

BOOK REVIEWS

EVIDENCE IN TRIALS AT COMMON LAW. Volumes III and IIIA. BY JOHN HENRY WIGMORE. REVISED BY JAMES H. CHADBURN. Boston: Little, Brown & Co., 1970. Vol. III: Pp. xx, 634. Vol. IIIA: Pp. xii, 635-1065. \$45.00 set.

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In legal academe the nearest analogue to the kamikaze's attempt at simultaneous triumph and suicide in the funnel of an aircraft carrier is an undertaking to revise or even update John Henry Wigmore's monumental ten-volume treatise, *Evidence in Trials at Common Law*.¹ Wigmore is the Master, not merely of the law of evidence, but of treatise-writing in general. The legal forest is full of Wigmore purists, who believe that both the Master's reasoning and his imaginative, not to say occasionally eccentric, prose style should be forever spared the revisionist's pencil.

It is hardly surprising that there are so many Wigmore purists. Since the day its first volume was published in 1904, Wigmore's *Evidence* has been considered the world's preeminent work of legal scholarship. The early reviews read like a theatrical advertisement. *Yale Law Journal*: "[T]he treatment is masterly."² "We cannot over-praise the completeness and the system with which Professor Wigmore has treated his subject."³ *Michigan Law Review*: "Too much cannot be said in praise of the scholarship and learning exhibited in it . . . invaluable contribution to the literature . . . will take its place among the great works of modern times . . ."⁴ *Harvard Law Review*: "This is unquestionably one of the most important treatises . . . published during the last generation. . . . It is hardly too much to say that this is the most complete and exhaustive treatise on a single branch of our law that has ever been written. . . . wonderful."⁵ *American Law Review*: "No legal treatise has ever anywhere been published which approaches this work in fullness and thoroughness of treatment."⁶ The

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¹ (3d ed. 1940) (Chadbourn's shortened title). The authors of this Book Review, who are currently revising Wigmore's one-volume student text, are acutely aware of this.

² Review, 14 YALE L.J. 124 (1904) (entire set).

³ Review, 14 YALE L.J. 245 (1905) (Volume III).

⁴ Recent Legal Literature, 3 MICH. L. REV. 684, 687-88 (1905) (entire set).

⁵ Book Review, 18 HARV. L. REV. 478 (1905) (entire set).

⁶ Book Review, 39 AM. L. REV. 478 (1905) (Volumes III & IV).

editors of the *Columbia Law Review* thought the Wigmore treatise was just about perfect in every way: "easily the best."⁷ "[D]estined to become the great reference work on Evidence. . . . a work of really gigantic proportions."⁸ "Paper, binding, type, clearness of impression, all are satisfactory."⁹ *The Brief*: "a monumental and exhaustive work. . . . complete, exhaustive, great. . . . the greatest treatise on a legal subject of recent years" ¹⁰ Buried in a breathless critique in the *American Law Review* were some ominous notes to revisionists: "[N]o one would ever dare to write on the same subject except to make supplements thereto. Other writers may well study this work for system and thoroughness in detail; and when they have done this they will doubtless stop in despair."¹¹

Within three years, Professor Joseph H. Beale was able to say that the Wigmore treatise "has become not merely the best but the only authority in general use in this country and in England."¹² But even the law of evidence evolves, and so revision of the work by Wigmore himself was inevitable. Wigmore on *Wigmore* was no affront to the Wigmore purists. It was said in the *Harvard Law Review* that "[t]his second edition is a model of re-editing."¹³ Dean Wigmore lived to a ripe old age and managed a third edition of his work in 1940, two years before his death. After that a North Carolina lawyer named Richmond Rucker produced biennial pocket-part supplements to the third edition but it was not until 1961 that anyone dared to take that one long, defiant step and commence the process of revising *Wigmore*, volume by volume. Professor John T. McNaughton, one of the brave men of the Twentieth Century, brought out a revision of Wigmore's Volume VIII, which dealt with "Rules of Extrinsic Policy," by which Wigmore meant illegally obtained evidence and the testimonial privileges.

McNaughton was shot down, figuratively speaking, before he could reach the aircraft carrier's funnel. In a raking review in the *Harvard Law Review*,¹⁴ Frederick Bernays Wiener, a prominent Washington, D. C., practitioner, recorded that Professor McNaughton's additions to and, worse yet, subtractions from the sum and substance of *Wigmore* were "highly improper, quite inexcusable, and . . . utterly outrageous."¹⁵ Undeterred by his colleague's fate, Harvard's Professor James H. Chadbourn has just become the second-bravest legal academic of the Twentieth Century. He has undertaken to revise Wigmore's Volume III. We shall be somewhat kinder to Chadbourn than Wiener

⁷ Book Review, 5 COLUM. L. REV. 68 (1905) (Volume I).

⁸ Book Review, 5 COLUM. L. REV. 252, 255 (1905) (Volume III).

⁹ Book Review, 5 COLUM. L. REV. 412, 414 (1905) (Volume IV).

