4-2004

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Sir John Baker's recent book *The Law's Two Bodies*[1] supplies a happy occasion to celebrate and reflect on Professor Baker's unique place within the field of English legal history today.

Students beginning their study of this subject can well imagine the long history of the English common law as an hourglass. The wide upper chamber of the hourglass is the rich, complex, intricate medieval law of the Year Books. The wide bottom chamber is the equally rich, complex, intricate but very different caselaw of the modern age. The narrow neck of the hourglass can be imagined as the mind of one person, Sir Edward Coke. Such was the authority, the personality, and the historical importance of Lord Coke that his Reports, his Institutes, and his other writings formed the core of what the later legal profession 'remembered' about medieval common law. The unfortunate part was that Coke made things up.

Students of English legal history can equally well imagine their subject today as an hourglass in which the narrow neck is again a single mind. That single mind, through which enormous quantities of manuscript sources have passed and from which enormous quantities of scholarly publications have issued, is of course Professor Sir John Baker. Every question of English legal history on which I have written has led me to find eventually in my research a few sentences in an article, chapter, or book by John Baker that anticipated both my question and my answer, and footnoted half a dozen manuscript sources of which I was unaware. I will not pursue the comparison of Sir John with Sir Edward any further, except to say that I am sure that Baker does not make things up.

I want to commend Professor Baker for keeping the reported body count so low in *The Law's Two Bodies*. By my reading of the book, there are enough bodies left lying on the stage to bring down the curtain on a Shakespearean tragedy. I count five bodies of law just in the main outline of the book. Baker emphasizes two of those bodies, and draws his principal contrast between them. I would like to comment briefly about another two bodies that play lesser roles in Baker's scheme but have interested me in my work and teaching.

The five bodies of law I identify in the book are these. First is the body of *printed law*: statutes, Year Books, and other case reports, with the early trea-

The Journal of Legal History, Vol. 25, No. 1, April 2004, pp. 74–83
ISSN 0144-0365 print/1744-0564 online
DOI: 10.1080/0144036042000216377

tises, book of entries, abridgements, and dictionaries, as they issued from printing presses from the 1480s onward through Coke's time to the end of the seventeenth century.

Second, the body of *existing manuscripts* that lie behind and alongside these early printed books and their modern scholarly incarnations in volumes of the Selden Society and Ames Foundation.

Third, the body of *everything that ever was written* by or about lawyers and judges, much of which does not survive and cannot now be known, the most that might be called 'the law in books'. Earlier generations of Year Book editors guessed that probably three-quarters of all legal manuscripts have been lost. Baker suggests that there might once have been a hundred times the present volume of available case-law in manuscript form (11).

Fourth, the body that Professor Baker has taught us to call the 'common learning'. This is the mostly oral tradition that constituted the professional consensus of judges and lawyers, transmitted through their learning exercises, their legal practice, their social activities, and their writings. This fourth body of law cannot be known in full, of course, and goes beyond what judges and lawyers wrote about law, beyond even what they *said* to each other, to include what unspoken assumptions they must have shared.

The fifth and final entity that Professor Baker mentions as a body of law in this book is what he encapsulates as the 'law in action', and at another point as 'the real-life results for parties to legal proceedings' (3). Like the 'common learning' (body four), this totality of actual outcomes in the material world can never be fully known, and would include jury verdicts and the shadowy motivations behind them, calculations of litigants to settle or pursue suits, the real strategies behind the law's elaborate fictions, and ultimately the real distribution of wealth, influence, power, force, and punishment in English society in past centuries.

So, to recap the bodies: 1) old printed books of law, 2) extant legal manuscripts, 3) all the legal manuscripts that ever were, 4) 'common learning' – the oral consensus, and 5) law in action – what really happened.

The Two Bodies of Professor Baker's title are the second and fourth of my series, surviving manuscripts on the one hand and the 'common learning' shared by the legal profession on the other. Baker is right, I think, that the English legal profession have long conceived their 'law' to be their shared consensus, and have insisted that this could be learned only through a slow and thorough process of socialization. This oral consensus is both more and less than the sum of decided cases and written judgments, or what the courts would decide in future cases, or what has been written about the law.

