HISTORICAL INTRODUCTION TO LEGAL STUDIES. By M.H. Ogilvie. Carswell, 1982. Pp. xi, 399. ($20.00 soft cover, $41.25 hard cover)

The format of this book is unique. I know of no other book on legal history that attempts to synthesize political, constitutional, social and legal history. I hesitate over the words "legal history" because I am not entirely sure what they mean,[1] but Ogilvie has given serious thought to that question, asking herself, "Given a class of law students whose knowledge of history may range from Grade 8 to post-doctoral, how can I best describe legal concepts in a broad context?" No one would say that her book is a perfect vehicle for meeting that objective, but she has created a remarkably concise and entertaining introductory text.

Good histories of constitutional law have been written in the past. Maitland's book is, like all his work, a model of historical scholarship.[2] W.P.M. Kennedy wrote an excellent volume on the history of Canadian constitutional law,[3] and Knappen and Lyon are more recent examples.[4] However, such works tend to have a narrow focus on major events, figures and institutions of State. They are essentially about political science and public law, with little about the chemistry of personality and only a sparse examination of the ways in which the big cogs of government have meshed with the smaller cogs of public opinion, practical administration and implementation of that power in the public arena. In contrast, there have been all too many studies of nineteenth and early twentieth century cabinet government with endless descriptions of what Lord X said to the Duke of Y when the Queen asked Lord Z to form a government. In the same vein, but at the other extreme, is the "I wonder what the peasants are doing tonight" study, with its minute descriptions of the workingmen's clubs in South Lancashire that met three times and then disbanded either because they could not agree on some internal administrative problem or because some of them wanted three rather than five workers on the benches of revolutionized inferior courts. Such "micro-studies" have their uses but they have now gone a little too far in recognizing the contributions of the proletariat, ignoring not only the actual power wielded by Lord X in cabinet, but also the "lore" dispensed by Sir Somebody Somebody, Permanent Under Secretary of the Department of This or That. I am relieved that Ogilvie resisted these approaches and am similarly grateful that she ignored the

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[1] Parker, *The Masochism of the Legal Historian*, 24 U. TORONTO L.J. 279 (1974).

[2] F. MAITLAND, THE CONSTITUTIONAL HISTORY OF ENGLAND (1908).

[3] W. KENNEDY, THE CONSTITUTION OF CANADA 1534-1937: AN INTRODUCTION TO ITS DEVELOPMENT, LAW AND CUSTOM (2nd ed. 1938).

[4] M. KNAPPEN, CONSTITUTIONAL AND LEGAL HISTORY OF ENGLAND (1964); B. LYON, A CONSTITUTIONAL AND LEGAL HISTORY OF MEDIEVAL ENGLAND (2nd ed. 1980).

siren call of the Hurstian or Wisconsin School[5] to write her treatise in turgid sociological prose. If she had followed such a route, we might have had the world history of English law written from the perspective, and with the aid of the voluminous archives, of the East Anglian coracle manufacturing industry between 1462 and 1581.

In the last few years, there have been good books on strictly legal history — Baker and Milsom come immediately to mind.[6] They are fine works but they have a sterile quality. Milsom's book, in particular, is a wonderful distillation of knowledge about the concepts of law but offers very little about the social environment in which the law evolved. Only occasionally does he give us an inkling of the larger picture. For instance, in the chapter on crime (admittedly not a major interest of the author), Milsom makes a telling point when he describes the history of criminal law as "miserable", and says so much (and so little) when he states that crime was simply not the business of lawyers.[7]

Although I would be the last person to disagree with Maine's observation that the history of the law is secreted in the intricacies of procedure,[8] it has been all too easy in the past for legal historians to become bogged down in antiquarianism and the masonic mysteries and cleverness of legal concepts. The "archeological" work of the Selden Society was inevitable and essential but it's time that legal historians, particularly those in the law schools, were more broadly educated in social history and less dedicated to the history of law, legal concepts and legal institutions. Of course, this is more difficult in any study of the medieval period because the preponderance of available data is legal in nature. That is not true for modern legal history however, and it is heartening to see some revisionist history being written that takes into account the extra-legal forces that have shaped landmark decisions.[9]