¹⁰ Book Review, 5 BRIEF 396, 396-99 (1905) (entire set).

¹¹ Book Review, 39 AM. L. REV. 478 (1905) (Volumes III & IV).

¹² Book Review, 21 HARV. L. REV. 377 (1908).

¹³ Chafee, Book Review, 37 HARV. L. REV. 513 (1924) (2d edition).

¹⁴ Wiener, Book Review, 75 HARV. L. REV. 441 (1961) (Volume VIII).

¹⁵ *Id.* 446.

was to McNaughton, partly because Chadbourn deserves better of us, and partly because we lack Wiener's unrelenting sense of self-superiority. We cannot ecstatically praise Chadbourn's effort; neither can we roundly condemn it.

A reading of the first 283 pages of Professor Chadbourn's revision of Volume III, dealing in the main with testimonial evidence, and all of Volume IIIA, which takes up methods of impeachment, reinforces one in the notion that Dean Wigmore said it all—or at least almost all—about every evidentiary topic. The only alternative conclusion is that the law of evidence has evolved very little since Wigmore prepared his third edition in 1940. Of course, it is difficult to be certain that Chadbourn's Volume IIIA and the first part of his Volume III contain no major additions to or deletions from Wigmore's third edition since changes are not indicated. But, apparently, the only major addition to the text in these initial 283 pages occurs at page 204, where Chadbourn discusses the subject of in-court identification of a criminal accused and quotes extensively Justice Brennan's opinion in *United States v. Wade*.¹⁶ We shall presently have more to say about Chadbourn's treatment of this topic.

The latter part of Volume III, dealing with confessions of an accused person, has been substantially rewritten, and here many of the changes, at least throughout the earlier sections, are noted in the text and in the footnotes. For the Wigmore purist, the Chadbourn revisions may seem to suffer the shortcomings of McNaughton's revision of Volume VIII, all gleefully catalogued by Wiener.

Chadbourn's approaches to revision, even more than McNaughton's, pose a tantalizing question since the failure in the first 283 pages of Volume III to make many changes or to mention those made can be contrasted with the major rewriting of approximately 400 pages at the end of that volume. The question is: Is it possible to revise Wigmore successfully, whatever approach is employed? Although this latter part, sections 815 through 863, has been almost completely redone by Chadbourn and his staff, enough pure Wigmore remains to present a fairly sharp comparison between the colorful, heavy prose of the Master and the bland, law-review style of the revisionists. For example, section 852 begins with Wigmore's own almost conversational style:

Owing to the casual adoption of one and then another of the various competing principles, it cannot be said that the rulings in the United States have represented any marked attitude. On the whole, they have been liberal in spirit; and the occasional legislation has also been liberal.

No attempt is worthwhile to label in detail the exact variety of principle which a given ruling has represented, because a comparison of it with the preceding discussion of

¹⁶ 388 U.S. 218 (1967).

the English cases will show where it stands (so far as that may be ascertainable).¹⁷

The next paragraph, added in the revised edition, lacks the Wigmore style:

However, in evaluating the current validity of the older precedents on judicial confessions or admissions of persons in custody, it is well to bear in mind this admonition of Friedman, J.: [which is then quoted].¹⁸

In addition, the revised sections on confessions are by no means consistent in their flagging of the additions to and deletions from the original.

Sections 815 through 841 indicate such changes quite clearly, for the most part, with the original Wigmore text reproduced in a footnote in many instances. But section 842 and those following do not indicate changes so clearly and methodically. We are not without a warning—Professor Chadbourn advises us that the material in sections 842 through 852 was substantially revised and that “[n]o attempt has been made to indicate each change.”¹⁹ And in section 859 we are confidently told:

This section was originally entitled “Discovered facts themselves always admissible.” The title and also the original text are now revised for reasons which will readily appear from a perusal of the revision.²⁰

After comparing the careful preservation of the original *Wigmore* text in a footnote in the earlier revised section dealing with *Massiah*, *Escobedo*, and *Miranda* with those sections recognizing that confessions may be inadmissible even if trustworthy,²¹ the reader must conclude that the reviser got tired, that the publisher wished to conserve space, or that the two portions of the revision were prepared by different persons.

There are other similarities between the Chadbourn and McNaughton revisions. Wiener, criticizing McNaughton’s Volume VIII, remarked:

[Wigmore’s] “*post*” and “*ante*” have been changed to “*infra*” and “*supra*”; . . . and his chapter numbers, roman in the original, now have been altered to arabic. I suppose it gives

¹⁷ III J. WIGMORE, EVIDENCE § 852, at 530 (Chadbourn ed. 1970) (footnote omitted) [hereinafter cited as CHADBOURN EDITION], slightly revised from III J. WIGMORE, EVIDENCE § 852, at 323-24 (3d ed. 1940) [hereinafter cited as THIRD EDITION].

¹⁸ III CHADBOURN EDITION § 852, at 530.

¹⁹ *Id.* § 842, at 497 n.1.

