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INTRODUCTION




On Legal Biography

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An introduction to a collection of legal biographies is usually accompanied by an apologetic justification for the merits of such scholarship. Biography itself is often regarded as a questionable exercise in academic scholarship¹ and legal biography has proven no exception to these questions.² Suspicions about the scholarship of biography arise from different quarters. Can a form that is so often the subject of popular interest also have academic merit? This question is compounded by the concern that those who are not academics so often undertake biographical writing. Its popularity, its position as 'a staple feature of publishing schedules, bookshops and literary supplements',³ detracts from its scholarship.⁴ And as Virginia Woolf recognized, a good biographer required 'gifts analogous to the poet's or the novelist's';⁵ a good legal scholar, it is thought, requires intellectual rigour, scientific methodology and scrupulous logic. The narrative which is required of a good biography appears to legal scholars as merely descriptive and the interpretative analysis which underlies the narrative is overlooked.

Much of legal biography is also attended by the criticism that it is written in a manner in which the personal life of the individual is detached from his (and it usually is his) legal or judicial accomplishments. Legal biography, more so than other forms of biography, has been dominated by what Woolf referred to as the Victorian biographer's preoccupation with 'the idea of goodness... [n]oble, upright, chaste, severe; it is thus that the Victorian worthies are presented'.⁶ English legal biographies in the twentieth century came, also, to become concerned with the enthusiastic, sometimes melodramatic, accounts of the great

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¹Richard Holmes, 'The Proper Study?', in Peter France and William St Clair, eds., *Mapping Lives: The Uses of Biography*, Oxford, 2004.

²R. Gwynedd Parry, 'Is Legal Biography Really Legal Scholarship?', 30 *Legal Studies* (2010), 208.

³Mark Bostridge, 'Preface', in Mark Bostridge, ed., *Lives for Sale: Biographers' Tales*, London, 2004, xi.

⁴As Parry noted, the legal dimension of legal biographies in this context acted as a 'backcloth to the subject's more salacious activities': Parry, 'Is Legal Biography Really Legal Scholarship?', 212.

⁵Virginia Woolf, 'The Art of Biography', in Virginia Woolf, *Collected Essays*, vol. 4, London, 1967, 223.

⁶Virginia Woolf, 'The New Biography', in *ibid.*, 231.

barrister's activities.⁷ A related problem is that legal biography is often depicted as the individual histories of great men and how they changed the course of history. Such biographies, as Laura Kalman has observed, are not in vogue; they are an 'unusually old-fashioned subject of an unusually old-fashioned field, political history'.⁸ Finally legal biography straddles that uneasy divide amongst legal historians, between an internal legal history concerned with a self-contained lawyer's world of rule development and an external legal history concerned to set, and explain, law and legal development within a broader historical context.⁹

And yet, despite these criticisms, a series of arguments exist to establish legal biography as scholarship fit for the twenty-first century. One is the popular appeal and interest presented to all manner of readers. Human curiosity in the lives of others, a 'natural nosiness'¹⁰ in the words of Kalman, acts to create interest in biography. Yet interest spurs education. Legal biography creates an access point for scholars in other disciplines and for ordinary people into the life and development of the law. Barbara Tuchman, writing more generally about history and biography, famously observed that '[a]s a prism of history, biography attracts and holds the reader's interest in the larger subject'.¹¹ The same process is true for legal biography: a thorough study of the legal life can provide larger generalizations about law and legal structures.

Linda Mulcahy and David Sugarman have demonstrated that legal biography is a form of scholarship which can provide an understanding of lives which would otherwise be obscure.¹² These legal biographies, in turn, can disrupt and reform conventional understanding about law and society, lawyers and legal processes. As Sugarman has argued, 'legal life writing, broadly conceived, offers new ways of advancing legal history and socio-legal scholarship, and of encouraging interdisciplinary dialogue between them, and also with other fields and audiences'.¹³

Within the common law world, individual judges, in particular, wield an enormous power over the development of law. The judge is also, of course, a product of his (or more recently her) environment. And the exploration of how these elements interact in particular instances and over time provides a greater contextual understanding of law and legal actors. For these reasons, Philip Girard has argued that judicial biography, set within particular themes other than the purely legal, has the potential to make major contributions to the socio-legal history of the common law world.¹⁴ Patrick Polden has already,

⁷Parry, 'Is Legal Biography Really Legal Scholarship?', 210–212.

