might also be found.[68]

6 Concluding thoughts

The perceived importance of history as a cultural resource for society is a basic viewpoint which is shared by critical legal historians and historians alike.

66 Tosh, *The Pursuit of History*, 40–42.

67 Jeremy Black and Donald MacRaild, *Nineteenth-Century Britain* (Basingstoke: Palgrave, 2002), xvii.

68 See e. g. Wilson, *The Origins of Modern Financial Crime*.

From this, writings from within history itself illustrate how both would acknowledge the importance of making the case for regarding the past as actually relevant for the present and not simply regarding it as being interesting as we work through it and look to the future. In setting out the parameters, Tosh explains that doubts as to history's significance are manifested in two broad ways. There are firstly ones founded on absolutism/essentialism, by virtue of viewing events which shape societies and inform their particular dispositions and characteristics as matters of accident, blunder and contingency, rather than being part of a pattern with meaning.[69] There are also objections channelled through views that paying attention to the past is inconsistent with modernity, with such views acknowledging that the past may well be useful in the face of current challenges, but insisting that understanding and responding to current conditions and future possibilities requires an approach reflecting "newness" in societal conditions, and which is progressive and forward looking.[70] Here reflections on the relevance of the past and concerns about attaching significance to it for ascertaining the "secret" of relationships between the legal and the social can be seen as clearly as ideas of "multiple trajectories" in writings of historical method and critical legal history.[71]

Given that one of critical legal history's most seminal writings laments the little hope it has for making "a new contribution to the longstanding debates of theory and method" in (socio-) legal history,[72] one might question the value of even developing the nascent "Law and History" discourse for legal scholarship. However, "Law and History" is seeking a distinctive aim in looking to encourage legal scholars to engage with historians' work on the value of history for today. Moreover, there are several indices for why this might be regarded as an important pursuit, and one for this moment in time. Indeed, recent appraisal of Gordon's contribution to "'critical legal history' – or, to be completely accurate, 'critical legal historiography'" venerates its importance and lasting contributions for setting parameters for legal scholarship's engagement with "law and the social,"[73] whilst several factors also point to why legal scholars should

69 Tosh, *The Pursuit of History*, 30–32.

70 Tosh, *The Pursuit of History*.

71 See Gordon, "Critical Legal Histories," especially 109–16.

72 Gordon, "Critical Legal Histories," 57.

73 Christopher Tomlins, "What Is Left of the Law and Society Paradigm after Critique? Revisiting Gordon's 'Critical Legal Histories,'" *Law & Social Enquiry* 37.1 (2012): 155–66; see especially 158, engaging with Gordon's commentary on how CLS blurs distinctions between law and society.

continue to explore the dynamics of the "law and society" relationship as envisioned by Gordon, and should do so with optimism, and where "Law and History" might assist in this pursuit.

The view that the "law and society" field has become *more* "law-centric"[74] than it once was make this an excellent time for lawyers to give greater visibility to valuable contributions which historians can make to social science scholarship. Whatever the perceptions amongst lawyers on how much attention critical legal studies has paid to history, historians perceive their absence from social science debate, with this signalling an opportunity for legal scholarship more generally to embrace historians' expertise in the "temporalities" of social life.[75] Any current trend towards increasing "legal-centricity" of legal scholarship is occurring in a wider intellectual setting which is encouraging engagement with other disciplines and increasingly non-academic perspectives, evident in attention being paid to interdisciplinarity and the importance of impact in the production of academic research respectively within the UK academy and in wider Higher Education policy, and which might alone sufficiently concretize the importance for legal scholarship to embrace history. However, the timeliness of legal scholarship's embracing of history in ways being encouraged by "Law and History" can also be demonstrated most saliently in how the current context of regulatory reform manifests very visibly Toshean "historical awareness" – albeit unacknowledged as such – in reactions of UK regulators to the global financial crisis and their assessment of responses required in its aftermath.

This is evident in earliest reactions to the arrival of the global financial crisis in Britain in September 2007,[76] and in responses from the much-criticised and now defunct Financial Services Authority, and highly profiled speeches from then Deputy Governors Andy Haldane and Paul Tucker during 2009,[77] all predating then incumbent Bank of England Governor Sir Mervyn King's now seminal lament on the importance of "lessons from history."[78] Thus whilst these parameters are not "new" as such for legal scholars, this current interest in history on the part of regulators spearheading legal and wider regulatory reform adds impetus to the importance of history for analyses of law in its

74 Tomlins, "What is Left of the Law," 157.

75 Sewell Jr., *Logics of History*, 1.

76 House of Commons Treasury Committee Report on Northern Rock: *The run on the Rock*, HC 2007-8, 56-1.

77 As considered extensively in Wilson, *The Origins of Modern Financial Crime*.

78 Sir Mervyn King, BBC Radio 4 *Today* Lecture 2012 (2 May 2012).

historical, current, and aspirational states. This current context complements how conventional legal history and critical legal history alike have long proffered the benefits for sophisticated analyses of law to look beyond its present state. To this extent, the aims of "Law and History" are part of a continuum rather than seeking a radical departure. And whilst much of its import and direction can be brought within the rubric of critical legal history, the emphasis placed by it upon the importance of historians' work and self-perception as contributors to social science scholarship does perhaps justify the distinctive "label" currently given to it. The same might also be said of how engaging with history in such a direct and explicit way does create the opportunity for lawyers to remind historians of how much the "art of writing history"[79] undertaken *by* historians owes *to* law and legal processes.

Sarah Wilson

Sarah Wilson is a Senior Lecturer in Law at York Law School, University of York in the UK. After qualifying initially in Law at Cardiff Law School she commenced studies in Modern British History gaining a MA (History) and PhD (History) before taking up a number of posts in UK Law Schools. Her key research interests lie in Trusts and Equity, Financial Law, and a "Law and History" combination of traditional Legal History and Modern British History. In the sphere of Trusts and Equity, Sarah is an enthusiastic member of the Equity and Trusts Research Network. In June 2015 she presented at the Network's *Equity and the Resources of Critique* workshop at the University of Kent, and then on "New Horizons in Equity" at *Complicities: Law, Literature and the Humanities Association of Australasia Conference 2015*, University of Technology Sydney, December 2015. She is also the longstanding author of *Todd and Wilson's Textbook on Trusts and Equity* (Oxford, Oxford University Press) with its 11th edition published in April 2015, and where Sarah's approach is to promote "mainstreaming" of interdisciplinary and critical perspectives.

79 Gearey, "'We Want to Live,'" 122.