I want to comment about two of those other bodies left lying on the stage, the very first and last on the list. They are both outside Professor Baker's primary focus here, but I think that something can be said about them that

will connect with some of his main themes. I want to cast some doubt on the usefulness of one of these outlier bodies of law and to beg some respect for the usefulness of the other.

REALISM AND ENGLISH LEGAL HISTORY

The 'law in action', the totality of actual outcomes of disputes, agreements, and transactions in the material world and the fifth on my list of bodies of law, is a legacy of American legal realism. US legal scholars in the 1910s and 1920s tried to shift our focus from 'law in books' (conceptual and doctrinal reasoning) to 'law in action'.[2] A legal historian, Oliver Wendell Holmes, Jr., led the way in 1897 by defining law quite provocatively as what the courts will do in the next case before them, rather than what the courts should do, or what the courts say they are doing, or what others say the courts have done.[3] Legal Realists expanded Holmes's definition of law outside the courtroom, to include all human behaviour influenced by or influencing legal norms. This dose of Realism has been salutary for twentieth-century US law. We are encouraged to break down artificial conceptual and doctrinal distinctions that make no real difference any more in the practical world.

Translating this strand of American Legal Realism to medieval or early modern English legal history, however, makes little sense. Lawyers and judges of the fourteenth and fifteenth centuries stubbornly and heroically preserved an ideal of law in a world that almost surely frustrated their hopes for achieving it. Litigation was one battleground among many in those contentious centuries, something to be tried after various types of more or less forcible self-help had failed, and before the really rough stuff would begin. These were still centuries in which might (force) got you more than half of the way towards right, and in which law was not very high on the list of what restrained people to be decent or fair to one another.

The idea of 'law in action' represents a peculiarly nineteenth-century view that law was or soon would be internalized so thoroughly among society that we would all act more or less as courts command us to do, or that courts would command more or less what we were already doing. Medieval judges and lawyers, by my reading, no more expected the world outside the courtroom to work according to the court's rules than a clergyman expected the world outside the church door to be heaven. Law was not the way things were, but the way things ought to be.

George Woodbine wrote in the *Yale Law Journal* in 1929 (when Yale was the Rome of Legal Realism), that medieval clerks or apprentices who wrote the Year Books were surely reflecting a view that law was what courts and counsel say, not what courts do. The Year Books usually did not even

mention the facts of the underlying dispute, or the judgment (if any) that the court gave.[4] Fully two-thirds of Year Book reports (in a large sample that I collected from the first third of the fifteenth century) do not even mention the merits of the underlying disputes, but merely report strategies of delay or procedural wrangling. When Year Books do report the second-stage lawsuits in which victorious plaintiffs tried (and often failed) to enforce the judgments the courts gave them, we get some sense of how hollow a court victory could be. Law was much more about what could and could not be done inside a courtroom than about what effects the court proceedings would have outside in the real world.

Lawyers and judges in the age of the Year Books could describe the world in legal terms. They could see fields enclosed with invisible fences of law.[5] But they would not have set up 'the real-life results for parties to legal proceedings' as a standard by which to critique their legal doctrines, which is what American Legal Realists tried to do. Nor should we. The abstractness of the early common law, its total obliviousness to how things might work out in the real world, give modern common law some of its oddest and most enduring fictions - such as our charming notion that litigation can be discussed as if it cost nothing, took no time, and reached consistent and regular results in a frictionless vacuum. My point is not that the real-life results for litigants are not interesting, but that they are not 'law'.

THE MANUSCRIPT TRADITION

Now I turn to the first body I listed – old printed law books. One of the most pervasive and persistent attitudes of English legal history, as taught and transmitted since at least the days of Frederic William Maitland, has been a preference for manuscript sources, and a corresponding prejudice against early printed editions of law books. Let me name this the 'Manuscript Tradition'. Its message is simple: manuscripts are good, printed books are bad, and anything set in moveable type before 1800 is likely to be wrong. The Manuscript Tradition is why English legal historians always run into each other in manuscript reading rooms, why we cultivate the palaeographic arts, and why we dream of finding some long-forgotten parchment in the attic of a remote country house.

