Introducing Applied Legal History

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James Oldham and Su Jin Kim write about the acceptance of arbitration in the early United States in their article, “Arbitration in America: The Early History.” They correct a misperception that stretches back at least to Justice Joseph Story’s 1844 opinion in Tobey v. Bristol that said equity did not enforce arbitration awards. Oldham and Kim recover a robust culture of arbitration in the early United States and thus correct the received wisdom, which led Justice Kennedy to remark in 2001 that American courts were historically hostile to arbitration. Perhaps this newly recovered history will add support for the acceptance of arbitration in the federal courts. Oldham’s and Kim’s article is, therefore, part of an emerging and sometimes controversial trend in legal history to speak to contemporary issues. It is also the first of an occasional series for Law and History Review on “applied legal history.”

What is applied legal history? It is deeply researched, serious scholarship that is motivated by, engages with, or speaks to contemporary issues. This trend toward self-conscious engagement with the present is part of the turning to history in law, from the increased interest in originalism to the


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use of history to show past injustices or demonstrate alternative, often progressive, intellectual traditions.

Applied legal history may be something very directly engaged in a current debate, such as the work on the meaning and context of the Second Amendment in the late eighteenth and early nineteenth century. Sometimes we call historical work aimed at responding to an immediate legal issue “law office history”—as in historical work performed in a law office for advocacy purposes. The phrase “law office” highlights that it is both advocacy oriented and unlikely to be good history. What is very different about some of the recent scholarship on gun regulation is that it is good history. It asks questions that are not solely about advocacy and it asks questions about meaning to the framing generation. It puts into context the issues that the framing generation faced. That work admits what is not known and what contradicts the arguments that the lawyers who use the scholarship are making. Similarly, the work by Paul Halliday and G. Edward White on the English law of habeas corpus in the eighteenth century and the Suspension Clause was inspired by recent controversy over the scope of habeas corpus for prisoners in the War on Terror. It occupied a significant place in the majority opinion in Boumediene v. Bush. Sometimes, the legal history scholarship is presented directly to the court through an amicus brief, as happened in Lawrence v. Texas.


In addition to the literature aimed at the Supreme Court is literature on the history of executive power, inspired by the War on Terror, which targets a general audience. John Yoo, for example, often draws upon examples from early American history using rather suspect methods. Conversely, some work returns to constitutional history, finds a rich culture of rights talk, and opens up a wider range of possibilities of constitutional protection. Closely related to this scholarship in which history informs contemporary constitutional rights and power is work that helps us understand the context in which statutes were enacted and how to interpret them, such as work on section 1983 and on Title VII.

Often, however, applied legal history is more abstract, or less applied, than the work aimed at understanding the original meaning of the constitution or at interpreting a statute. There are several varieties of work that is both serious as historical scholarship and directed in some ways, even if obliquely, at contemporary issues. It is difficult to try to draw bright lines between varieties of applied legal history, and much scholarship responds in multiple ways to contemporary concerns. Nevertheless, maybe it is useful to try to separate out some of the ways that legal history scholarship is motivated by or responsive to contemporary issues.

A second category of applied legal history normalizes (or in other cases destabilizes) a contemporary practice by showing that it has (or perhaps lacked) antecedents. One classic work of this genre is C. Vann Woodward’s *Strange Career of Jim Crow*. Woodward recognized that the “twilight zone that lies between living memory and written history is one of the favorite breeding grounds of mythology.” He defeated the mythology that segregation was the natural order of things by showing that in the years after the Civil War, Southern life was more integrated than it was in the early twentieth century. More recently, Larry Kramer and others have shown the vitality of popular constitutional ideas in American history and have thus helped reignite debate about the proper


role of constitutional thought outside the courts. Richard Posner’s work on the economics implicit in twentieth century tort law laid the groundwork for his subsequent push for economic analysis of law by showing that judges had been engaged in an economic analysis for generations. Relatedly, Morton Horwitz’ Transformation of American Law, 1780-1860 was inspired in part by the 1970s controversy over law and economics. It may have, oddly, legitimized the law and economics movement by showing that judicial considerations of utility were central to the common law tradition. Oldham and Kim fit within this category, because they show the historical antecedents of arbitration, just as Jenny Martinez points out the precedent that courts that tried violations of the ban on the international slave trade serve for contemporary human rights courts.

