Introduction

Making Legal Historians

The subjects of the essays included in Making Legal History range from local government in seventeenth-century New England to executive power in the Reagan administration and illustrate the variety of subjects and methods now being pursued by historians of American law. Some cast new light on perennial questions; others move in entirely new directions. About half focus on private law, the other half on public law. All rest on original research, and each could stand alone as an original contribution to the field. Taken together, they offer a unique and illuminating cross-section of the questions, sources, and narratives used by historians working in the field of American legal history today.

It is therefore fitting that these essays were first presented at a conference at New York University School of Law honoring William E. Nelson. Few fields of history are as vital and diverse today as American legal and constitutional history. That was not so in 1965, when Bill Nelson graduated from New York University School of Law and began doctoral studies in history at Harvard University. At that time, legal history often fell between law schools and history departments, with no home in either. Half a century later, the situation is quite different. Legal historians teach in law schools, history departments, and elsewhere, and the field has an array of journals, book series, and professional organizations. Annual conventions feature dozens of scholarly papers, and the literature of the field is growing exponentially. Indeed, the pace of publication outstrips the ability of even the most assiduous readers to keep up.
Probably no legal historian in the past generation has undertaken more original research, exploring a wider range of sources to pursue a broader array of questions, than Bill Nelson. Nor would it be easy to identify a legal historian who has composed more pages of compelling narrative answers to those questions. Bill Nelson has produced a remarkable body of scholarship—to date, fourteen books and more than seventy articles and essays—spanning the full course of American legal and constitutional history, from its colonial origins to twentieth-century New York. (A bibliography of Nelson’s work is appended to this volume.) Several of his books are methodologically innovative as well as essential for understanding their subjects. He also served for ten years as assistant editor of the American Journal of Legal History and many terms on the Board of Directors of the American Society for Legal History, an institution that supports the publication of books and a journal. Nelson’s record of scholarship alone would mark him as a central figure in the modern efflorescence of American legal history, and his writings have shaped the contributions of dozens of younger scholars.

Yet Bill Nelson has not been just an excavator, digging into legal records on a heroic scale. Nor has he been only a prolific author. He has also been one of the field’s great institution-builders. Through the Samuel I. Golieb Fellowship Program and the Legal History Colloquium, which he created and has administered at NYU since 1981, Nelson has shaped the careers of a generation of legal historians. Not only has he made much legal history—he also has helped to make a generation of legal historians.

The “Goliebs,” as they are often known, owe Nelson an enduring debt of gratitude, both for the year of training in legal history at NYU and for years of mentoring thereafter. The contributors to this volume (as well as its editors) are all former Golieb Fellows. The authors were students when they were Goliebs, typically completing their dissertations in history. Now they are tenured professors who have produced substantial publications, on average more than one book per contributor. For most of us, the year at NYU was our initiation into the field of legal and constitutional history. The Legal History Colloquium has long been one of the premier workshops for legal historians, who present work-in-progress to a revolving membership, including each year’s Golieb Fellows, for a demanding two hours of commentary and critique. In almost
every session of the Colloquium comes a moment when Nelson leans forward and says, “There are at least two things going on in this paper. Let’s set aside the things that are not all that original and have been done before. What’s new and interesting and hasn’t been done before is this . . .” As Nelson talks, outlining a sometimes radically reconceptualized version of the paper before the group, the presenter will seize a pen and begin to scribble notes destined to become a roadmap for recasting the project into a new, more interesting and useful form. Many of the leading studies in the field of legal history have first taken shape as papers presented to the Colloquium, and the distance between the original papers and the final articles and books is a measure of the value of the Colloquium and the assistance it has brought to generations of young and established scholars alike. These features make the Golieb Fellowship and the Colloquium unique in the field.

Yet Bill gave and continues to give the Goliebs even more. For all of his impressive achievements as a scholar and critic, perhaps his greatest contribution to the field has been the creation of a tight yet expanding network of scholars. Each Golieb is connected to Bill, and through Bill they connect to one another. It is an impressive web. More than one hundred Golieb alumni teach at dozens of law schools and history departments throughout the United States and around the world. Not only is Bill Nelson an indefatigable investigator of past communities; along the way, he has created a vibrant one that did not exist thirty years ago. Now, it’s difficult to imagine the field without it. We offer these essays to Bill in a tribute to his generous spirit and in appreciation of his tireless efforts on behalf of the Golieb Fellows and the field of legal and constitutional history.

