SUMMARY

1. A very brief diachronic summary by topics. Some of this is worthy of *1066 and All That* (We start with the Venemous Bead, inventor of the rosary, proceed from there through Magna Carta ["Magna Charter was therefore the chief cause of Democracy in England, and thus a *Good Thing* for everyone (except the Common People)].", and from there through the split King Henry IV, Henry IV part 1 and Henry IV part 2, and end, pretty much, with Broody Mary.)
2. Government and the constitution—
    a. We begin with tribal chiefs—Aethelberht in the 7th century
    b. The country is unified as a result of the Danish invasions in the 9th and 10th centuries
    c. The country is feudalized in the time of the Conqueror in the 11th century—it becomes much less feudal as a result of the reforms of Henry II in the 12th
    d. Out of the struggle of the king, the barons, and the church emerges a mixed monarchy of king, council and parliament—lordship and borough—pope, bishops and priests, a long period splaying over much of the 13th through the 15th centuries
    e. The so-called rise of Tudor absolutism in the 16th century is the result of a weakening of the nobles and of the church, the former as the result of the disturbances of the 15th century, the latter as the result of a Europe-wide phenomenon known as the Reformation in the 16th.
    f. This, in turn, leads to a century of revolution—court and countryside, puritan and cavalier, Protestant and Catholic
3. The courts and the legal profession can be seen as part of the political development, but they have a life of their own
    a. We begin with Anglo-Saxon moots
    b. They were not unified when the country was in the 9th and 10th centuries, though they had at least nominal connection with the king
    c. An overlay of feudal courts was probably introduced by the Conqueror. Among these courts was the *curia regis*. This court under Henry II became the most powerful court in the land because it obtained a monopoly of all major cases dealing with property and crime. Over time, it drew to itself the local royal courts and by reviewing the work of the feudal courts led to their ultimate demise, at least so far as freeholders were concerned.
    d. The legal profession develops around this court in the late 13th century. We see a world of pleading and the YBB. Once more, we have a long period splaying over much of the 13th through the 15th centuries
    e. The Tudor period sees the development of a multiplicity of central royal courts—engaged in an unseemly competition for jurisdiction—KB, CP—the conciliar courts, Star Chamber and Requests—Chancery and Admiralty (both of which have origins considerably antedating the 16th century)—even to a certain extent the church courts
    f. In the 17th c the jurisdictional lines harden again, the newer courts, except for chancery, lose out, the common-law courts and the common-law profession emerge triumphant
4. Property—a story with intimate parallels both to the development of the courts and of government
    a. Of Anglo-Saxon property we know little—the glimpses suggest individual ownership and some feudalization

   b. Military feudalism probably introduced by the Conqueror in the 11th century was tamed by Henry II in the 12th.
   c. The later MA sees the working out of the consequences of the assizes of Henry II—the statutes Quia Emptores, De Donis—and the rise of the use
   d. The Tudor Revolution in government produces the Statute of Uses, restoring property, at least in part, to the common law
   e. The remainder of the 16th century and the 17th see the working out the consequences of the S/Uses. A struggle, perhaps, between old money and new. The beginnings of the modern rule against perpetuities in the *Duke of Norfolk's Case* and the rise of the strict settlement, both, we would suggest, reflecting a compromise between the older generation and the younger, and perhaps between old money and new.

5. Tort and contract—here the parallels to the development of the governance and the courts are less easy to see
   a. AS ideas are a legacy. I'm not sure that we can speak of AS personal actions. We can certainly see the notion of a legal wrong and perhaps the notion of debt
   b. The old personal actions—first seen clearly in the central royal courts in the 13th c. They are dominated by the ancient pattern of the lawsuit, claim and denial and an inscrutable verdict of an inscrutable fact-finder. This century also see the very shadowy emergence of trespass, finally broken off from crime.
   c. The later MA sees the separation of trespass from case and a development, despite much uncertainty, of various actions on the case.
   d. The Tudor period sees the rise of a general action that can cover most of what we call contract, although the doctrines are still unrefined
   e. What is left is the law of torts, not generalized until the 19th c