²⁰ *Id.* § 859, at 554 n.1.

²¹ *Id.* §§ 815-26a (comprising 155 pages).

a reviser a sense of power thus to make these and similar other minor alterations in a text that has been committed to him.²²

Such criticisms are far too picky. In Wiener's case they stemmed from opposition to "current law review diseases" such as the *Uniform System of Citation*. We happen not to share Wiener's aversion to the *System's* deviations from "professional tradition and existing judicial practice."²³

As McNaughton learned, to revise *Wigmore* is to invite charges of *Wigmore*-tampering if changes are made, and of being a do-nothing reviser, undeserving of all those nice royalties, if the original is left more or less intact. Chadbourn seems by and large to have adopted the sound approach of altering only that which clearly required substantial revision. The important new sections on confessions are extensive, as we have indicated; they are also methodical and scholarly. Other new material has been dealt with almost exclusively by means of additions to footnotes. These additions seem well chosen, with the possible exception of too many references to decisions of the courts of the Philippines and the Canal Zone. Much of the small print retains the original supportive materials of the third edition. It is obvious, however, that *Wigmore's* footnotes were reviewed thoroughly and that one can be confident that on each point major contributions to the legal literature since the third edition have been noted. The only really painful omission is any reference to the Proposed Rules of Evidence for the United States District Courts and Magistrates.²⁴

Reading a volume of *Wigmore* from cover to cover is an impressive if somewhat numbing experience. Revised or unrevised, there is indeed a lot to *Wigmore*. In 1905 Professor Beale summed it up: "For greatness of conception and patience of execution, for complete collection of authority, and for fullness and vividness of treatment, this treatise cannot be too warmly commended" ²⁵ *Wigmore* had the advantage of having first produced the sixteenth edition of Greenleaf's *Evidence*,²⁶ which, Chadbourn asserts, "possessed a unique authority."²⁷ He also had before him the "added . . . insights to the history and theory of the subject"²⁸ provided by the great James Bradley Thayer. To this *Wigmore* added his immeasurably valuable but sometimes quite insufferable organizational structure.

²² Wiener, Book Review, 75 HARV. L. REV. 441, 446 (1961).

²³ *Id.* 446-47.

²⁴ PROPOSED RULES OF EVIDENCE FOR THE UNITED STATES DISTRICT COURTS AND MAGISTRATES (Preliminary Draft, 1969), in 46 F.R.D. 161 (1969). Nor is there reference, of course, to the revised version, PROPOSED RULES OF EVIDENCE FOR THE UNITED STATES COURTS AND MAGISTRATES (Revised Draft, 1971), in 51 F.R.D. 315 (1971). There are, however, some references to the 1965 California Evidence Code.

²⁵ Book Review, 18 HARV. L. REV. 478, 479 (1905).

²⁶ S. GREENLEAF, EVIDENCE (16th ed. 1899).

²⁷ III CHADBURN EDITION v.

²⁸ *Id.*

The structural intricacies provide both the greatest challenge to and the most direct limitation on a reviser. Wigmore's convoluted organizational methods, together with his flamboyant prose ("concomitant evidence," "prospectant evidence," the ever-unpopular "autoptic proferance," etc.) account for the fact that a Wigmorean thought, worthwhile as it may be, is occasionally obscured. One fascinating instance of this limitation may serve to indicate the scope of the task to which Chadbourn could have, but apparently did not, set himself: one can, with some difficulty, trace the roots of the Supreme Court's decisions on eye-witness identification at trial—*United States v. Wade*²⁹ and the cases accompanying *Wade*³⁰—to *Wigmore*.

Wigmore deals with the subject of eye-witness identification at trial, and the use of prior identifications of an accused, at two places: in section 1130, which is in his third edition's Volume IV, and in section 786*a* of the third edition's Volume III. In section 786*a* he dealt with the general subject of improper suggestion in the production of testimonial evidence, cautioning against sharp and shoddy practices in preparing identification evidence for a criminal trial:

Some of the most tragic miscarriages of justice have been due to testimonial errors in this field, the error being chiefly due to imperfect Recollection, with the occasional further complication of defective Perception and of Suggestion.³¹

Wigmore then proposed an ingenious scheme for ensuring "improvement on the present imperfect methods of presenting persons for identification."³² His plan involved the preparation of a hundred talking-pictures of men, all similarly attired, and the same number of women, each person to be filmed six separate times and to speak the same words. The suspect was to be filmed in the same manner. The victim would be given an opportunity to view twenty-five of the films, including the film of the suspect. The victim could indicate a positive identification by pressing a button that would light up an indicator behind the film screen.

In his section 1130 Wigmore stated, somewhat obscurely, the reasons for his view that such lengths were necessary to ensure the validity of an identification. The general subject heading under which section 1130 occurs is "Rehabilitation by Prior Consistent Statements." We are informed, in section 1122, that it is appropriate for a witness to explain infirmities in his testimony by recounting prior consistent statements. We are told in sections 1123 and 1124, however, that to permit a witness to testify about prior consistent statements in advance of his

²⁹ 388 U.S. 218 (1967).