A third, exceptionally broad, category of applied legal history looks to “how we got where we are now.” Some recent examples of this kind of work are Felicia Kornbluh’s book on poverty and welfare rights in the 1960s, Reva Siegel’s work on early twentieth century legal thought that both suggests new avenues of constitutional protection for women’s rights and helps us understand the origins of those rights the Court recognizes, and Karen Tani’s work on due process rights to government social welfare benefits in Fleming v. Nestor. David Tanenhaus recovers the context of In re Gault and teaches us, in that way, about the state of juvenile justice now.

Often this kind of work is directly engaged with the continuing effect of past events, or seeks to put those injustices into a better context. This is particularly true of Native American legal history. Much of recent African American legal history also turns to the era of slavery, Jim Crow, and Civil Rights to understand where we are today. Perhaps it also encompasses scholarship that focuses on past triumphs and thus provides some inspirational basis for thinking about the United States.

There is, perhaps, a fourth category that is closely related to the third: work that is motivated—as has happened with historical work on


immigration—by contemporary issues, even if it is not searching for a solution to them. There may be no direct prescriptions from this work, it is inspired by contemporary problems. Robert Cover's *Justice Accused*, which was motivated by Cover's questioning why Vietnam-era federal judges sentenced draft resisters to prison, is one example here. That set Cover on the mission of understanding the legal constraints upon antislavery judges who decided cases involving slaves. Oldham and Kim definitely fit here.

Perhaps there is a fifth, catchall category of a “useable legal history,” which teaches us something about contemporary law reform. Sometimes there is a direct lesson, such as in Michael Klarman’s *From Jim Crow to Civil Rights*, which has a fairly stark message about the dangers of looking to the courts for social reform. Often the lesson is more indirect, such as how people have remade the law. Felicia Kornbluh’s work on welfare comes to mind, because that shows us something about how reform takes place. Kenneth Mack’s *Representing the Race*12 and Tomiko Brown-Nagin’s *Courage to Dissent*13 both teach us lessons about how reform happened, from lawyers’ offices to civil rights protesters who took to the streets to remake their world. Mack and Brown-Nagin’s work is far from the core of applied legal history, but what often motivates that kind of “useable past” is some desire to show how people outside the traditional seats of power have thought about law and used it, and remade it. Perhaps therein lie possibilities for inspiring more activism. But even if inspiring activism is not the goal, it lets us know that positive legal change happens in many ways; that literature legitimizes activism and, perhaps, change.


34. Many of applied legal history’s goals are similar to those that William W. Fisher described for legal history, including “contributing to contemporary policy debates by enabling readers to assess the merits and preconditions of policies pursued in other societies,” “exposing injustice and inspiring indigent and commitment,” and “assisting contemporary judges in construing constitutional texts.” “Texts and Contexts: The Application to American Legal History of the Methodologies of Intellectual History,” *Stanford Law Review* 49 (1997): 1065, 1096, 1101, 1103.

based on its contemporary utility. We should—and obviously will—continue to write "pure" legal history.

What is the value, then, of this discussion? Applied legal history is a way of describing what many of us are already doing. It explains what has motivated much legal history lately and explains to people outside of the historical profession what we are doing. Given how much recent literature falls under the definition of "applied legal history," one may ask whether almost all legal history is applied in some way. And even if most legal history is applied, what does that mean for how we should think about what we do and why? If we assume that most legal history is applied, should we be rethinking the conversations we are a part of? We tend to define our conversations substantively, such as intellectual history of the old South, and usually we read work by people who write about those things. But maybe we need to think of people who are asking similar practical questions. In which case, the historian of the antebellum South should read about Ancient Rome, England as it emerged from feudalism, Victorian and Edwardian England, and other places where labor tensions, forces of conservatism, and competing notions of people and nation came together. Talk of applied legal history highlights that legal historians are engaged in public debates and having an impact on them. I look forward to the articles that will follow Oldham and Kim and the questions they will prompt about methods and contemporary law, as well.

describe the intersection of legal practices and everyday life and those complex yet common dialectics, and may provide insight into current dynamics. See, for example, Elizabeth Dale, _Debating and Creating Authority: The Failure of a Constitutional Ideal in Massachusetts Bay, 1629–1649_ (Aldershot: Ashgate, 2001). Although such social history may speak to some contemporary issues, this is different from the more directly applied legal history envisioned in this article.