I mention all this because for the last four years I have been patiently making an index and paraphrase of the printed Year Books.[6] For more than three-fifths (62 per cent) of all the approximately 20,000 Year Book cases in print, and for more than nine-tenths (92 per cent) of the cases after 1399, the best and most accessible printed edition is still the standard or Vulgate or so-called Maynard edition from 1679 and 1680. Here is what Frederic William Maitland said about the edition I am using: 'that hopeless

mass of corruption that passes as a text for the Year Books',[7] 'a bad and clumsy edition'[8] with 'about as many faults as an edition can well have', 'it teems with gross and perplexing blunders',[9] 'a bad edition' that 'give[s] us but dark hints and unsolved riddles',[10] 'how bad, how incorrigibly bad they are', 'of mere, sheer nonsense, these old black letter books are but too full'.[11] Maitland's denunciation of the particular 'bad, very bad' volume of Year Books of Edward II, first printed from Serjeant John Maynard's manuscript in 1678, was even more damning.[12]

Maitland had and still has great authority in our tradition, and so plenty of other English legal historians have piled on the poor old printed Year Books. William Craddock Bolland, another early Year Book editor for the Selden Society, should be singled out in this regard, because he not only called the old editions 'absolute nonsense', 'a horrible mess', 'the mass of mistakes',[13] 'extremely corrupt',[14] 'practically unintelligible', and 'repellent',[15] but Bolland also, in two sets of lectures, actually made the argument that no lawyer in seventeenth-century England would have bought the printed Year Books, because none of them except possibly Serjeant Maynard could have made them intelligible,[16] and Maynard had manuscripts to work from.

Professor Baker does not go nearly this far, but it is fair to say that Baker has continued the Manuscript Tradition, that he has done so brilliantly, and that *The Law's Two Bodies* stands squarely within that tradition.[17] Here is how strong a tradition it is. Baker noted over 30 years ago, in an article about 'unprinted sources of English legal history', the striking irony that even the list of manuscript Year Books – where they were, and what years they covered – was itself in manuscript kept by the Selden Society. Jennifer Nicholson's mimeographed list of Year Book manuscripts from 1956 was, Baker said, 'a brave attempt' but 'seriously inadequate'.[18] Thirty years later, although Baker has listed in print the legal manuscript holdings of several great libraries, we are still using Nicholson's list. The Selden Society's list of Year Book manuscripts still resides in manuscript.[19]

Now I will admit that there were good reasons for focusing on manuscript sources and steering people away from printed texts. One reason is what I will call the 'Sir Edward Coke effect'. Remember that Coke made things up. As legal history students soon learn, Coke passed off his own arguments as resolutions of the courts. He said that he found multitudes of early plea roll precedents for some rather unlikely propositions. And he repeated fanciful stories of ancient British history as solemn fact. Much of the business of English legal history for the past century and more has been to correct misrepresentations perpetrated by Sir Edward Coke.[20] Coke's false and fanciful notions have persisted into the twentieth century in part because of the tremendous authority of Coke's printed texts within the legal profession. The Manuscript Tradition's message that everything in print before 1800 was likely

wrong might have been the only way to inoculate successive generations of law students and legal historians against repeating Coke's errors.

A second perfectly good reason for the Manuscript Tradition was that there were a lot of manuscripts to be edited. And over the last 136 years, the Rolls Series, the Selden Society, and the Ames Foundation have together produced 66 volumes of Year Book reports edited from manuscript sources, covering, as I said, almost two-fifths of the whole number of printed Year Book cases.

But this still leaves three-fifths in those bad, clumsy, corrupt, hopeless, repellent printed editions that I know and love. Let me note also that the quality of scholarly editions has improved so much that the most recent Selden Society volume of Year Books of Edward II contained only 50 cases. At this rate, it would take some 250 more volumes to edit all the remaining Year Books to current standards. Why are we still asking, after more than 100 years of inaugural lectures, why the history of English law has not been written? The answer is simple. Because we are all still waiting for that last manuscript to be found, dissected, collated, edited and published with facing page translation and plea rolls entries reproduced in full.