³⁰ See *Gilbert v. California*, 388 U.S. 263 (1967); *Stovall v. Denno*, 388 U.S. 293 (1967). See also *Simmons v. United States*, 390 U.S. 377 (1968).

³¹ III THIRD EDITION §786*a*, at 163 (footnote omitted).

³² *Id.* 165-66.

impeachment—that is, permitting the receipt of such testimony “in chief”—is objectionable because it is hearsay and because “[s]uch evidence would ordinarily be both irrelevant and cumbersome to the trial”³³

But Wigmore notes in section 1130 that the act and testimony of a witness in pointing out the accused in the courtroom “is of little testimonial force.”³⁴

After all that has intervened, it would seldom happen that the witness would not have come to believe in the person’s identity. . . .

The psychology of the situation is practically the same as when Recent Contrivance is alleged. To corroborate the witness, therefore, it is entirely proper . . . to prove that *at a former time*, when the suggestions of others could not have intervened to create a fancied recognition in the witness’ mind, he recognized and declared the present accused to be the person.³⁵

In other words, when an in-court identification is offered it is essential, even before any impeachment is undertaken, that the circumstances surrounding any antecedent out-of-court identifications be presented to the factfinder in order that it can assess the ever-present question of how the witness came to identify the accused in the first place.

Wigmore quoted at length from the dissenting opinion of Judge Parke in *Blake v. State* to support his contention:

The testimony related to the identification of the accused by the prosecuting witness. The identification was the expression of the opinion of the witness, and it had much more evidential force shortly after the commission of the crime. An identification at the trial when the witness is testifying has not the same weight, since, by that time, the witness would have come, by force of intervening circumstances, to believe in the prisoner’s identity. The best evidence of identification is usually the first identification. . . . The circumstances of the original identification, and the acts and demeanor of the girl and the accused, would be of significance in ascertaining the weight to be given the identification.³⁶

Having succeeded, quite typically, in getting himself hot under the collar, Wigmore concluded, “This is a simple dictate of common sense,

³³ IV THIRD EDITION § 1124, at 194-95.

³⁴ *Id.* § 1130, at 208.

³⁵ *Id.* (Wigmore’s emphasis).

³⁶ 157 Md. 75, 85-86, 145 A. 185, 189-90 (1929), *quoted in* IV THIRD EDITION § 1130, at 210.

and was never doubted in orthodox practice. That some modern Courts are on record for rejecting such evidence is a telling illustration of the power of a technical rule of thumb to paralyze the judicial nerves of natural reasoning.”³⁷

The essential point, it seems, is simply that antecedent identifications and the circumstances surrounding them must be presented for the factfinder's assessment if an in-court identification is to be deserving of any evidential weight. And this notion is at the core of *Wade* and the cases coming after it.

In *United States v. Wade*³⁸ the Supreme Court held that an identification at a post-indictment lineup, conducted without notice to the accused's lawyer, should have been excluded from evidence at trial as violative of the accused's sixth amendment right to counsel. The Court discussed the suggestiveness inherent in the lineup process and noted that a lineup is frequently used to crystallize the witness' identification of the accused.³⁹

*Simmons v. United States*⁴⁰ applied the principles of *Wade* to an in-court identification that was preceded by an identification from a photograph. The Supreme Court held that a trial court has an obligation to inquire into the circumstances surrounding out-of-court identifications, even by photograph, to ensure that there was no such suggestiveness or other unfairness as to deny due process of law.

Dean Wigmore's analysis exposed the bases for the conclusion that an improperly suggestive pre-trial identification is sufficient to exclude a later in-court identification. Even more significant, his analysis is justification for the conclusion in *Simmons* that there must be a hearing at trial to determine that the foundation underlying an in-court identification is not defective.

Chadbourn, in his revision of section 786a, does not explore the rationale discussed in Wigmore's section 1130. The cross-reference to section 1130 remains, nothing more.⁴¹ Perhaps for the purposes of a revision of a single volume of the treatise the somewhat clouded significance of Wigmore's thought need not be pointed up specially. Perhaps quotation from *Wade*, introduced by this statement, is after all sufficient and fair to Wigmore:

Extensive data recently assembled and evaluated by the Supreme Court of the United States have demonstrated the hazards to suspects of unfair practices in identification procedures and have led that court to an important conclusion respecting right to counsel.⁴²

³⁷ IV THIRD EDITION § 1130, at 210 (footnote omitted).

³⁸ 388 U.S. 218 (1967).

³⁹ *Gilbert v. California*, 388 U.S. 263 (1967), was virtually identical to *Wade* except that *Gilbert* involved a state court proceeding. *Stovall v. Denno*, 388 U.S. 293, 300 (1967), held that *Wade* and *Gilbert* would not be applied retroactively.

⁴⁰ 390 U.S. 377 (1968).