⁸Laura Kalman, 'The Power of Biography', 23 *Law and Social Inquiry* (1998), 479, 482.

⁹Parry, 'Is Legal Biography Really Legal Scholarship?', 220–222.

¹⁰Kalman, 'The Power of Biography', 480.

¹¹Barbara E. Tuchman, 'Biography as a Prism of History', in Marc Pachter, ed., *Telling Lives: The Biographer's Art*, Washington, 1979, 133.

¹²Linda Mulcahy and David Sugarman, 'Introduction: Legal Life Writing and Marginalized Subjects and Sources', 42 *Journal of Law and Society* (2015), 1.

¹³David Sugarman, 'From Legal Biography to Legal Life Writing: Broadening Conceptions of Legal History and Socio-legal Scholarship', 42 *Journal of Law and Society* (2015), 7, 11.

¹⁴Philip Girard, 'Judging Lives: Judicial Biography from Hale to Holmes', 7 *Australian Journal of Legal History* (2003), 87, 106.

convincingly, demonstrated how individual judges affect the course of legal development.¹⁵

Thomas Carlyle's observation that 'History is the essence of innumerable Biographies'¹⁶ is well known and, while frequently rejected in the modern world for its espousal of 'great man history', the power of individuals over events is hard to reject entirely.¹⁷ This is particularly true of legal actors in the common law world. It is also the case that the life writing of a 'great man' has, itself, changed considerably in the last century. Lytton Strachey led this process in his *Eminent Victorians*, in 1918, heralding a new biographical form which called for a reconsideration of the historical role of individuals.¹⁸ Later twentieth century biographers, in the tradition Woolf called 'the new biography', came to examine different and more personal aspects of individuals. These changes were slow to reach English legal biographies but emerged fully in Nicola Lacey's biography of HLA Hart.¹⁹ Lacey examined material many thought too intimate to be included in a legal biography because she sought to demonstrate how Hart's life drove his ideas and how his ideas impacted upon his life. Only by examining Hart's life in its entirety could one understand his ideas.

This issue of the *Journal of Legal History* provides biographies of three English judges of the late nineteenth and early twentieth centuries and the critical challenge of feminist legal biography. Two of the judges considered remain familiar to common law lawyers, Edward Fry (1827–1918) and Nathaniel Lindley (1828–1921), partly because of the enduring nature of so many of their judgments and partly because of their association with influential academic treatises. The third judge, Walter Phillimore (1845–1929), bears a familiar surname but, perhaps, a less recognizable individual role. We deal with them by order of birth and death. We end with a critical assessment of the Victorian model of 'great man' biography.

Catharine MacMillan identifies a forgotten aspect of Fry's life, that he was England's first Quaker judge. Fry and Lindley were contemporaries, yet their biographies are far from identical. If Lindley was something of a judicial insider, Fry was anything but. MacMillan's article considers Quakers and their often-complex relationship to the law, setting Fry within this milieu. Fry's Quakerism had a profound impact upon his legal life and, at the same time, his legal life had a profound impact upon his Quakerism. MacMillan uses biography as a lens to explore Fry's life and to explain his actions. The

¹⁵Patrick Polden, 'Mingling the Waters', 61 *Cambridge Law Journal* (2002), 575.

¹⁶Thomas Carlyle, 'On History', in Thomas Carlyle, *Critical and Miscellaneous Essays*, Boston, 1858, 220.

¹⁷See the short debate between Diarmaid MacCulloch, Jane Ridley, Sean Lang and Lucasta Miller, 'Is There Still Value in "Great Man" History?', 69 *History Today* (2019), 8.

¹⁸Laura Marcus, 'The Newness of the "New Biography": Biographical Theory and Practice in the Early Twentieth Century', in France and St Clair eds., *Mapping Lives*, 193–218.

¹⁹Nicola Lacey, *A Life of H.L.A. Hart: The Nightmare and the Noble Dream*, Oxford, 2004.

article is not only concerned with understanding Fry's approach to law-making but also his contribution to academic scholarship and legal writing.