That's the basics on tort and contract, but a number of you wanted to review it in a bit more detail. The fundamental problem may be that we are looking for tort and contract, and in some sense these do not emerge as basic doctrinal categories until the 19th century. By the middle of the 13th century, however, certainly by the end, we have three quite well-defined actions: covenant, debt, and trespass. The fundamental idea in covenant seems to be quite close to what we call 'contract': you ought to do what you agreed to do, but around 1300 if not before, in the central royal courts, you can't bring a covenant action unless you have a sealed instrument to support it. We think of debt as also being contractual, but it is pretty clear that they did not. Here the fundamental idea seems to be an imbalance of accounts between the plaintiff and the defendant: you owe me money, perhaps because I lent you money, perhaps because I sold you goods and delivered them, but you haven't paid for them. Trespass sort of looks like tort, but in the central royal courts trespass actions are, at least nominally and in most cases, limited to actions where you caused me harm by force and arms and against the peace of the king.

In the middle of the 14th century – and the development is so close to the disruptions caused by the Black Death that it is hard to imagine that there is not some connection with it – the requirements of force and arms and against the peace were relaxed, principally, it would seem in cases where someone undertook to do a job, and botched it: the smith who lamed the horse, the carrier who lost or damaged the goods, the surgeon who made the patient sicker. By the 1360s, these actions tended to allege that the defendant undertook (*assumpsit*) to do something and botched the job. By the end of the 14th century it was clear that if this was the gist of your case, you could not sue in trespass, you had to sue in the action on the case.

Actions on the case could also be brought in situations where there was no undertaking but the defendant caused harm that could not be said to be with force, at least not direct force, but the plaintiff was nonetheless damaged. In the early modern period, the plaintiff would frequently allege that he was harmed by the negligent acts of the defendant. Relatively little doctrine was developed around this concept, however, because in most of the cases, the defendant pleaded not guilty, and it was up to the jury to decide if he was to blame in such a way that he ought to pay.

What happened where assumpsit was alleged is a bit clearer. The 15th century sees a number of Year Book cases in which the plaintiff alleges that the defendant undertook to do something and didn't do it. This allegation was met with a plea that the action did not lie because the plaintiff should have sued in covenant, that was the action for enforcement of promises. Various ways around this plea were found: for example, if the plaintiff could allege special damages because of the non-performance of the promise, like the carpenter didn't put a roof on the barn and the crops were destroyed. Perhaps the defendant revealed the plaintiff's secrets to another person where hs had a professional obligation not to do so. Perhaps the defendant not only did not perform the promise but disabled himself from ever doing so. Some of the justices clearly wanted to go further, but there is no case that so holds until 1499 where it is not a case but a statement by Chief Justice Fyneux of King's Bench in Gray's Inn. From that time on covenant is dead. People sue in assumpsit for non-performance of promises so long as there was consideration for the promise.