⁴¹ III CHADBURN EDITION § 786a, at 206.

⁴² *Id.*

This much must be said, however. If such insights as we have just described are anywhere to be found in Professor Chadbourn's revision of the confessions sections of *Wigmore*, they are stated even more obscurely than were some of the Dean's best perceptions. We cannot find them at all. And the words are not Wigmore's, nor the style his. The completeness of the coverage may make the revised volumes substitute authority for *Wigmore*; we think they deserve to be that. When all is said and done, however, where there has been no substantial revision by Chadbourn the result is merely good updating; where there has been extensive revision, it is Chadbourn, not the Master. There is a difference.

FREDERIC WILLIAM MAITLAND: A LIFE. By C. H. S. FIFOOT. Cambridge: Harvard University Press, 1971. Pp. x, 312. \$10.00.

David E. C. Yale †

Mr. Fifoot's edition of five hundred of Maitland's letters appeared in 1965 as the first volume in the supplementary series of the Selden Society. He has now broadened his work into a substantial biographical study of Maitland that assembles what was previously known, adds considerably to our existing information, and presents Maitland's life in a readable and reasonably comprehensive narrative. Maitland himself at the end of his life was writing a biography of his friend, Leslie Stephen. It was, he wrote in one of his letters, "in one sense a work of piety."¹ So also is this book, in the best sense of the word, a work of "piety." No one who has written of Maitland, whether from personal acquaintance or not, has failed to reveal a strong sense of admiration and even affection. This work is no exception.

One of the most striking features of Maitland's career as a legal historian is the quite astonishing volume of work published between the appearance of his *Pleas of the Crown for the County of Gloucester* in 1884 and his too early death in 1906 at the age of fifty-six. The achievement in terms of output was sustained by a quality of insight and originality of mind that can only be described by that difficult word "genius," and was, moreover, accomplished despite his routine work in the university, the time spent in nursing the perilous infancy of the Selden Society, and the chronic ill-health of his later years. It is not surprising therefore that there has been a perennial interest in the question, "how was it done?" This book tells us.

Mr. Fifoot's picture of Maitland pays due regard to context and circumstance. He does indeed in his preface speculate whether in so doing he "may seem to have accumulated too much detail," but he does "not feel it necessary to apologize."² And, on the whole, his treatment is vindicated by the result. He portrays Maitland in company with the other historians of his time, as well as in domestic surroundings. The author was aided in gathering much family information, literary and otherwise, by Maitland's elder daughter, who bore the Bractonian name of Ermengard.³ Possibly these family details occupy an overly generous allocation of space in Mr. Fifoot's book, though it seems a

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¹ THE LETTERS OF FREDERIC WILLIAM MAITLAND 472 (C. Fifoot ed. 1965) (letter no. 472 to Melville M. Bigelow).

² C. FIFOOT, FREDERIC WILLIAM MAITLAND: A LIFE viii (1971). This book is the first volume of the American Society for Legal History's "Studies in Legal History."

³ *Id.* vii.

carping spirit that would object to having more rather than less. There is a larger question to be considered in the balance of this book.

Perhaps Mr. Fifoot starts too early and stops too soon. The first chapter, which rehearses Maitland's forebears, is rather overextended even at fifteen pages. We read, for example, in some detail of the work of Maitland's grandfather in ecclesiastical history and of the viscissitudes of medieval heresies. Mr. Fifoot closes his book on the day that Maitland died. Mr. Fifoot expresses consciousness that Maitland's work is not explored in depth, and evidently his choice as author has been to concentrate on the living Maitland. He faithfully narrates Maitland's progress as a scholar—and he has many perceptive comments on the various enterprises that Maitland undertook—but he declines the task of detailed appraisal. "For such a task," he writes, "I am not fit."⁴ We may be forgiven for questioning this disclaimer when Mr. Fifoot's own contributions to the study of legal history are borne in mind. The other reason Mr. Fifoot advances is that Bell's *Critical Examination and Assessment*⁵ has already performed the task. Bell's book certainly has considerable merit, but also has its limits, and in important respects leaves much to be said. Of course, the difficulty of deciding how much further to go in including historiographical material in a biographical study would have presented a considerable problem. An author is entitled to make his own choice, but it seems a matter of regret that Mr. Fifoot did not venture further.

This book follows a straightforward chronological sequence. We follow Maitland down the years, from Cambridge to London, and back again. Intellectual exploration apart, Maitland never went far afield: he spent his vacations in Gloucestershire, and his winter journeys to the Canaries in the end were a matter not of choice but of inexorable necessity. The ten years in London, superficially considered, may be regarded as wasted years, for Maitland found his vocation comparatively late in life. But in a serious sense those unproductive years were the formative years, when he had turned from philosophy to law, and before he had discovered legal history. It is highly significant that he found his field not reading about it but by perusing original documents. After Vinogradoff turned him decisively in the right direction—to the records, and to Bracton's extracts from the plea rolls—then, as the saying goes, he never looked back.