Victoria Barnes employs Lindley's life to examine how, and why, autobiography, a life itself and legal biography are distinct entities. In so doing she considers Lindley's life, and sets it within the intellectual, political and professional scene of his time. She explores his own personal insights into his family life before providing a careful analysis into the advancement of his legal and judicial career. She shows Lindley's strong identification with his professional persona, which seems to be a common trait within the legal profession, especially, perhaps, within its elite. Lindley's legal contemporaries, who were insiders, constructed their self-identity in a similar fashion.

Charlotte Smith's article begins with an explanation of how a twenty-first century judicial consideration of the role of church and state was underpinned by the religious beliefs of Phillimore. The nature of Phillimore's beliefs, as an Anglo-Catholic, Smith argues, determined much of his legal and judicial career. Her account of his life also tells us much about Phillimore's background, his judicial career and his embeddedness within the socio-political elite. She proceeds, in scrutinizing Phillimore's life, to explain why an awareness of history is important when using the past. This speaks to a larger question how legal history can be deployed in modern law-making. Smith's analysis of Phillimore's life also strengthens and enriches our understanding of the religious and legal history of the nineteenth century.

Rosemary Auchmuty and Erika Rackley challenge the traditional approach of legal biography from a feminist approach. As they explain, feminist legal biography is not just concerned to uncover the lost lives of women but also to focus upon gender, the relationship between the sexes. While legal history is dominated by men, an explanation of their lives requires a consideration of the ways in which these men maintained their position in society. An exploration of how they excluded and marginalized women professionally, whilst relying upon the private support of women family members, is a necessary consideration in legal biographies. The article concludes on a cautionary note of common pitfalls in presenting the legal biographies of women and those of men.

These four contributions, with all their differences in approach and focus, have a unifying feature. They highlight how legal actors are shaped by their gender, religion, family relationships and education, and how these factors influence their views on legal matters. At the same time, they do not purport to provide a representative sample of the scholarship. One of the reasons is that they all stay within the sphere of British legal history, broadly understood.

As usual, a comparative perspective opens up further avenues for research because it sharpens awareness for aspects that tend to be overlooked by those operating within the framework and the parameters of a single legal system. If

we turn to the major continental legal systems, for example, we witness a few general tendencies that resemble the British historiographical landscape. If anything, the hostility towards biographical writing and a corresponding preference for social, structural and contextual approaches were even more pronounced in the French and German historical scholarship of the 1960s and 1970s. As in Britain, the following decades witnessed a decisive biographical turn that has led to the current ubiquity of life stories of greater and lesser historical figures. All of a sudden, individual biographies were seen as indispensable elements of a history of mentalities, networks and everyday life.²⁰ Continental legal history, occupying a similarly ambivalent position between legal and historical scholarship as its British counterpart, has followed suit with its customary time lag. Since the turn of the millennium, the genre of legal biography has become firmly established, in Germany even more than in France.²¹ As in Britain, it has been mostly limited to ‘old white men’.²²

This is where the similarities end. The most obvious difference concerns the profession of those whose lives are chronicled. As opposed to the prominent judge who has been the typical object of the traditional British biography, continental life stories are almost invariably dealing with legal scholars. These, in turn, have been almost invisible in British historical writings.²³ This does of course reflect the very different roles played by either group in the legal development of their respective jurisdictions. On the continent, particularly in Germany, it is the jurists who have traditionally been most visible in the development of the law, not least because they often doubled as judges and legislators.²⁴ In contrast, the individual contribution of judges to lawmaking usually remains hidden behind the façade of the collective judgment of ‘the court’. Judges therefore only tend to be the object of a biography if their lives are particularly interesting for reasons other than shaping the law.²⁵ More recently, other members of the legal professions have come into focus, too. The considerable role of advocates and public prosecutors in the development of the law is reflected in a small, but growing number of legal biographies. This trend is only discernible in recent scholarship in the common law world. The term ‘legal biography’ is part of a general shift and

²⁰For a recent overview, see Hans Renders, Binne de Haan and Jonne Harmsma, eds., *The Biographical Turn: Lives in History*, London, 2017.

²¹Martin Otto, ‘Biographien allüberall. Zur aktuellen Blüte der rechtshistorischen Biographie’, 36 *Zeitschrift für Neuere Rechtsgeschichte* (2014), 142.

