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Introduction: Baron Bramwell at the End of the Twentieth Century

by RICHARD A. EPSTEIN

Fads and fashions in legal history are often very difficult to predict. Legal history in America, for example, is now heavily weighted to the study of American law and American institutions. The assumed dominance of English common law in the American Courts, which was very much a nineteenth century fixture, waned somewhat between 1900 and the end of World War II. During the past 50 years, the decline has been still sharper. With the notable exception of the criminal law, English law has been much less in evidence on the civil law side of American law: property, tort, contract, and restitution.

Explanations for the apparent retreat of English common law within the American setting are not difficult to come by. The most obvious point is that the American system has come of age: the sprawling nature of common law in America makes it difficult for English cases, especially recent English cases, to fit under one tent. After all, with 50 states and 13 Federal Circuits churning out decision after decision, why should anyone search for persuasive authority across the Atlantic? Before the epic decision in *Erie R. Co. v. Tompkins,*[1] the Supreme Court provided some glue by making substantive law on important common law issues. But once the Court committed itself to reflecting instead of making common law, the centripetal forces in the system became far greater. Each state became a law unto itself, and the English decision—that loomed so large before the Supreme Court slowly receded from view. To be sure, the classical English opinions still continue to wield some influence in the United States today: given their early incorporation into the fabric of American law, they were carried forward through the earlier American cases. But more recent English opinions find it much harder to secure a foothold in this country because earlier American cases do not bring them to the attention of contemporary American judges. Since time and money limit the willingness to search, English opinions were first overlooked and then more consciously ignored.

Other forces are also at work, for the basic structure of common law has changed as an outgrowth of two separate forces. First, the level of statutory intervention into areas that were once dominated by common law has proceeded apace both in England and America. While there is only a limited menu of judicial rules that could be developed in a system dedicated to the principle of freedom of contract, thousands of different

1. 304 U.S. 64 (1938)

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alternatives can be introduced either through the codification of common law rules, or, more emphatically still, through legislative activity that self-consciously limits the scope of contractual freedom. Yet, once these statutes are on the books, the ability and inclination of judges to return to common law precedents is severely limited. Codes and statutes are normally conceived of as self-contained bodies of law, and their sound explication depends only in part on the common law principles that these codes and statutes were designed to displace. In a world of statutory compromises and administrative intrigue, general principles are harder to articulate, and paradoxically, less important as well. No one pretends that the latest variation in a consumer credit statute is the outgrowth of the enduring principles of common law. To master the operation of the statute, it is necessary to begin with its text, and often to pursue the regulations passed to construe the elaborate compromises that led to its passage. This process necessarily precludes any reliance, explicit or implicit, on the decisions of English judges.

English cases are also less important in the United States because of differences in our two constitutional structures. In England, Parliament is the boss, and whatever it says goes, so long as it says it clearly—which it can, at least to the satisfaction of English judges. American judges do not play second fiddle to the legislature, but reserve the power under both federal and state law to declare state laws unconstitutional. This difference in judicial authority has led to a difference in ways of thinking. English judges are reticent to look at the policies behind statutes whose commands they understand: plain meaning as a canon of construction, indeed as a way of life, has lasted much longer in England than in this country. Given our capacious Constitution, American judges feel free, and indeed compelled, to look at these ultimate policies in order to see whether a challenged statute squares with some constitutional provision of broad generality, be it on the enduring verities of speech, religion, property, due process, or equal protection. The habits of mind that American judges cultivated in their constitutional role often carry over to their common law work: after all, what judge will be content to follow common law precedent when the grander constitutional styles of litigation have become customary. As the patterns of judicial thinking appear to change, so the separation between the American legal system and its English forbears continues apace.