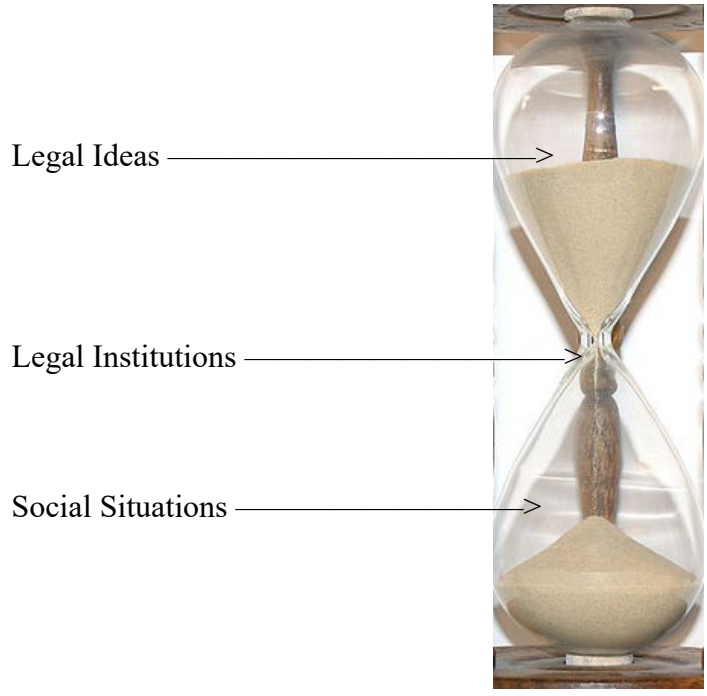
In the 16th century the issue becomes whether assumpsit could substitute for debt. King's Bench allowed it. Common Pleas did not. This ends up in a total mess at the end of the century that was finally resolved in Slade's Case where a majority of the justices seem to have decided that assumpsit could substitute for debt. From here on in debt on a contract was dead.

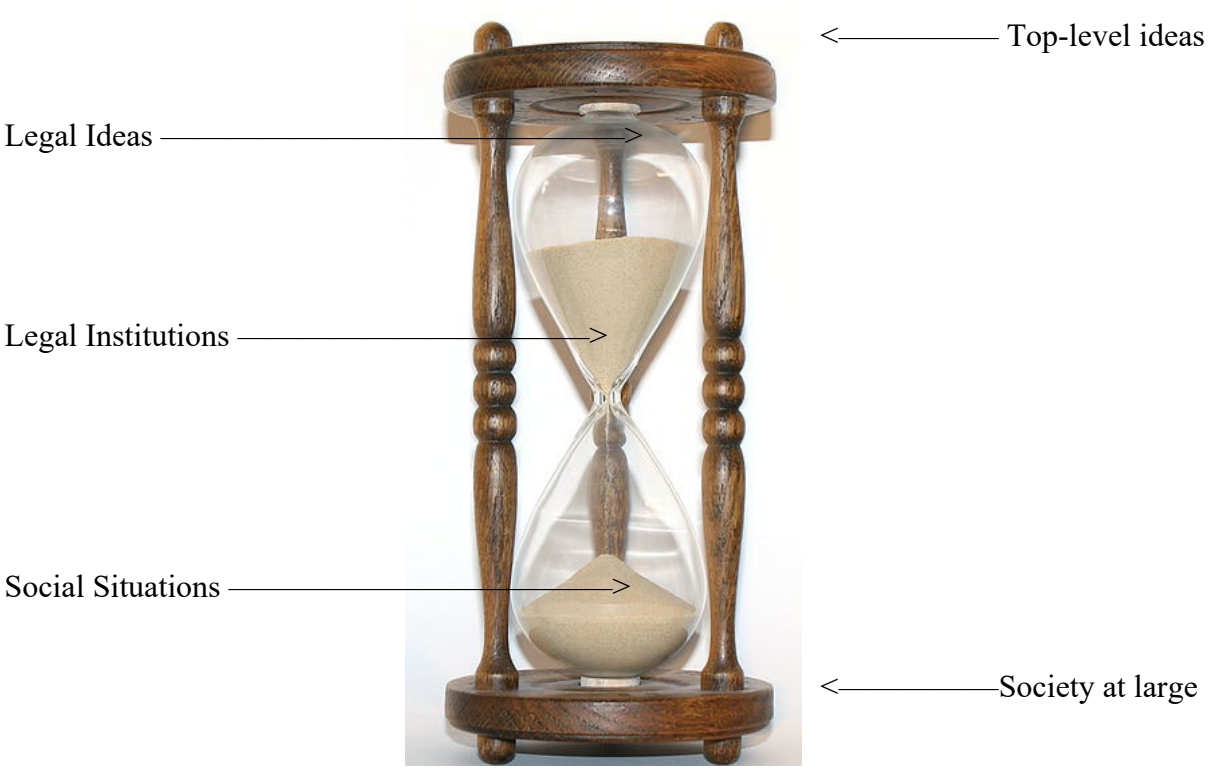
Questions?