²²For the efforts to overturn this, see Rosemary Auchmuty and Erika Rackley, eds., *Women’s Legal Landmarks*, Oxford, 2018.

²³Susan Bartie, ‘Histories of Legal Scholars: the Power of Possibility’, 34 *Legal Studies* (2014), 305.

²⁴Stefan Vogenauer, ‘An Empire of Light? Learning and Lawmaking in the History of German Law’, 64 *Cambridge Law Journal* (2005), 481.

²⁵See Marike Hansen, *Erna Scheffler (1893–1983)*, Tübingen, 2019. The clue is in the sub-title, which translates as *First Female Judge of the Constitutional Court and Trailblazer for a Society Based on Gender Equality*.

this scholarship now encompasses biographies of those legal actors, who were not judges, and those biographies, which do not use life stories to explain the outcome of case law.²⁶

Further differences in the genre of legal biography flow from two related features of continental legal systems. First, until very recently lawyers were much more specialized than their opposite numbers in the common law, and this was true not only for academics but also for judges and practitioners. As a result, their professional lives were closely intertwined with the doctrinal development of their particular area of expertise. A good legal biography therefore automatically becomes a major contribution to the history of, say, labour law, private international law or criminal procedure in a way that would be impossible for the life story of a judge of a British superior court with its idiosyncratic caseload or a nineteenth century London barrister with his wide variety of briefs. This feature has also led to a sub-genre of continental legal biography that recounts the history of a particular area of law through the lives and works of selected scholars;²⁷ something that has only been attempted very recently in the United Kingdom.²⁸

Second, the academic teaching of law in the universities has a much longer tradition on the continent than in England, and also until relatively recently the number of law schools was much higher. As a result, there are many institutional histories of law faculties, often produced on the occasion of anniversaries, which unfailingly turn into collections of legal biographies.²⁹ Compare this to FH Lawson's masterly *The Oxford Law School: 1850–1965* where personalities come into sight here and there, but where the focus is much more on the institution with its governance, syllabi and rituals.³⁰ Continental legal life stories are thus often closely connected with regional and local 'schools' of legal thought in a way that does not seem to be explored in Britain. There, the link between legal biographies and institutions is made with a view to particular courts or judicial offices, as in the infamous *Lives of the Lord Chancellors*.³¹ Perhaps future legal historians will rather analyze the 'Oxford school of contract law', the 'Cambridge approach to legal history' or 'Warwick socio-legal studies'.

²⁶David Sugarman, 'Brian Simpson's Approach to Legal Scholarship and the Significance of Reflections on "The Concept of Law"', 3 *Transnational Legal Theory* (2012), 112; Fiona Cownie, 'The United Kingdom's First Woman Law Professor: An Archerian Analysis', 42 *Journal of Law and Society* (2015), 127.

²⁷See Stefan Grundmann and Karl Riesenhuber, eds., *Private Law Development in Context: German Private Law and Scholarship in the 20th Century*, Cambridge, 2018.

²⁸James Goudkamp and Donal Nolan, eds., *Scholars of Tort Law*, Oxford, 2019; Catharine MacMillan, 'Legal Development from a Comparative Perspective: English Contract Law in the Nineteenth Century', in Joshua C. Tate, José Reinaldo de Lima Lopes and Andrés Botero-Bernal, eds., *Global Legal History: A Comparative Law Perspective*, Abingdon, 2018, 37–52.

²⁹Most recently, Tilman Reppen, Florian Jeßberger and Markus Kotzur, eds., *100 Jahre Rechtswissenschaft an der Universität Hamburg*, Tübingen, 2019.

³⁰Oxford, 1968.

³¹John Campbell, *The Lives of the Lord Chancellors and Keepers of the Great Seal of England*, vols. I–VII, London, 1847–49; Robert F. Heuston, *Lives of the Lord Chancellors*, vols. I and II, Oxford, 1964 and 1987.

The genre of legal biography thus changes its shape and focus according to its jurisdictional context. If anything, this short introduction should have highlighted that the methodological and historiographic challenges of legal biographies are not yet fully explored. They were discussed at a transnational workshop at the Max Planck Institute for European Legal History in Frankfurt on 2 and 3 July 2019 which was co-hosted with King's College London, and where the contributions to this issue were first presented.

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No potential conflict of interest was reported by the author.

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