In some sense, I view these trends with genuine regret. My own legal education began in the mid-1960s with a law degree from Oxford, where my course of study began not with English but Roman Law. I was steeped in the learning of the great English judges of the eighteenth, nineteenth, and twentieth centuries, because older precedents tended to hold on longer in a unitary jurisdiction that followed (as England did then) a strict principle of stare decisis. No one would believe me if I said that a Yale Law School education removed whatever affection I had for English law before I entered teaching. And it did not. But there is now, happily, some reason to think that once again we have an interest in English law,

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as evidenced by this symposium on the work of Baron Bramwell. Quite independently, I received in the mail manuscripts prepared by David Abraham and Anita Ramasastry on the legal thought of Baron Bramwell, long one of my favorites of the English bench. They asked if I would write an introduction to their two papers, to which I readily agreed. But once I read their papers, my old fascination with Baron Bramwell revived; so I chimed in with a longish contribution of my own, designed to offer a qualified defense of Baron Bramwell against his many critics, past and present. I must say that the closer I looked the more I was astonished at how my own views had so often tracked his, often by a form of unconscious parallelism: I did not know, for example, of his fascination with special pleading—a subject dear to my own heart[2]—but me, that I did not think had any clear political connections. It is just that this similarity of thought often explains why we have, at both levels, been outsiders to the dominant legal traditions.

Here is not the place to explore the overlap in our own views, but to speak briefly of Bramwell directly. By the reckoning of his own contemporaries, Baron George William Wilshere Bramwell stood out as one of the dominant judicial intellects of his time. The key events in Bramwell's life can be briefly stated. He was born in 1808, had an early career in merchant banking in his father's house, was admitted into pupillage at Lincoln's Inn in 1830 when he was 22, to the Inner Temple six years later when he was 28, and was finally called to the Bar in 1838 where he served with distinction for 20 years. He was appointed to the bench as a Baron of the Exchequer in 1856, when he was duly knighted, and served there for 20 years. With the reorganization of the English Judiciary in 1876, he became a Lord Justice of Appeal—a position he held until his formal retirement at age 73 in 1881. His judicial efforts did not cease: in 1882, he was given the title of Baron Bramwell of Hever, and heard many appeals as a member of the House of Lords until his death in 1892.

Broadly speaking, Bramwell's career falls into two separate stages. First, when principles of laissez faire were in the ascendancy, Bramwell showed the buoyant optimism of his age and assumed the mantle of one of the leading spokesmen of intelligent reform. Having established his reputation as a special pleader at the bar, he took active part in the dismantling of the older system of pleading and procedure as a member of the Common Law Procedure Commission, whose work was translated into law with the Common Law Procedure Act of 1852.[3] Ten years later, he was active on a second commission that consolidated the English company, or as we say, corporate law, which resulted in the passage of the

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2. *See*, Richard A. Epstein, *Pleadings and Presumptions*, 40 U. CHI. L. REV. 556 (1973); Richard A. Epstein, *Defenses and Subsequent Pleas in a System of Strict Liability*, 3 J. LEGAL STUD. 165 (1974).

3. 15 & 16 Victoria c. 76 §3. For a positive assessment of his contribution, *see* W.S. HOLDSWORTH, HISTORY OF ENGLISH LAW 505 (1927).

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Companies Act, 1862.[4]

As Professor Remasastry shows, Bramwell's second period began, roughly speaking in 1870 when the dominant mood in England began to change, and men were less sure that the verities of liberty, property, and contract were sufficient to meet all the challenges and ills of a modern industrial society.[5] Bramwell, however, did not alter his beliefs to stay in tune with the times, but retained his youthful attachment to the immutable truths of laissez faire. No longer an insider, his rhetoric could take on a shrill and defensive cast, for he could never understand why these plain truths were rejected by the powerful intellectual and political elites of his own time in favor of collectivist or socialist dogma that he regarded as destructive of both individual rights and the long-term soundness of the society as a whole. After his membership in the House of Lords, he was in part freed of the constraints of being a full-time sitting judge. It was at this time that Bramwell, as a founding member and first President of the Liberty and Property Defence League, threw himself into passionate and often barbed defense of the same conception of limited government that animated his earlier work: the preservation of peace and good order, the protection of property from external aggression and, most critically, the enforcement of voluntary contracts.

