Worth a Volume of Logic: The Study of Legal History at the Law School

By Meredith Heagney
If you’ve ever walked into Professor Richard Helmholz’s office, you know about the very old books. Dozens of thick tomes, lined on shelves along their worn, hand-bound spines, cover nearly the whole east wall. Most are hundreds of years old, and in Latin. For Helmholz, one of the world’s top historians in medieval and early modern English law, these books are anything but irrelevant old volumes.

As Oliver Wendell Holmes wrote in 1921’s *New York Trust Co. v. Eisner*: “a page of history is worth a volume of logic.” Helmholz takes it further: “If history is important, it’s important to get it right. We need to understand what happened on the ground and what it meant then.”

Legal history is dedicated to this pursuit, of understanding today’s laws and debates in the context of the past. It is much more than a recollection of dates and characters, but rather a science with its own methodology and ethos. All law, in a sense, is legal history, as it is built on precedent and shaped by its time.

At the Law School, three professors dedicate much of their time to teaching and writing about legal history. Helmholz, Ruth Wyatt Rosenson Distinguished Service Professor of Law, is joined by Alison LaCroix, Professor of Law and Ludwig and Hilde Wolf Teaching Scholar, and Laura Weinrib, Assistant Professor of Law. All three have a PhD in history as well as a JD.

Three well-regarded and active legal historians on one law faculty is an impressive number, said Patricia Minter, Associate Professor of History at Western Kentucky University and membership chair for the American Society for Legal History.

“One of the great strengths of a law school of the rank and reputation of Chicago is that they have three legal historians and others who are interested in the field, and this gives them a gravitas that is difficult to duplicate elsewhere,” Minter said.

Two Department of History professors, Jane Dailey and Amy Dru Stanley, also do important work in legal history and have appointments at the Law School.

The Law School’s legal historians each have their own specialty. Helmholz, a fellow of the American Academy of Arts and Sciences who has taught at the Law School since 1981, earned his PhD in medieval history from the University of California, Berkeley, five years after his JD from Harvard Law. In his history program, he developed an
LaCroix focuses on eighteenth- and nineteenth-century US legal and intellectual history. “What I like to do is study the history of ideas and use all these diverse sources to understand what these ideas meant at a given time,” she said. She was a history major in college at Yale University, where she also earned her JD in 1999. She took one seminar in legal history during law school; amazingly, a majority of the students in that seminar are now legal historians. She practiced law for a short time and then went to Harvard for her PhD, which she completed in 2007.

Much of LaCroix’s work centers on federalism, such as whether Congress can compel the states to take certain actions because of the spending power conferred in Article I of the Constitution. Today, those debates are around topics such as health care and immigration, but LaCroix looks to contextualize them by examining the debates of the past, such as the founding-era debates about giving Congress a veto over state laws, the Fugitive Slave Acts, and the public works projects of the early nineteenth century. She challenges common assumptions about the way the Supreme Court has “always” acted and shows that other approaches to federalism were taken in the past.

For example, she said, the modern Supreme Court has often taken a strongly protective view of state sovereignty. It has held that it is not up to the states to consent with federal laws, but rather the job of the courts to protect...
them from commandeering by Congress. This means that the Court has overruled acts of Congress even when the states have consented. But a review of the historical sources reveals that this view was not always held by legal and political actors in the federal government. For example, during the first decades of the nineteenth century, the consent of a given state was a key element in the debate about federal funding of public works projects, such as roads and canals. This and many other examples illustrate that ideas about federalism are far from fixed, LaCroix said.

Weinrib, a 2003 graduate of Harvard Law, completed her history PhD in 2011 at Princeton University. Her specialty is twentieth-century American legal history, with an emphasis on the history of civil liberties and labor history.

Weinrib’s attraction to legal history is that it gives scholars the “critical distance” to see the way law shapes social and cultural ideas and the way those ideas shape the law, she said. Legal history is a reminder that even concepts that we take for granted, such as the First Amendment, were anything but inevitable developments. Sometimes, we falsely see history as a slow progression toward ideal forms of laws and norms, she said, but really those laws and norms are the product of contending ideas about access to justice.