Thereafter he wrote year after year on the history of English law. Bracton in the thirteenth century and the yearbooks in the fourteenth provided the centrepiece in his balance of interests. As Professor Milsom has remarked in his introduction to the reissued *History of English Law*, "If Maitland set his watch by any one source it was by Bracton."⁶ From the thirteenth century he extended his range back-

⁴ *Id.*

⁵ H. BELL, *MAITLAND: A CRITICAL EXAMINATION AND ASSESSMENT* (1965).

⁶ 1 F. POLLOCK & F. MAITLAND, *THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I*, at lxxii (2d ed. reissued 1968).

ward to the century of the Domesday Book and forward to the sixteenth century. Here his spectrum stopped, with the end of the yearbooks and the opening of a new age. Paradoxically his sceptical and anti-authoritarian mind was not at ease in the post-Reformation world, and, in his studies of English canon law, his search for historical truth led him to the view that there was singularly complete papal authority over the medieval English church.

It is not, however, the business of a reviewer to describe Maitland's work in recovering the law and life of these centuries. It is more appropriate to recognize, in Bell's words, "that his work utterly changed both the techniques and scope of English legal history,"⁷ for it is here that we may take Maitland not only as a master in medieval studies but as one setting an example of the widest possible application. Briefly put, Maitland pioneered a way of using words and legal concepts to further our knowledge and understanding of legal history.

With regard to words, in 1884, before he left London, Maitland had written his paper on *The Seisin of Chattels*.⁸ In the context of a complex and confused story, it demonstrates the change in the use of the term "seisin" over the centuries, and inculcates the simple lesson that we must ask what words meant at the time under inquiry and not assume they meant what they later came to mean or indeed mean to us today. That Maitland did not invariably achieve perfection in this technique need not worry us (later scholars have certainly made corrections in Maitland's work by using his method, for example, in the early history of torts), for the pioneer cannot be expected to draw a map that never needs revision. The achievement is in formulating the right questions, even if some answers given in fact require later amendment. This preoccupation with the language of the law (which surely derives from his days in Chancery chambers, not from his earlier studies in philosophy, as that subject was then practiced) led Maitland into other fields such as the language of the yearbooks. Again he opened the way of philological studies, and the work thus started remains yet to be fully exploited. It is really remarkable that the subject still lacks a modern Anglo-French vocabulary, the creation of which was among the first objects of the Selden Society in its inception in 1886. Words and ideas go together, and, though Maitland did not shrink from institutional studies,⁹ he was happiest in tracing the origin and development of legal ideas. When "cornered" into writing narrative history, as he was by Acton for the *Cambridge Modern History*,¹⁰ he did it well, al-

⁷ H. BELL, *supra* note 5, at 7.

⁸ Maitland, *The Seisin of Chattels*, 1 L.Q. REV. 324 (1885).

⁹ His *Memoranda de Parlamento, 1305* (RECORDS OF PARLIAMENT HOLDEN AT WESTMINSTER, A.D. 1305 (F. Maitland ed. 1893)), was a starting point for scholarly discussion by modern historians about medieval parliaments.

¹⁰ THE CAMBRIDGE MODERN HISTORY (A. Ward, G. Prothero & S. Leathes eds. 1st ed. 1902).

though reluctantly. But this attraction for Maitland in tracing legal ideas in history did not lead him in the direction of historical jurisprudence as practiced by Sir Henry Sumner Maine. He distrusted the generalizations of *Ancient Law*¹¹ and other such works (indeed, he rather undervalued them); his mind was usually very close to the facts, and the facts were in the documentary sources. It was through them that he could listen to the speech of the lawyers of the old common law, and, significantly, he delighted most not in the treatise or the text, but in the spoken debate, that is, the yearbooks.

But we must return to Mr. Fifoot's book, which is biography, not historiography. It is highly readable and thoroughly researched. There are messages for both those who already know Maitland and those who do not. Perhaps it will encourage some of the latter to read Maitland himself. Legal historians never have been, and probably never will be, a numerous breed, and one welcomes anything that may excite interest and help prevent the extinction of the species. And Maitland, let it be repeated, is not for the medievalist alone. His methods, if not his style, are imitable in any field of legal history. Even within the scope of Maitland's own writings, as much work remains to be done as has been accomplished. As Plucknett once said:

[H]is work is remarkably fertile in suggestions. Sometimes he would obviously open up whole realms of novel study, but on numberless occasions he has left mere hints to express his doubts upon a point which needs more study. The hints are very gently expressed, not at all obvious, but well worth looking for.¹²

To the discerning reader Maitland's writings are, therefore, not relevant alone for what they say, but also for alerting one to further possibilities. In this sense, his works remain remarkably alive.

The title page of the book is faced with a photograph that the author assures us is "the least unsatisfactory" picture of Maitland. The subject sits awkwardly on an uncomfortable-looking chair next to a white and woolly dog, and stares mournfully at the camera. This sad picture is not Maitland as we know him in his work, the nervous energy, the almost playful use of words, the scintillating style. For these we must look not at this picture but at his books, and, indeed, at Mr. Fifoot's description of him.