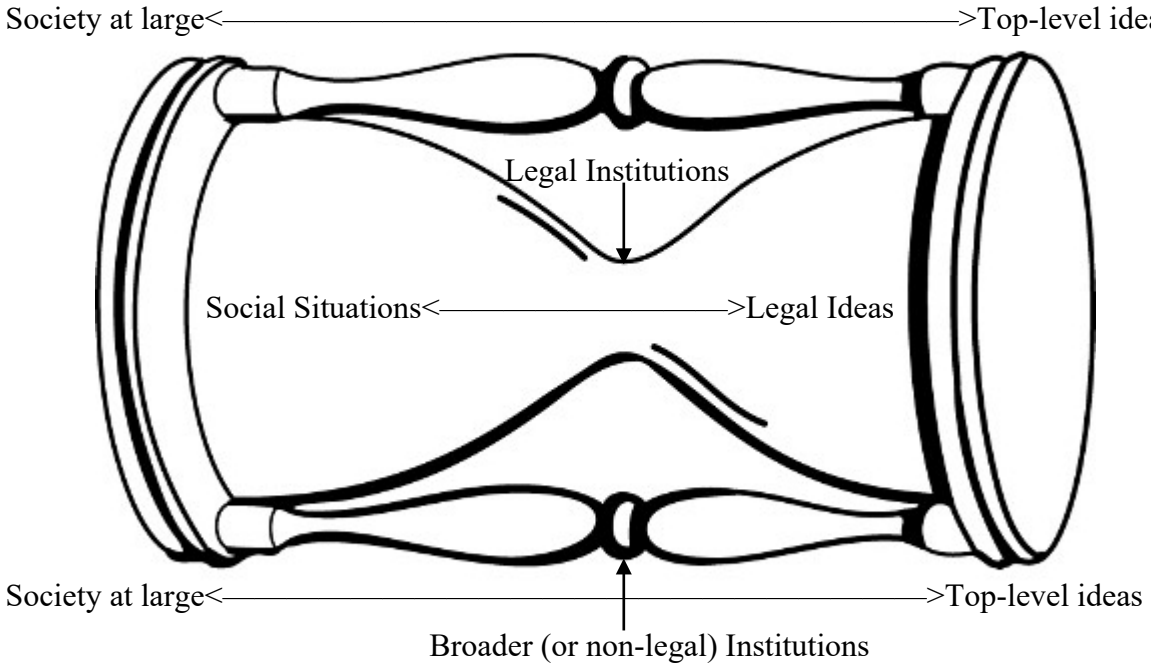
6. In the realm of larger ideas we traced a number of important themes
    a. The continued presence of Roman law long after the fall of Rome. The influence comes largely through the church, though there is some evidence of direct influence at the level of broader ideas.
    b. The presence of Judaeo-Christian, Stoic and Aristotelian ideas about law in general, particularly natural law
    c. The idea of the rule of law—a product, perhaps, of the struggle with the church in the 11th and 12th centuries.
    d. The emergence of the notion of an estate in land and the distinction between legal and equitable interests in property
    e. An initial conceptual economy in the personal actions—right (owing & promise) and wrong (trespass), how these ideas blur and merge and reshape themselves into a law of torts in the plural and contract in the singular
7. What was the achievement of the English medieval constitution?
    a. It is not parliament, as Stubbs thought it was. All the work that has been done on parliament since Stubbs would suggest that its survival was too much a matter of chance to make it the principal theme.
    b. Nor was it the balance of power between the king and the three estates as Lyon suggests, though that may have been a *sine qua non* for what I am about to suggest.
    c. Rather it was the growing appreciation in theory, and, despite egregious departures, in practice as well, of the idea of the rule of law. And that law is something in which the estates as well as the king have a stake. Much, of course, remains to be worked out. Both