“I think history can help us recover lost paths that are useful in contemporary approaches to the law,” she said. She chooses to teach in a law school, rather than a history department, because she wants her work to have contemporary policy implications, which means it helps to be surrounded by people working on contemporary legal problems.

“I have a lot to learn from political scientists, philosophers, economists, and others who are studying the law,” she said. “In the time I’ve been here, my work has become much richer because of the conversations I’ve had.”

Now, she’s working on a book about the history of the modern civil liberties movement in the United States, with a focus on the period between World War I and World

**LACROIX HELPS DEVELOP NEW FIELD**

Professor Alison LaCroix, a legal historian, taught the Law School’s first class on law and linguistics over Winter Quarter with Jason Merchant, Professor of Linguistics and Deputy Dean for Languages and Instruction in the University’s Division of the Humanities.

The class, Historical Semantics and Legal Interpretation: Questions and Methods, was a seminar that taught students to use the methodologies of linguistics to gain a better understanding of historical jurisprudence. The meaning of words and phrases change greatly over time; this is a way to analyze those changes in legal contexts, whether in the Constitution, statutes, codes, contracts, or any other source of law.

For example, in the Second Amendment, the words “keep and bear arms” invite many interpretations of meaning. Using linguistics methods and new search technologies, a legal scholar can find uses of that phrase in historical texts and gain an idea of its changing use over time.

This is a new field, and LaCroix and Merchant plan to publish together on the subject. Their class was supported by a grant from the Center of Disciplinary Innovation, part of the University’s Franke Institute for the Humanities.

“It’s very exciting, because it feels like something that could have a real impact on how judges decide cases,” LaCroix said. “It has really enormous applications across all fields of law, to tell us something that is the real goal of legal practice and legal scholarship: what do legal words and phrases mean, and how do we know?”

Merchant, who studies the interface between syntax and semantics, said the course combines their respective areas of expertise: LaCroix is an expert in the legal texts and their ambiguities, while he knows the technology and methodologies of linguistics, which takes a mathematical approach to analyzing language. Most of the students in the class were linguistics students, though a few law students did participate.

“It’s great to work with an expert on early American federalism and constitutional law like Alison, and even more fun to coteach with her,” Merchant said.
War II. She argues that it was this era in which the modern concept of civil liberties as rights asserted against the state and enforced through the courts emerged. It grew out of the labor movement and involved unlikely coalitions across the political spectrum.

The book will explain how a social movement evolved and grew and used the courts as an agent for change, which has relevance for plenty of modern causes, Weinrib said. The work also dives into the many limitations of the courts when it comes to the expansion of rights. Helmholz, LaCroix, and Weinrib all agree that you can be a legal historian without having both degrees, but it does have its intellectual and practical benefits. For one, each discipline teaches distinct skills that are hard to pick up as an outsider. Two, in a competitive academic marketplace, top schools want their legal historians to have all the credentials. Scholars with JD/PhDs have training in the methodology of legal history, which involves intense reading of historical sources and learning the existing historiographical debates. “This is not just narrative, telling a story of the past,” Weinrib said. “It is constructing arguments about the past.”

LaCroix agreed, adding that a legal historian’s job is to investigate the source material without anticipating the outcome beforehand. Like law and economics, the data has to bear out, she added. To do that kind of research, it’s very helpful to have a full understanding of both legal and historical literature. “It’s hard to pick that up on the fly,” LaCroix said.

These days, almost all legal history is done in law schools, said Dailey, the history professor. She considers herself a historian with a legal interest, not a legal historian. She doesn’t have the JD, and “it’s close to essential” if your work is legal history, she said. Much of Dailey’s work is on the civil rights movement; she started working with law professors to gain some legal training and make her research better. Obviously, legal scholars “grip on the law is surer than historians who haven’t had the formal law school training,” Dailey said. She also expressed gratitude for Dean Michael Schill’s support of legal history within the history department, where he has made funding available to PhD students who already have JDs and want to teach in law schools one day. This has helped the history department compete with other top schools for these students, Dailey said.