¹¹ H. MAINE, *ANCIENT LAW: ITS CONNECTION WITH THE EARLY HISTORY OF SOCIETY AND ITS RELATION TO MODERN IDEAS* (1st ed. 1861).

¹² T. PLUCKNETT, *EARLY ENGLISH LEGAL LITERATURE* 3 (1958).

CONTEMPORARY CHINESE LAW: RESEARCH PROBLEMS
AND PERSPECTIVES. EDITED BY JEROME ALAN COHEN.
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In conjunction with the general maturing of Chinese studies in the United States during the early 1960's, there developed a sudden interest in Chinese, especially Chinese Communist, law. Several law schools, notably Pennsylvania, Harvard, Berkeley, Columbia, Michigan, and Washington, introduced courses dealing with Chinese law, and during the succeeding years a number of first-rate young scholars emerged with competency in both Western law and Chinese language and institutions. The foundations, especially through the Social Science Research Council, poured money into the field, sponsoring conferences, the compilation of a large dictionary of Chinese legal and administrative terms (soon to be published by the Stanford University Press), and numerous research projects. Books such as Clarence Morris and Derk Bodde's *Law in Imperial China* and Jerome Alan Cohen's *The Criminal Process in the People's Republic of China, 1949-1963*, appeared along with numerous articles in law journals and China-oriented publications.

All of this not only improved our knowledge of Chinese law and legal institutions per se, but also considerably helped our understanding of the workings of Chinese society and the pattern of Chinese thought. At the same time, China's unique legal tradition, one of the most comprehensive and durable systems in human history, was made available for comparative study with our own Western institutions.

Thus by the middle of the 1960's the future of Chinese legal studies in the United States looked bright indeed. During the past three or four years, however, the situation has appeared less promising, partly because of the general financial squeeze, which has adversely affected all fields of academic work, and also because of two special problems.

First, even before the boom in Chinese legal studies started in the early 1960's, events in China had already cast a pall over the future. In 1957-1958 the so-called Anti-Rightist Movement in China brought an end to a period, beginning in 1953, of experimentation with constitutional law based on the Soviet model. During this period there emerged in Communist China the beginnings of a legal profession, a somewhat independent judiciary, separate law departments and schools, several legal journals, and two texts on criminal and civil law. A criminal code was promised for the near future, and there was even some experimentation with so-called people's lawyers as advocates for

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the defense. Indeed, it seemed for a time that Communist China was moving rapidly toward a system of justice different from that of the West, but still more or less comprehensible in Western terms.

Unfortunately this development of a stabilized legal system and independent judiciary came into conflict with basic Party doctrine that law is merely a tool of the revolution and that politics must always be in command. Therefore, when the Hundred Flowers Bloom Movement of 1956 revealed growing liberal opposition to Party dominance in almost every phase of political, cultural, and social life, it was unsurprising that one of the first objects of counterattack should be the legal profession. Most of its effective advocates, both Party and non-Party, were purged. The Party's political functionaries took over direct control of the legal system and instituted a period of legal instability that reached its peak in 1967 during the Great Proletarian Cultural Revolution. The development of a separate legal profession was aborted, police administration largely replaced the judiciary, the system of people's lawyers disappeared, and the promised code never materialized. Previous legal publications were sharply criticized, and either ceased to publish or turned almost entirely to theoretical discussions of Marxism-Leninism, with only an occasional article of any significance to legal scholars. Because most other legal materials, such as court records and judicial instructions, have always been considered classified information by the Communists, American and other foreign scholars, after they had exhausted publications of the early 1950's, suddenly found themselves with a paucity of new material. Even though some of them conducted extensive interviews with refugees in Hong Kong, this could hardly fill the gap.

A second discouraging factor has been the general failure of the law schools in the United States to provide ongoing support. Indeed, if anything, the number of courses offered in Chinese law has declined since the approximate high point of 1967. The courses of the early 1960's were usually initiated by established law teachers because of personal interest. As these people retired or their interest shifted, the programs they initiated began to fade away, and, with one or two notable exceptions, American law schools have been unwilling to hire new personnel solely on the basis of expertise in Chinese law. They have continued to express interest in Chinese law as a sideline packaged with primary expertise and experience in torts or one of the other classic fields of American legal studies, but not as a field in itself. Further, political and social science departments, caught up in the current craze for computers and methodology, as many of them are, have shown little interest in Chinese law, and feel that the subject belongs in the law schools, where most of its experts received their training. Thus during the past several years a number of highly trained and well-qualified young scholars have had either to eke out an uncertain existence chasing elusive research grants or to leave the field entirely.