What made Bramwell unusual even for the laissez faire judges of his own time was his shrewd philosophical insights that inform so much of his legal work. Many judges are moved by a respect for precedent and seek to improve law by increments, without seeking to justify, question, or even identify the first principles behind the legal rules. Most have some sense that the function of judges is to decide cases, not issue pronouncements on the eternal verities. Very few had Bramwell's strong sense of the architecture of the law, or his ability to make a forthright statement of his position as an integral part of his judicial work. Indeed, the very clarity and power of his sometimes incautious expression made him the most convenient judicial foil of reformers and critics of a latter age.

Owing to the richness and complexity of his thought, it is not surprising that Professors Abraham, Remasastry, and myself all learn much from Baron Bramwell, even if we differ among ourselves in what that lesson would be. Professor Abraham is in what might be called the mainspring tradition that continues to castigate him strongly for his views. Professor Ramasastry takes a more sympathetic position, and finds in his Progressions and Paradoxes a man who defies easy characterization. At the risk of some oversimplification, she is critical of his judicial application of the principle of freedom of contract, but far more approving of his

4. 25 & 26 Vict. Ch. 89. (1862).

5. *See*, the classic account of A.V. Dicey, LECTURES ON THE RELATION BETWEEN LAW AND PUBLIC OPINION IN ENGLAND DURING THE NINETEENTH CENTURY 62-65 (1st ed. 1905), which divides the nineteenth century into three overlapping periods. I. The period of Old Toryism or Legislative Quiescence (1800-1830), II. The period of Benthamism or individualism (1825-1870); and III. The period of Collectivism (1865-1900).

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varied achievements and reforms that were in large part driven by the same philosophical principle that animated his decision in the cases. Finally, while I am happy to quarrel with Bramwell on points of detail and application, I count myself as his defender both for his common law decisions and the larger political philosophy that animated them.

To speak of this divergence of opinion, however, is to put the cart before the horse. The preliminary inquiry is, why the renewed interest in Baron Bramwell in the first place? To my mind, the explanation depends on many of the factors set out above. The development of twentieth century law has not proved wholly satisfactory even to its defenders. The growth of statutory law has lead us away from questions of first principle, and from questions of political morality. Whatever the weakness of Baron Bramwell, he confronted just these questions in a blunt and uncompromising way. His opinions may be less authoritative than those of modern American judges, but usually they are less verbose and less labored; they are also more provocative, more informative, and more jurisprudential. In addition, we have entered, I think, a new phase of political life. Refutations of laissez faire still fill the air. Much of the intense passion about its ostensible injustices continues to burn bright. But there is this difference. Critics of laissez faire are no longer as cocky about the present alternatives. The size of government continues to grow; the plate of positive rights becomes even fuller; the dominance of this new wave of thinking is almost unchallenged in popular circles. Yet, there is an increasing sense of disappointed expectations, a sense that the brave new legal order is not able to deliver the prosperity, peace, and contentment that it once so freely promised. And try as one may, it becomes harder with each passing year to point an accusing finger at the bygone heyday of laissez faire, for so long cast as the villain of the piece. More immediate explanations dominate remote ones, and we must attribute at least some of the failings of our own times to contemporary policies and not to some ill-defined legacy of a bygone era. Perhaps the critics are overhasty, and laissez faire contained a core of good sense, perhaps more than modern writers want to acknowledge.

With our doubts about our own jurisprudence, it is perhaps natural to turn to the masters of a bygone age to see whether our generation, too, should follow in the footsteps of its immediate predecessors and repudiate the doctrines that held sway over much of the nineteenth century. The reader will have to be the judge of whether the renewed interest in Baron Bramwell represents an important change in intellectual direction, or a passing fancy that will be quickly forgotten as legal scholars once again turn to business as usual in the welfare state.

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