Margaret Ogilvie teaches a course in an undergraduate programme. She has obviously discovered that her students know very little history. To remedy this she has written a story that describes the political background of the times, the personalities of the people who ran the important institutions and the nature of their jobs and relates these to the law, the courts and the legal profession. Occasionally her background descriptions are a little cryptic but we must remember that she is trying to write a 1000-year history of the law, and much else, in less than 400 pages.

I like the book because it is opinionated. Ogilvie, for example,

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[5] *See, e.g.*, J. HURST, LAW AND ECONOMIC GROWTH: THE LEGAL HISTORY OF THE LUMBER INDUSTRY IN WISCONSIN: 1836-1915 (1964).

[6] J. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY (2nd ed. 1979); S. MILSOM, HISTORICAL FOUNDATIONS OF THE COMMON LAW (2nd ed. 1981).

[7] MILSOM, *id.* at 403.

[8] H. MAINE, ANCIENT LAW (14th ed. 1891).

[9] *See, e.g.*, A. SIMPSON, CANNIBALISM AND THE COMMON LAW (1984).

seems to be an adherent of the "Norman yoke" viewpoint but without taking it too seriously; the result adds spice to her narrative. She plays down the role of Edward I, the English Justinian. However, she leans toward the Royalist cause, an orientation that I find a little incomprehensible, particularly in its underestimation of the important reforms that the Cromwellian regime had planned for England; the Restoration caused a very long postponement of those improvements to the law.

Ogilvie is too busy writing history to give much thought to its theoretical underpinnings but I think she strikes the right mix of background information and technical description of legal institutions and concepts. If we are to understand the law, we need some social and political background. She has provided that background and has shown the way in which the law has developed from it. The best way to explain her approach is to examine some of her perceptions. The following, for instance, is a neat rationale for feudalism:

> Relinquishing land in exchange for the protection of one's life was a hard decision, but rendered less painful when permitted to continue to live on the land and to work it. Services on the land would in turn become consideration for protection. An abstract legal concept of property facilitated this exchange: the land was owned by the lord but in the possession of the tenant. The nature of the service, whether it was knight-service, prayers or tilling manorial fields, was incidental to the relationship.[10]

This is an excellent description, and one wishes that all law students engaged in the study of property law could start with this notion of tenure.

When describing the transition of a society previously devoted to a land economy, Ogilvie once again shows a deft and sure touch when she notes that "[t]he replacement of a feudal economy by a money economy and the movable wealth associated therewith challenged Angevin ingenuity to assess taxes in relation to the value of personal property owned".[11]

Similarly, when she describes the first institutions we could call courts, she says of the Court of Common Pleas in the early thirteenth century that it was "little more than a sub-committee of the curia regis rather than a separate court in its own right".[12] She also shows great economy and accuracy in tracing the legal evolution of criminal procedure; "Compurgation was now unreliable and trial by combat impossible since in most criminal actions the king was the prosecutor."[13] To explain a crucial change in the nature of the trial process, she writes:

> In the past judges have been suspicious of sworn evidence, preferring instead to rely upon the opinion of the community expressed by the jury. However,

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[10] P. 29.
[11] P. 65.
[12] P. 69.
[13] P. 72.