The Manuscript Tradition has given us a misleading impression about the sources of English legal history. Think of two icebergs. The message of the Manuscript Tradition has been that the Year Books are like an iceberg with a small, soot-stained part visible in print and the vast rich bulk of Year Book materials still submerged and well-preserved in manuscript form.[21]

That iceberg should be flipped on its head. As near as I can estimate, most of the Year Book material in existence has been printed, and only a relatively small proportion of new material remains in manuscript. Only a handful of manuscripts are known to have survived for years that have never been printed at all, a few for the early 30s of Edward III and some for one last year of Richard II that is still in the works at the Ames Foundation. For years that have been printed, some manuscripts do contain entirely new cases that have never been printed. Some manuscripts do add interesting passages to cases that already appear in the printed report or correct errors that crept into the printed books. But when Ralph Rogers surveyed many of the manuscripts for the years 1–10 Edward III, he found that what they would give us, for each year, are hundreds of thousands of variant spellings, alternate wordings, and variant sentence structures, and only a small proportion of new cases or cases that he could not identify in the old printed editions.[22] For many of the fifteenth-century Year Books there appear to be no surviving manuscripts that predate the printings.

What the Manuscript Tradition has neglected is the remarkable outpouring of printed Year Books, more than 500 separate editions from twenty-some printers between 1480 and 1680, carefully reporting the same cases in the

same order. Year Books of Henry VI, Edward IV, and Henry VII were printed at least seven or eight times each, and some years as many as 15 times each.[23] These Year Books were also the first to be excerpted in the Abridgements of Statham, Fitzherbert and Brooke. Yet the Manuscript Tradition, represented by Theodore Plucknett, found it 'quite impossible to believe that there was any lively interest in the Year Books, or any serious desire to have cases reported, in the latter half of the fifteenth century'.[24] Surely the legal profession's continuing interest in Year Books in the late fifteenth and sixteenth centuries can better be measured by the huge outpouring of printed Year Book editions than by the paltry number of surviving manuscripts.

Sir John Baker's new book wisely counsels us that when we look beyond the Year Books, to the plea rolls, readings, conveyancing documents, and practice records, the iceberg rights itself again, and we can say that a huge bulk remains (and will likely always remain) in the obscurity of manuscript. But for the Year Books, what is in print now is pretty much all that we have got.

There is some politics here, a subtext of positivism and of originalism at the heart of the Manuscript Tradition. It has kept us looking for that one obscure manuscript that will correct our understanding of a doctrine or a case that has been in print for nearly 400 years. This is somewhat at odds with the notion of a 'common learning', because the notion seems to be that what a court *really* said in some sole surviving manuscript is supposed to be somehow more authentically 'law' than what later generations and centuries of common lawyers thought the court had said.

My overall point is that the Manuscript Tradition has had some unfortunate consequences for English legal history. It has diverted much of our energy away from synthetic overviews, away from writing the history of English law in full from a comprehensive perspective. It is possible to study a certain word, like the word 'property',[25] or a certain category, like crime,[26] or a certain topic, like the attitude toward civil and canon law[27] or the behaviour of juries,[28] and to show how they appeared in the whole of the Year Books (by which I mean the printed Year Books). But this requires doing what Frederick Pollock once said could not be done[29] and what Bolland said should not be done[30] – reading through the whole of the printed Year Books. Someone could usefully study what could be learned about apprenticeship in the Year Books, or the practice of arbitration, or annuities (which always seemed to be transactions between churchmen), or the appearance of the *amicus curiae* – and that's just what comes first to my mind among the A's.