the distinction between fundamental law and law that can be changed more easily and the distinction between what we call the legislative and executive spheres of government lie in the future. Indeed, this last is not completely a feature in England even today because of its parliamentary system. But by 1600 the judicial has been quite firmly separated from the legislative and the executive, and the 17th century was to make that separation firmer. The English did, however, go into the 17th century with an extraordinary sense of the importance of the law, however ill-defined, as a separate force binding on all subjects (contrast the divergent *coutumes* in France) and in some not completely defined sense as binding the king. In the 17th century the constitutional struggles will be fought on legal grounds, and the various kinds of law will acquire a precision that they do not have in 1600. But what the middle ages left was the idea of law itself, which emerges from the workings of institutions, parliament, council, chancery, the law courts, and this heritage was to be passed on from the 17th century to ourselves.

8. What was the achievement of the medieval legal system? That's a lot harder. We discovered, at least if we looked at the story from the point of view of the winners, was that a tiny group of men, created and preserved a body of ideas and institutions known today as the common law. They were conservative but not reactionary. They did not like to change, but they changed when they had to. They changed in response to political, social and economic forces that they only dimly perceived. They changed in order to keep their jobs, but they also changed because they thought they had something worth preserving. Of the three major explanations of legal development in fashion today, there is evidence of all three: preservation of an oppressive class structure, response to underlying structures of thought, a drive toward the efficient solution. While, we can see evidence of all three, and no one of them, or even all three, in my view, quite captures it.
9. A framework for talking about these kinds of problems:







Let's take a look at some of the topics we have covered to see if we get some hints as to what the dominant forces are likely to have been.

10. Most of our examples seem to show the importance of process, the nodal point of our hour glass, but they also show underlying structural features that operate in the realm of ideas derived from what's going on in the society:
    a. Property and conveyancing. Beginning in the late fourteenth century, property law features an interplay between the Chancery and the common law courts. What is going on within the legal institutions themselves, the nodal point in our model, is hugely important. Now I'm not saying that some kind of way would not have been found to get around the rigidities of the common-law system of succession had the Chancery not allowed the testamentary disposition of the use and had the common-law courts not invented the common recovery, but it is hard to imagine that the results would have been the same had those two institutions not done what they did. These two developments, I would suggest, created a social tension, or, rather, exacerbated one that was already there, a tension between generations: How much power would the present generation of property-holders, basically fathers and occasional mothers, have to dictate not only to their children but to generations to come how the property was going to be held? The question hung in the balance for the better part of two centuries. The ultimate resolution, whether it be seen in the *Duke of Norfolk's Case*, and the beginning of the modern rule against Perpetuities, or in the development of the strict settlement, had a structural feature: the ancestor and the heir have to get together if the arrangement was to continue. The fundamental conflict between generations was resolved by requiring them to get together at least every generation. In the mass of technicalities which this body of law became, this idea strikes me as one that certainly everyone would have understood, and it is hard to imagine that it was solely the invention of lawyers. There's another process point to close with. Property and conveyancing are institutions that proceed frequently for some time outside of the view of courts, so that the nodal point in the hour glass is frequently not a judge or a court but a conveyancer. If the Rule Against Perpetuities was largely the creation of the courts, the strict settlements was largely the creation of the conveyancers. The fact that it was the creation of lawyers being paid to work something out outside of the purview of the courts is another reason for thinking that the sources of the fundamental compromise are, at least in part, social.
    b. Contract. In the realm of contract there are also important process issues. Contract was not exclusively within the jurisdiction of the central royal courts in the Middle Ages. The decline of the ecclesiastical, the merchant and the local courts in the later Middle Ages brought a lot more contract cases before the central royal courts than had previously been there. There was a moment when it looked like Chancery might have a large share of the jurisdiction. Ultimately, it did not, although it retained some (specific performance, relief from penalties and forfeitures, some remedial gimmicks like accounting). That's the process point. And once more, had the process turned out differently it is hard to imagine that the substantive results would have been the same. What ultimately comes to prevail in the realm of ideas lies largely after our time. Modern contract doctrine, which has striking similarities to the law of the European Continent is largely the creation of the eighteenth and nineteenth centuries. What happens in our period is, I would suggest, is a remarkable survival of the medieval idea of contract. It is an idea of contract that pays relatively little attention to the enforcement of promises as such and a great deal of attention to righting the imbalance of accounts that results when one person has performed his side of the bargain and the other one has not.
    c. Tort. In the area of the law of wrongs, we can make the same point as we did in the case of contract about the decline of the local courts. What happened would not have happened in the way that it did had it not been for the fact that the central royal courts acquired jurisdiction over tort actions at different periods, and except for the very beginnings of the