> the break-up of feudal and manorial social structures, especially after the Black Death, produced less closely-knit communities than before so that community opinion accounted for little when community members could no longer be expected to know what their neighbours were up to. Thus witnesses under oath were heard and juries were required to evaluate the evidence given in assessing guilt or innocence. Once such evidence was permitted rules of evidence grew up to regulate acceptable oral evidence, relating to the competence of the witnesses to testify, the relevance and materiality of what he wished to say and how the jury should evaluate what they heard. As a corollary to the admission of sworn evidence, pleading by barristers to ensure that the evidence was properly understood increased. Both civil and criminal juries acquired new roles in the judicial process as a result.[14]

On the civil side, she discusses the forms of action, but leaves us mystified as to why the barons were so upset by the proliferation, admittedly gross, of writs in the thirteenth century. Was this because of a fear that the law would be uncertain, or were the barons afraid that their interests were being attacked by this increase in civil remedies? Ogilvie does offer, however, this explanation of the innovations of the fourteenth century:

> The writ of trespass was further expanded to trespass against the peace of mind of the plaintiff, in that when the defendant had assumed (*assumpsit*) an obligation and then failed to fulfil it, he had trespassed on the plaintiff's peace of mind and should pay damages to remedy the situation.[15]

On the same subject, the author makes an interesting point in suggesting that once pleadings changed from the oral to the written "with its attendant concentration on details and once the practice of sending cases for judgment in banc to Westminster had developed, the logical and synthetic system of legal principles which is the common law grew up".[16] This is a theme that deserves much more attention from intellectual historians of the law. Legal scholars need to acquaint themselves with their own legal heritage rather than indulging in third-hand Lit. Crit. or jumped-up pseudo-political science.[17] Notice Ogilvie's common-sense description of the legal historical significance of Magna Carta:

> Drafted in the form of a charter conveying land, . . . contemporaries called it "great" not because they perceived that it would come to be regarded inaccurately as the legal foundation for human liberties and democratic government but merely because of its length.[18]

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[14] P. 154.

[15] P. 155.

[16] P. 199.

[17] *Compare* the depth of understanding of White, *Law as Language: Reading Law and Reading Literature*, 60 TEX. L. REV. 415 (1982) to the more superficial contribution of Fish, *Interpretation and the Pluralist Vision*, 60 TEX. L. REV. 495 (1982). *See also* J. WHITE, WHEN WORDS LOSE THEIR MEANING (1984).

[18] P. 73.

When analysing the doctrine of the supremacy of legislation, Ogilvie gives a perceptive explanation of the continuing influence of the common law despite the supposed pre-eminence of Parliament:

> Many members of Parliament were lawyers and a natural alliance between Parliament and the law was cemented in the fourteenth century. Parliament upheld the law, but Parliament also did not interfere with the common law declared in the courts. There was no need to when the same types of men dominated the Parliament and the bench; they could trust one another to apply similar principles in their respective spheres of endeavour.[19]

As stated earlier, Ogilvie is not very sympathetic to the law reform efforts of the Commonwealth. Yet, to be fair, she allows that, with the Restoration, the "law could once more blissfully cocoon itself in its own snug, smug practices and traditions".[20]

And in considering the eighteenth century, Ogilvie shows that the common law continued to predominate, and she offers this explanation:

> Parliament took little interest throughout the century in reform of either the system or the common law and such statutory interventions as there were were comprised of private acts dealing with such matters as enclosures or the creation of *ad hoc* bodies and statutes dealing with the maintenance of law and order especially at the turn of the nineteenth century when the level of civil unrest in Britain was high. Absence of fear at incurring the royal wrath and parliamentary disinterest in legal reform by statutory enactment produced a century of clever, strong-willed and strong-minded judges who were not only dedicated to the traditions, customs and ethos of the common law built up over past centuries but who were also confident in their abilities to mold these to the new world.[21]

Ogilvie's book suffers from some predictable weaknesses but they are not so much of her own making as they are deficiencies in the way we have traditionally studied and researched the law. For example, her book is weak on statutory law, particularly that of the modern period; this reflects the serious lack of attention paid to that half of the law by law schools. This introductory text is also rather thin in its treatment of Canadian law. This is understandable in view of the small amount of data available at present, although that is now beginning to change, particularly with the important contribution of the Osgoode Society.

Ogilvie has written a pioneering book and I congratulate her on her vision, her very wide reading and her *jeu d'esprit*.

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[19] P. 153.
[20] P. 267.
[21] P. 314.

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