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Our goal is to honor Bill Nelson’s convictions about the historical enterprise, above all the central importance of identifying a genuine problem, undertaking original research, and telling a compelling story. Bill’s “foundational assumption,” as he lays it out in The Legalist Reformation, his pathbreaking analysis of liberal jurisprudence in the courts of twentieth-century New York, is that “historians should rediscover forgotten data rather than rehash what is already familiar.” Time and again he has
told the Colloquium that deep, comprehensive research in the records of legal institutions and the legal profession distinguishes legal history from many academic pursuits in the legal academy, where theory and abstraction are often the starting and concluding points. The commitment to concrete historical facts of the law—facts revealing the fate of real people who staffed and used the legal institutions that created, regulated, and disciplined liberty and power—also distinguishes his historical vision from some of the more abstract concerns current in history departments. We have also heard him say that good data, though necessary, is not sufficient. The historian must also weave those sources into a story that illuminates important developments in the legal culture as well as in the larger society framing it. This enterprise enables the historian as well as the reader to “delight in the discovery of new knowledge and insight.”

A preference for original sources, arguments, and narratives is compatible with a wide variety of historical methods. In his approach to historical method as to the past itself, Nelson is reflexively pluralist. He is catholic about the types of history that count as contributions to the field, and his evaluative standards for judging scholarship are consciously nondoctrinaire. He has celebrated the boisterous diversity of “traditional history,” by which he means scholarship that does not hew to one methodology, and he has argued that it is “precisely this variety of theme, objective, and method that gives [historical] scholarship . . . its power.” The goal of legal history is first to identify real problems and then to offer evidence that enlightens or solves them. How precisely they are solved is not the main issue. The nature of the problem usually suggests the sorts of evidence and methods that might best produce answers. As long as the research is “competent,” meaning simply factually accurate, then the work cannot be criticized as bad—or as good. To be good, or powerful, a work must be both “unconventional” in some way and ultimately “influential.” By “unconventional,” he means the use of new sources and interpretations. His concern with influence speaks to a work’s ability to shape research agendas throughout the field. Methods are means to those ends, not the main event, and especially not the main measure of scholarly value.

Nelson often says that history is an intrinsically comparative enterprise, an exercise in comparative law. Unlike comparative law scholars,
though, American legal historians do not regularly compare different legal cultures in different places at the same time. Instead, they often examine legal ideas, institutions, and practices in the past and, with differing degrees of consciousness, compare and contrast them with formal or functional equivalents in the present. The point is not usually to trace legal genealogies but rather to understand the function and meaning of the law as rooted in particular times and places. Formal training in the law is not necessary to gain this insight—three of our contributors are not lawyers—but it has not hurt Nelson that he is an accomplished lawyer. (Indeed, listening to Bill’s descriptions of colonial legal practice—his first field of inquiry, to which he has returned in the past decade—is like being in the presence of the last surviving member of the eighteenth-century bar.)

Accordingly, the contributors to this volume set out to identify, interpret, and explain original sources in ways illuminating contemporary methods of writing legal history. They do not subscribe to a single programmatic theme or method. Instead, they ask different questions, use an array of sources, and tell their stories in individual ways. Together, they provide a kaleidoscopic image of the men, women, institutions, ideas, and practices that have made American legal history in the past and how historians make it into scholarship today. So the essays exemplify less a “school” of legal or constitutional history than a shared sense of scholarly purpose, one not limited to Bill Nelson or the Legal History Colloquium but one that he epitomizes in his own work and that he has inculcated into the Golieb Fellows for three decades. Call it a sort of ethical unity: an ethos of making history faithful to the past and yet alive for readers in the present.

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Two civil wars punctuate American legal history: the American Revolution and the Civil War of 1861–65. Contrary to Cicero’s dictum that in times of war the laws are silent, law pervaded both wars: before as a cause, during as a means, and after as a mechanism for changing the resultant political and social world. In “The Landscape of Faith: Religious Property and Confiscation in the Early Republic,” Sarah Barringer
Gordon explores the fascinating story of the legal battles over colonial church property ownership in the new republic. Much is known about the law and politics of disestablishment in the early Republic. But what happened to all the land, such as glebe lands, that established churches had received from colonial governments before the Revolution? Forgotten today, this question burned brightly in a few of the postrevolutionary states. Fights over how best to disestablish—how to think about church property in a newly disestablished jurisdiction—consumed state legislatures and courts for decades. Gordon traces the litigious fate of Church of England lands in Virginia and Vermont.