trespass action, every piece of jurisdiction that they acquired had to be fitted into an existing structure that was not designed to accept it. Hence, for us, and frequently for them, the bizarre distinction between trespass and case, an idea that does not correspond to any known general idea about wrongs and does not, so far as we can tell, correspond to any social idea, need or desire. In the middle of this rather messy situation two ideas emerge that are comprehensible, however far away they may from our from our own. Not doing is no trespass and a man acts at his peril. The notions are not absolute. The first was ultimately breached at the end of the 15th century when contract actions were admitted under the rubric of trespass, and the second was never absolute: acts of God and performance of public duty were always acceptable excuses for doing what was otherwise tortious. But this area, more than any other with the possible exception of the criminal law was one in which English law for many centuries was quite content to let the social prevail almost unchecked. If one thought one's conduct was justified, the answer was "tell it to the jury." Hence, in this area the process seems designed to ensure that the social will prevail.

11. Are we dealing here with the non-falsifiable? I can't prove to you that this is what was going on in any of these areas, and I cannot argue that we could not have found similar explanations had things come out differently. Ultimately any explanation at this level is going to draw on one's fundamental views about what human beings are all about. It is going to draw on a belief that however technical the law became and however divorced the discourse of lawyers was from social discourse, social forces do get felt in the ultimate results and a given result cannot last for long if it is fundamentally at odds with what makes sense for society.

12. What pushes all this around? I would like to close by reading you the explanation, if such it can be called, of S.F.C. Milsom, the greatest English legal historian of the last generation:

... [H]owever disrespectfully one is prepared to use them, legal ideas have their own strength, and it shows itself in many ways. It shows itself first in the difficulty of change. Apart from the tiny extent to which, at any period of our history, the courts have felt themselves able to reverse an accepted rule, direct change can be made only by legislative act and that too was rare until Bentham's work was done [in the late 18th and early 19th century]. Change has for the most part been indirect. All that the practitioner can do for one hit by a rule, whether yesterday's taxing statute or some entrenched result of circumstances long dead, is to look for a way round it. If he succeeds, the rule is formally unimpaired. If the route that the special facts of his client's case enabled him to take can be exploited and broadened by others, the result in the real world may be reversed, but the rule remains. Even when it is formally abolished or finally forgotten, its shape will be seen in the twisting route by which it was circumvented. And the ideas involved in the circumvention will prove their own strength. The first resort to them may have been artificial: but their natural properties will assert themselves, and consequences may follow as far-reaching as the ecological disturbances produced by alien animals or plants.

The life of the common law has been in the unceasing abuse of its elementary ideas. If the rules of property give what now seems an unjust answer, try obligation; and equity has proved that from the materials of obligation you can counterfeit almost all the phenomena of property. [The S/Uses.] If the rules of contract give what now seems an unjust answer, try tort. Your counterfeit will look odd to one brought up on categories of Roman origin; but it will work. [The rise of assumpsit.] If the rules of one tort, say deceit, give what now seems an unjust answer, try another, try negligence. [Warranty.] And so the legal world goes round.