The Law School also hosts the annual Maurice and Muriel Fulton Lectureship in Legal History, created in 1985. Maurice Fulton is a member of the class of 1942, and his wife Muriel is an alumna of the University. Since its inception, the Fulton Lecture has grown in size and reputation. Last year, Professor David Armitage of the history department at Harvard University presented a critical history of the conceptions of civil war and its evolving legal definitions. This year, Professor Tomiko Brown-Nagin of Harvard Law School will speak on the life and legacy of Judge Constance Baker Motley, the first African-American woman
appointed to the federal judiciary.

Mr. Fulton said there was no legal history class when he was in law school, but he wishes there had been. He and his wife support the lecture series to ensure that the school’s commitment to legal history is sustained, he said. “The history of law is bound tightly with the subject of history,” he said. “I think the students, when they go through the Law School, are exposed to the history of law whether they like it or not.”

Abbey Molitor, ’15, worked as a research assistant for LaCroix last summer, helping find federalism sources for the book and a related *Yale Law Journal* article. Reading primary source materials such as letters of a Washington socialite from the early decades of the 1800s was “really fun,” Molitor said. “It was a lot more history than law, and it was fun to do that after a year of all law.”

Another enthusiastic legal history student, Mike Educate, ’14, said he has learned to view the study of history as “an act of persuasion.” For example, he wrote a paper for Professor Tom Ginsburg’s constitutional design seminar about the relationship between nationalist parties and the success of secessionist movements. He used Scotland as a case study, showing how the Scottish National Party used a historical narrative to sell the idea that Scotland is culturally distinctive from the rest of the United Kingdom. “It’s more than just ‘history matters,’ or ‘history is awesome,’” he said. “History actually has an instrumental, normative function. If you can effectively tie it to policy concerns, people are going to buy into it.”

Both Molitor and Educate said they would consider pursuing PhDs in history in the future. But even law students without an intense interest in legal history can use it to understand their own legacy as lawyers. As Helmholz explained: “Law is a learned profession. It should be about more than just making money. A lot of learning comes from understanding the past of what you’re doing,” he said. “You see yourself as part of something that’s been going on since the twelfth century, and even before that in Roman times. If you have a new idea, it has to fit within this system that has developed over the ages.”

Assistant Professor Laura Weinrib shows off one of the great legal history research tools: the microfiche machine.

And they often do like it, said LaCroix, who finds that law students see legal history work as an enjoyable departure. During Winter Quarter, she taught a class on American legal history from the colonial period through Reconstruction. “They often say, it’s so nice to be reading things besides cases,” she said. “I think it feels to them like a different way to look at law. It feels grounded.”

A handful of her legal history students have proved capable research assistants for her upcoming book, *The Interbellum Constitution*, LaCroix said. Throughout the course of a seminar last Spring, they collected a stack of primary sources seven inches tall. “They liked seeing the inside of what their professors do. It felt really productive pedagogically.”

Abbey Molitor, ’15, worked as a research assistant for LaCroix last summer, helping find federalism sources for the book and a related *Yale Law Journal* article. Reading primary source materials such as letters of a Washington socialite from the early decades of the 1800s was “really fun,” Molitor said. “It was a lot more history than law, and it was fun to do that after a year of all law.”

Another enthusiastic legal history student, Mike Educate, ’14, said he has learned to view the study of history as “an act of persuasion.” For example, he wrote a paper for Professor Tom Ginsburg’s constitutional design seminar about the relationship between nationalist parties and the success of secessionist movements. He used Scotland as a case study, showing how the Scottish National Party used a historical narrative to sell the idea that Scotland is culturally distinctive from the rest of the United Kingdom. “It’s more than just ‘history matters,’ or ‘history is awesome,’” he said. “History actually has an instrumental, normative function. If you can effectively tie it to policy concerns, people are going to buy into it.”

Both Molitor and Educate said they would consider pursuing PhDs in history in the future. But even law students without an intense interest in legal history can use it to understand their own legacy as lawyers. As Helmholz explained: “Law is a learned profession. It should be about more than just making money. A lot of learning comes from understanding the past of what you’re doing,” he said. “You see yourself as part of something that’s been going on since the twelfth century, and even before that in Roman times. If you have a new idea, it has to fit within this system that has developed over the ages.”