In “It cant be cald stealin’: Customary Law Among Civil War Soldiers,” Thomas C. Mackey explores the cognitive dissonance that Civil War soldiers, Union and Confederate, experienced as they left their ordinary lives, suffused with customary common-law understandings of property, and entered the military, where according to the laws of war they could appropriate personal property in a variety of circumstances. Back home, that appropriation might be called “stealing.” During wartime, however, such foraging was often legitimate and necessary. That it was “legal” did not, for many soldiers, lessen their unease. Instead, they felt compelled to explain their behavior to civilian correspondents back home—and to themselves. Examining rarely used personal correspondence by these soldiers, Mackey wonderfully captures the lived experience of legal pluralism among ordinary Americans who found themselves pulled between two legal orders, civilian and military, in the extraordinary circumstance of a civil war fought at home.

Daniel W. Hamilton turns in his essay, “Debating the Fourteenth Amendment: The Promise and Perils of Using Congressional Sources,” to the historically and constitutionally crucial question of the congressional understanding of the Fourteenth Amendment. Building on Bill Nelson’s insight that the congressional debates offer a view into deeply contested principles of legal and constitutional ideology, Hamilton argues that historians can analyze congressional debates (and others like them) as examples of legal ideology-in-action. Highly charged political debates over constitutional principles offer wonderful case studies for testing the relative autonomy of those principles.

The function of law as a mechanism of social regulation has long been a central concern to legal historians. The next four essays explore this old
question in exciting new ways. In “Was the Warning of Strangers Unique to Colonial New England?” Cornelia H. Dayton and Sharon V. Salinger examine the previously unused logbook of a colonial official charged with “warning out” strangers and discover that the warning-out usually did not result in banishment, as we might think, but served rather to mark that stranger as ineligible for local poor relief. Instead, those newcomers could stay (and many did stay, for many years), engaging fully in the town’s economic and civic life, and even remaining eligible for welfare from the provincial rather than the town government. Warning-out, it appears, functioned to sort those who could apply for local welfare from those who would have to seek aid from the colony.

Barry Cushman reads lawyers’ briefs and judicial opinions closely to explore free-labor ideology in “Ambiguities of Free Labor Revisited: The Convict Labor Question in Progressive-Era New York.” In the context of the debate over whether states could prohibit the sale of goods made with convict labor, the sellers invoked free-labor ideology as a defense of their right to trade in those goods. It’s an irony that recalls Nelson’s early work on the connection between antebellum antislavery ideology and late-nineteenth-century judicial formalism. Here, the sword of free labor also could be used as a shield, to protect manufacturers from legislation designed to promote goods made with “free” labor.

In “The Long, Broad, and Deep Civil Rights Movement: The Lessons of a Master Scholar and Teacher,” Tomiko Brown-Nagin asks how the legal history of the Civil Rights Movement would look if historians turned the focus away from such leading litigators as Thurgood Marshall and concentrated instead on “local people and ordinary Americans.” Approaching that history “from the bottom up” and focusing in particular on the complicated dynamics within local Southern communities, she finds an extraordinary diversity of views among local African American activists, including many who held more radical and hopeful views of the possibilities of constitutional change than did the leading NAACP lawyers, but also including those who preferred a “pragmatic” approach by emphasizing the economic and political empowerment of black communities rather than integration and colorblindness. Local community studies offer one way to recover the history made by ordinary people in American legal culture. The aggregation of data offers quite a different method toward the same goal.
John Wertheimer focuses on the promise and limits of quantitative method for legal historians in his essay, “Counting as a Tool of Legal History.” He rightly argues that some legal institutions, such as the jury, agency prosecutors, and the state census, cry out for more quantitative work, which, as he demonstrates with three examples, can illuminate the social and racial politics of law enforcement and statutory regulation in American history.