But it goes round slowly, too slowly for the violence with which the conceptual economy is transformed to be felt, too slowly, in periods of rapid social change, for the law to keep pace with life. In the sixteenth century the gap grew so wide that the system itself was perhaps in peril. In the twentieth we make use of legislation; and our familiarity with deliberate change makes it easy for

us to misread history. How could our ancestors be so perverse in doing deviously what could be done directly? Certainly if we view the common law on the eve of reform as a piece of social engineering, we see the spirit of Heath Robinson at his most extravagant. [a cartoon character who made elaborate inventions to achieve purposes that could be achieved much more simply directly] But the viewpoint is anachronistic and the questions unreal. It is a real question why nobody before Bentham was provoked, and a part of the answer is that nobody before Blackstone described the system as a whole. Lawyers have always been preoccupied with today's details, and have worked with their eyes down. The historian, if he is lucky, can see why a rule came into existence, what social or economic change left it working injustice, how it came to be evaded, how the evasion produced a new rule, and sometimes how that new rule in its turn came to be overtaken by change. But he misunderstands it all if he endows the lawyers who took part with vision on any comparable scale, or attributes to them any intention beyond the winning of today's case.

13. Obviously, I have considerable sympathy with Milsom's ideas or I would not have quoted him at such length. At the same time, the vision that I just offered you is somewhat different from Milsom's. Like Milsom, I see the forces that demand change as being, at least normally, social, or perhaps even natural, like the Black Death. Unlike Milsom, I am inclined to look a little more widely for the ideas that may be pushing the lawyers around. While Milsom is no doubt correct that the overall scheme of English law makes no sense to one brought up with the Roman categories, the Roman categories were there, and were known by at least some from the twelfth century on. They may or may not have played a role in devising the assizes of Henry II; they certainly played a role in what those assizes eventually came to be. That a reception of Roman law in the sixteenth century was not a serious possibility is, I think, almost universally accepted today, but the common law was, as Milsom notes, in serious trouble at the beginning of that century. The way in which it reformed itself shows little evidence of Roman law in the specific doctrines, but there is also little doubt that over the course of the century English lawyers, like their Continental counterparts, came to focus more on substantive rules and less on arcane points of procedure, despite the fact that what allowed them to do this was the manipulation of the procedural system through a bizarre collection of fictions. I accept Milsom's notion that the profound social changes that were brought about by the assizes of Henry II were probably not contemplated by those who designed the assizes, but the assizes were the product of conscious choice, created in a political context, in which the desire both to centralize power in the king and his courts and to minimize conflict between tenants and lords almost certainly played a role. Milsom probably seriously underestimated the role that conscious change prompted by the Black Death played in the creation of the action on the case. He was quite right in seeing that that created two categories in the law of wrongs with which the courts struggled, not totally successfully, and that lasted way too long. Milsom's vision works best if we focus on private law, what today we call property, tort, and contract. I'm not sure that it works at all well with criminal law, and I'm not sure that he would have claimed that it does. Here the absence of lawyers, though not of judges, left an archaic system of law well into the early modern period. Milsom's vision certainly does not work with public law other than criminalQu law, where conscious change designed to achieve social ends becomes the norm from at least the 14th century. The fact that this was happening on the public-law side certainly raises the question whether the lawyers, many of whom participated in making these changes, were quite so much working with eyes down as Milsom makes them out to be.
14. The pieces of puzzle, Milsom would agree, are the ones that I put in the hour glass. How one generalizes about the way in which the forces interact is something that no one has a satisfactory predictive theory. It may well be that granted the complexity of interaction, no such theory can or should be devised. What I have hoped that I have given you in this course is

enough information that you can make your own generalizations that do justice to the complexity of the interaction.

15. Questions?

16. The exam will be posted on the website at 2:00 p.m. on Fri.