

A Revival of Historic Jurisprudence?

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- Dan Priel, *Holmes's 'Path of the Law' as Non-Analytic Jurisprudence*, 35 **Univ. Queensland L.J.** 57 (2016), available at [SSRN](#).
- Markus D. Dubber, *New Historical Jurisprudence: Legal History as Critical Analysis of Law*, 2 **Critical Analysis of Law** 1 (2015), available at [SSRN](#).

Of late there has been a notable burst of attention to the interaction between history and legal theory generally, and historical jurisprudence specifically. This includes a symposium in the *Virginia Law Review* last year on [Jurisprudence and \(Its\) History](#), and a forthcoming book, *Law in Theory and Jurisprudence*, both with contributions from prominent scholars. What makes this noteworthy is that decades ago historical jurisprudence itself was consigned to the dustbins of history. As Brian Bix declares in his leading [Jurisprudence text](#), “historical jurisprudence has largely disappeared.”

Historical jurisprudence emerged in the nineteenth century in the influential writings of Friedrich von Savigny and Henry Maine. It revolved around the insight that law evolves over time in connection with surrounding social, cultural, economic, political, and technological influences. Law at any moment in any place is the cumulative product of the history of its society (including interaction with external influences).¹ At the turn of the twentieth century, historical jurisprudence and legal positivism were the two main rival branches of jurisprudence, with natural law theory a distant third. Writing in 1906, prominent American jurist Melville Bigelow [observed](#), “Two distinct schools have in succession held the field, more or less, of legal education in English and American law, the analytical of Bentham and Austin and the historical school.” Soon after Bigelow uttered these words, however, historical jurisprudence seemingly expired, not to be heard from again—until now. [Dan Priel's](#) *Holmes's 'Path of the Law' as Non-Analytic Jurisprudence* and [Markus Dubber's](#) *New Historical Jurisprudence: Legal History as Critical Analysis of Law* explicitly advocate a revival of historical jurisprudence.

Priel and Dubber's respective visions of historical jurisprudence and their reasons for promoting it differ. Priel offers historical jurisprudence as a curative for the wrong turn taken by contemporary analytical jurisprudence. He writes, “The barrenness of conceptual jurisprudence has many sources, but one of them is its unselfconscious, untroubled pre-Darwinism, its continued search for explaining human practices in terms of unchanging, timeless essences.” (Priel, P. 18.) Framing Holmes's essay as argument in historical jurisprudence, Priel presents an illuminating re-reading of *Path of the Law*. The three parts of essay, he suggests, can be understood in terms of Holmes's three ages of law: beginning in primitive times as intuitive reflections of natural human responses to rights and wrongs, then becoming a technical system of artificial reason grounded in tradition, and finally in the modern age becoming a scientific mode of social engineering. When viewed within this historical framework, Priel shows that common debates over Holmes's discussion of the “bad man,” though informative, largely miss the point. This demonstration supports his broader message that historical jurisprudence makes available insights about law that analytical jurisprudence overlooks or suppresses.

Dubber presents historical jurisprudence as a powerful (albeit neglected) critical method: “Historical analysis of law, in this light, appears as one mode of critical analysis among others, including, notably, comparative analysis of law, along with economic analysis of law, or philosophical or sociological or ethical analysis of law.” (Dubber, P. 2.) Historical jurisprudence adds a critical perspective in two ways lacking in other approaches, he explains. (Dubber, P. 14.) First, a genealogical inquiry exposes pivotal moments in the development of legal institutions and legal doctrines, shedding light on their origins and how they took their current shape. Second, historicizing legal institutions and doctrines—viewing them within their specific social historical context—exposes ideological and material influences on law

and the interests it served. Both aspects of historical analysis reveal influences behind contemporary legal arrangements and shows that they are contingent. This in turn opens a critical distance, facilitating the functional evaluation of law—does it work in ways that achieves our collective goals and serves our interests?—and normative evaluation of law—is it good and just?

Despite having these very different orientations, both articles pointedly identify with early figures in historical jurisprudence: Priel with Oliver Wendell Holmes and Dubber with Savigny. Neither Priel nor Dubber endorses the particular theories of these pioneers—rather what they emphasize is the theoretical perspective Holmes and Savigny brought to bear on law as an evolving social institution, and the potential of this perspective to enhance our understanding and normative evaluation of law. Another trait in common is Priel and Dubber link their respective analyses to the current revival, after its own lengthy dormancy, of history on a grand scale, both citing among other works David Armitage and Jo Guldi's [The Return of the Longue Duree](#).

It is too soon to tell whether the recent spate of work on historical jurisprudence is a temporary blip or the beginnings of a genuine revival.² The odds are not in its favor. Though we do not know what led to the original demise of historical jurisprudence, the fact that it fell away is a warning. One factor that likely contributed is the sheer difficulty of combining rich historical knowledge with sophisticated theory. The rare self-identified historical jurists in modern times—notably [Harold Berman](#) and [Peter Stein](#)—are scholars with immense historical learning, as were Savigny and Maine. Mere mortals like the rest of us are unlikely to match their standards. A better way forward, I suggest, is to aim lower than grand narratives. The core insight of historical jurisprudence is law evolves in connection with surrounding social forces. This can be explored in innumerable contexts at scales small and large. One might even say that a lot of work along these lines is already being done, though it is not recognized as historical jurisprudence because everyone thinks, as is often repeated, this theoretical perspective on law died a century ago. Priel and Dubber make strong cases in their essays that there is much to gain by a return to historical jurisprudence. We may be witnessing its resurrection.

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1. For an overview of historical jurisprudence, see Brian Z. Tamanaha, *The Third Pillar of Jurisprudence*, Wythe Lecture, 56 *Wm. & Mary L. Rev.* 2235 (2015). [2]
 2. I would add to this list my forthcoming book **A Realistic Theory of Law** (forthcoming 2017); see also Brian Z. Tamanaha, *Insights About the Nature of Law From History*, Kobe Memorial Lecture, Archiv fur Rechts-und Sozialphilosophie (forthcoming 2016). [2]

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