Courts, judges, and lawyers are traditional subjects for legal history. The essays in the final section demonstrate that when historians approach these institutions from new angles, ask new questions, and unearth new material, studies of courts, judges, and lawyers remain the richest topics in the field. In “A Mania for Accumulation: The Plea of Moral Insanity in Gilded Age Will Contests,” Susanna L. Blumenthal explores one of the most fascinating civil trials of the late nineteenth century—that focusing on the attempt to probate the will of “Commodore” Cornelius Vanderbilt, the controversial railroad magnate who died as the nation’s wealthiest man. The family fight over his fortune also was a source of almost obsessive popular interest owing to the murky circumstances of his last days. As Blumenthal shows, the legal and journalistic controversies swirling around the clashing attempts to challenge and to defend Vanderbilt’s ability to make a will shed new and unsettling light on evolving ideas of testamentary capacity, the effects of enormous wealth on the values and psychology of testators, and the roles of courts and psychological experts in resolving disputes over the dispositions of vast estates.

John Fabian Witt’s essay, “The Political Economy of Pain,” explores one of the great puzzles in twentieth-century tort law: How did pain and suffering damages move from the backwater of American law to become one of its main currents? Witt finds that plaintiff’s lawyers used pain and suffering damages as a vehicle for staving off legislative revision of tort law, a defensive collective action that, ironically, helped produce even more of the common-law litigation that reformers had wished to prevent. In so doing, Witt reminds us that courts include more actors than judges and juries: Trial lawyers sometimes coordinate to act as independent agents and thereby make more than just litigation; they make law and change the course of legal history. The last essay brings the collection up to the end of the twentieth century.
Reuel Schiller, in “An Unexpected Antagonist: Courts, Deregulation, and Conservative Judicial Ideology, 1980–94,” argues that the Reagan administration’s policy of “executive deregulation” largely failed because the federal courts rejected the administration’s attempts to do this—even during Reagan’s second term, when his appointees had come to dominate the federal judiciary. Judicial rejection of executive deregulation illustrates some of the contradictions in late-twentieth-century conservative ideology. Reagan-era conservatives were committed to anti-statist beliefs, out of which deregulation naturally flowed, but many also were committed to controlling “judicial activism.” The means deployed by these conservatives included textualism and a commitment to originalism in both constitutional and statutory interpretation. These approaches undermined executive deregulation. In this instance, conservative judicial method trumped conservative executive policy.

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The power of Bill Nelson’s scholarship comes from his hard-earned understanding of the craft-wisdom of past legal communities, his analysis of the social meaning of those ideas and practices, and his ability to put it all together in imaginative narratives written in lucid prose. He has exemplified this method for the Goliebs across three decades. The contributors to this volume wrote their essays with Nelson’s example and precepts in mind, and each reveals something strikingly new about the functions of lawyers and of law in past communities. They offer their essays in gratitude for Bill’s many years of support.

NOTES
2. Ibid.
5. “A critic must distinguish between plain errors of fact and factual interpretations derived from differing perspectives.” Nelson, ”Standards of Criticism,” 323.
7. “[N]o one hypothesis can generate as much insight into the past as can the
historian’s basic conceptual tool, the examination of changes over time,” a
belief that Nelson may have learned from his own dissertation advisor, Bernard
change over time, see James A. Henretta, Michael G. Kammen, and Stanley N.
Katz, eds., The Transformation of Early American History: Society, Authority, and
8. Though of course they do, for example in the new journal Comparative Legal
History.
9. Nelson was graduated first in his class at New York University School of Law;
clerked for Judge Edward Weinfeld of the U.S. District Court for the Southern
District of New York, known as a "judge's judge"; and then clerked for U.S.
Supreme Court Justice Byron R. White. He has since written illuminatingly
about both Weinfeld and White. For example: William E. Nelson, Edward Weinfeld:
In Pursuit of Law and Justice (New York: New York University Press, 2004);
Legacy for the Twenty-First Century,” University of Colorado Law Review 74:4
Thought About Himself,” Harvard Law Review 116 (November 2002): 9–12; Wil-
liam E. Nelson, “Justice Byron R. White: A Modern Federalist and a New Deal
Court in Historical and Political Perspective (Charlottesville: University Press
of Virginia, 1993), 139–54; and William E. Nelson, “Deference and the Limits
to Deference in the Constitutional Jurisprudence of Justice Byron R. White,”
Harvard University Press, 1975; reprint ed., with new introduction, Athens:
University of Georgia Press, 1994).
513–66.