My index (which now encompasses over 16,000 printed Year Book cases, all but the reign of Edward III, and which fully indexes and paraphrases nearly 4,000 cases, everything from 1399 through the 1450s) is an attempt to make

such research in the Year Books a bit easier, and also to facilitate the editing of new manuscripts and the matching of plea rolls to the printed reports. In its current form, it is freely available and publicly searchable at <http://www.bu.edu/law/seipp>. Work is ongoing to complete the index and to link these records to images of the full Year Book reports from the Vulgate edition.

The Manuscript Tradition, by contrast, warns students away from primary sources that they could try to read and toward primary sources to which students cannot even get access. This means that students are deterred from independent explorations and are left only with what has been selected and edited by the scholarly societies or the sourcebooks. This can give a distorted view. The proportion of criminal law cases, for example, is far higher in the old printed editions than it is in the scholarly volumes, in part because some Selden Society editors simply skipped the criminal cases in their manuscripts as somehow 'unworthy' of being in the Year Books.[31]

The Manuscript Tradition keeps English legal history closed to all but the best-educated and best-connected insiders, much like the early English bar as depicted in Baker's book. No one can do serious work in the Manuscript Tradition without years of training and study, without socialization in the community of legal historians, without the sort of institutional support or independent means that would permit frequent and regular trips between London, Oxford, and both Cambridges.[32] Enthusiastic, passionate amateurs who dared to publish their less-than-perfect translations were driven out of our midst either by being ridiculed in print by established scholars (I am thinking of Margaret Center Klingelsmith, who translated the Abridgement attributed to Statham) or by being blocked from access to the manuscripts (I suspect something like this happened to Ralph V. Rogers). We are better than this.

When I work on the old printed Year Books, which are really much better than they would have you think, I suspect that even Maitland and Bolland, for all their talk about bad, clumsy, corrupt, hopeless, repellent, unintelligible editions, would sometimes, in their weaker moments, lock their doors, draw their curtains tight, and secretly look up cases in the old black-letter Year Books. I suspect that when Baker writes in this book on page 77 that there is only one explicit reference to a reading from the Inns of Court in the whole of the Year Books, he may have based his observation at least in part on the printed Year Books, and not entirely on an exhaustive survey of the manuscripts. But with Professor Baker, you never know. I find so much with which I agree between the covers of *The Law's Two Bodies* that I can only nibble around the edges in this essay, and suggest that the tradition which it so well represents might at least admit a little competition.

In 1889, Maitland repeated the warning of a distinguished English lawyer that the important work of English legal history would more likely be done by

some of the scholars of Germany or America because hardly anyone in England would have the patience or learning to attempt it.[33] I want to suggest that some of the important work of English legal history can be accomplished by turning a share of our attention away from the Manuscript Tradition and back to the printed texts, so that we might allow ourselves the opportunity to get some idea of the Year Books as a whole and what marvels they contain.[34]