It now appears that China is entering a new period of stability and growth following the end of the Great Proletarian Cultural Revolution. If so, we can expect a revival of legal stability with an attendant shove toward professionalism and the resuscitation of publications and discussion of legal issues. In any case, China's entrance into the United Nations, and particularly the development of Sino-American relations, is bound to create a new interest in Chinese law—and perhaps a change in law school attitudes on the subject. They may even come to see the value of Chinese law in their comparative law programs. It is my personal conviction that in this time of social crisis when our legal institutions are being confronted with the necessity for drastic change, anyone who claims to be educated in the law must have some knowledge of other legal systems, including those of the Soviet Union and China.

In this connection the publication of this volume on *Contemporary Chinese Law* takes on special significance because it in a way sums up the past experience in the field and lays the groundwork for further study. The work emanates from a conference on tools for research in Chinese Communist law held in Bermuda in 1967,¹ but its thirteen articles cover a wide range of subjects and go far beyond the normal concept of research tools. It brings together the scholarship of a truly international group representing the foremost experts in the field. Four excellent articles by Tao-tai Hsia,² Yasuhei Taniguchi,³ Harold Berman,⁴ and George Ginsburgs⁵ deal with Chinese, Japanese, and Soviet sources and provide not only an extensive bibliography, but also a critical evaluation of the scope and perspective of the sources.

Jerome Cohen⁶ and Victor H. Li⁷ relate from practical experience the many pitfalls of interviewing and suggest techniques for improving quality. At the same time they clearly establish interviewing as an indispensable aid to legal research on China. Four other articles by Hungdah Chiu,⁸ Dan Henderson,⁹ David Finkelstein,¹⁰ and Marinus J. Meijer¹¹ treat the complicated problems of language and translation.

¹ CONTEMPORARY CHINESE LAW: RESEARCH PROBLEMS AND PERSPECTIVES 11 (J. Cohen ed. 1970).

² Tao-tai Hsia, *Chinese Legal Publications: An Appraisal*, in *id.* 20.

³ Yasuhei Taniguchi, *Some Characteristics of Japanese Studies on Contemporary Chinese Law*, in *id.* 294.

⁴ Berman, *Soviet Perspectives on Chinese Law*, in *id.* 313.

⁵ Ginsburgs, *Soviet Sources on the Law of the People's Republic of China*, in *id.* 329.

⁶ Cohen, *Interviewing Chinese Refugees: Indispensable Aid to Legal Research on China*, in *id.* 84.

⁷ Victor Hao Li, *The Use of Survey Interviewing in Research on Communist Chinese Law*, in *id.* 118.

⁸ Hungdah Chiu, *The Development of Chinese International Law Terms and the Problem of Their Translation into English*, in *id.* 139.

⁹ Henderson, *Japanese Influences on Communist Chinese Legal Language*, in *id.* 158.

¹⁰ Finkelstein, *The Language of Communist China's Criminal Law*, in *id.* 188.

¹¹ Meijer, *Problems of Translating the Marriage Law*, in *id.* 210.

Their articles also contribute much to an understanding of the cultural and ideological bases of Chinese law. Chiu's article on the development in Chinese of international law terms and Henderson's study of Japanese influence on Communist Chinese legal language make significant contributions to the understanding of modern Chinese institutional history.

The remaining three authors, Stanley Lubman on civil law,¹² Richard M. Pfeffer on crime and punishment,¹³ and Jerome Cohen on international law,¹⁴ are concerned with problems of methodology. All three stress the need for a functional approach. Pfeffer and Cohen point out the need to look at legal realities rather than verbiage when comparing Chinese and American institutions. All too often, they maintain, such comparative studies test foreign systems against the ideal, not the reality, of our system.¹⁵ Lubman goes further to question even the feasibility of comparing Chinese and American institutions. After analyzing the role of contracts in Chinese Communist society, he concludes that Chinese contracts and modes of settling disputes that arise under them are too flexible and too dependent upon an administration designed to serve political ends to be analogous to institutions that bear similar names in Western countries.¹⁶

Finally, Jerome Cohen provides to the book a compact introduction that is notable for its brief history of Chinese legal studies in the United States and a selective but generally excellent bibliography of works about Chinese law in Western languages.

As is often the case with such anthologies, the quality and coverage of the different articles varies considerably. Perhaps the major weakness of the book is its inadequate coverage of criminal law. Pfeffer certainly makes his point that those who compare our ideals with foreign realities engage in rhetoric rather than scholarship. Unfortunately he does little to enhance our understanding of crime and punishment in China, a subject deserving much broader consideration in a book entitled *Contemporary Chinese Law*. Be that as it may, this book is an important one not only in the field of law, but also in the study of modern China in general.

¹² Lubman, *Methodological Problems in Studying Chinese Communist "Civil Law,"* in *id.* 230.

¹³ Pfeffer, *Crime and Punishment: China and the United States*, in *id.* 261.

¹⁴ Cohen, *Chinese Attitudes Toward International Law—and Our Own*, in *id.* 282.

¹⁵ Pfeffer, *supra* note 13, at 262; see Cohen, *supra* note 14, at 289-93.

¹⁶ See Lubman, *supra* note 12, at 256.