NOTES

1. J.H. Baker, *The Law's Two Bodies: Some Evidential Problems in English Legal History*, Oxford, 2001.
2. Baker (1) cites R. Pound, 'Law in Books and Law in Action', 44 *American Law Review* (1910) 12–34.
3. O.W. Holmes, Jr., 'The Path of the Law', 10 *Harvard Law Review* (1897) 457, 458–59. Baker (4) mentions the definition of law as what courts would do in a given case.
4. G.E. Woodbine, 'Pakenham's Case', 38 *Yale Law Journal* (1929) 775.
5. Law 'encloses' one man's land from another's, though they both occupied an open field, in C. St. German, *Doctor and Student*, 91 Selden Society, London, 1974, 62–3 (*c.*1520).
6. Interim results can be searched at <http://www.bu.edu/law/seipp>.
7. F.W. Maitland, 'Why the History of English Law is Not Written', 1888, in *Collected Papers*, 2 vols., Cambridge, 1911, vol.1, 484.
8. F.W. Maitland, 'The Materials of English Legal History', 4 *Political Science Quarterly* (1889) 496, 501.
9. Maitland, 'Materials', 642.
10. Maitland, 'Materials', 644.
11. F.W. Maitland, 'Introduction' to *Year Books of 1 & 2 Edward II*, 17 Selden Society, London, 1903, xxi.
12. Maitland, 'Introduction', xxiii.
13. W.C. Bolland, *The Year Books*, Cambridge, 1921, 46.
14. Bolland, *The Year Books*, 50.
15. W.C. Bolland, *A Manual of Year Book Studies*, Cambridge, 1925, 75. Another proponent of the tradition was Ralph V. Rogers, who wrote of 'the monstrosity known as the "Vulgate"': R.V. Rogers, 'The Editing and Publication of the Year Books of the Reign of Edward III', 44 *Law Library Journal* (1951) 71. See, at 72, 'The text as printed is so corrupt, so carelessly printed and contains so many errors and omissions as to be often entirely untrustworthy'.
16. Bolland, *The Year Books*, 46; *Manual of Year Book Studies*, 75. Holdsworth also opined that Serjeant Maynard 'was the last who had thus earned the right to guess what the [Year Book] report ought to have said': W.S. Holdsworth, 'The Year Books', 22 *Law Quarterly Review* (1906) 266, 271.
17. In an early article, Professor Baker joined in dismissing the old printed Year Book editions. J.H. Baker, 'Unprinted Sources of English Legal History', 64 *Law Library Journal* (1971) 302, 309 col.1.
18. 'Unprinted Sources', 309 col.2.
19. A consolidated list of Year Book manuscripts, organized by regnal year, can be found through the website ⟨http://www.bu.edu/law/seipp⟩.
20. E.g., F.W. Maitland, 'Materials for English Legal History', 496–503; T.F.T. Plucknett, 'Case and the Statute of Westminster II', 31 *Columbia Law Review* (1931) 778–99 (May 1931); S.F.C. Milsom, 'Not Doing Is No Trespass', [1954] *Cambridge Law Journal* 105–17.
21. As Baker wrote in 1971, 'there are far more cases in manuscript, and many of these are superior in quality to those that chanced to reach the press. To overlook the best cases may lead to serious error'. Baker, 'Unprinted Sources', 302.

22. Rogers, 'The Editing and Publication of the Year Books', 73.
23. A complete list of early printed Year Book editions, organized by regnal year, can be found through the website ⟨http://www.bu.edu/law/seipp⟩.
24. T.F.T. Plucknett, *Early English Legal Literature*, Cambridge, 1958, 111.
25. D.J. Seipp, 'The Concept of Property in the Early Common Law', 12 *Law and History Review* (1994) 29–92.
26. D.J. Seipp, 'Crime in the Year Books', in C. Stebbings, ed., *Law Reporting in England*, London, 1995, 15–34.
27. D.J. Seipp, 'The Reception of Canon Law and Civil Law in the Common Law before 1600', 13 *Oxford Journal of Legal Studies* (1993) 388–420.
28. D.J. Seipp, 'Jurors, Evidences, and the Tempest of 1499', in J. Cairns and G. McLeod, eds., 'The Dearest Birthright of the People of England': *The Jury in the History of the Common Law*, Oxford, 2002, 75–92.
29. F. Pollock, *Principles of Contract*, 3rd edn., London, 1881, quoted in Bolland, *The Year Books*, 45: 'To read straight through the Year Books in their present condition is a task that no man living can be expected to undertake.'
30. Bolland, *The Year Books*, 45: 'I do not suppose that anyone has really read in any seriously critical sort of fashion the whole of them. No one who is competent to do so has had the time to give to such an unprofitable piece of work.'
31. J.H. Baker, 'Why the History of English Law Has Not Been Finished', 59 *Cambridge Law Journal* (2000) 62, 75 n.33: 'Selden Society editors . . . silently edited out the criminal cases found in the Edward II reports, presumably as not fitting into their concept of a year book'.
32. See P.H. Winfield, 'Some Bibliographic Difficulties of English Law', 30 *Law Quarterly Review* (1914) 190, 192–5.
33. Maitland, 'The Materials for English Legal History', 496, quoting Charles Elton, 'Review of Bracton's Notebook', 4 *English Historical Review* (1889) 154, 155.
34. This review essay was first presented at the Merriam Conference on Legal History at Arizona State University on 20 Sept. 2002.