REVIEW


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I

Justice Story has not, in this century, had a good press. Indeed my own generation of law students was brought up to believe that the only open question about Story was whether he was more stupid than he was wicked, or, alternatively, more wicked than he was stupid. The overruling1 of Swift v. Tyson2 on the astonishing ground that its doctrine was, and always had been, unconstitutional was greeted, by those of the liberal persuasion, with a sort of fierce exultation. Some of the more advanced thinkers of the time seemed to feel that posthumous impeachment proceedings would be in order, now that Justice Brandeis, that uncompromising moralist, had unmasked the arch-villain, Story, as the only member of the Supreme Court ever to have written (in Mr. Dunne's neat phrase) "an unconstitutional opinion in a leading constitutional case."3

Mr. Dunne's admirable study of Story's career is a long overdue rehabilitation of one of the truly great figures of our legal history. One of the pleasant ironies of the situation is that Story (whom the so-called legal realists hated) appears to have been much closer to their own jurisprudential position than was Holmes (whom they adored). It is, of course, a wise child that knows its own father, but the realists appear to have been doubly mistaken both in disowning the Story patrimony and in claiming the inheritance of Holmes. For the Story that emerges from Mr. Dunne's pages is an easy-going pragmatist who looked on rules of law not as mystical absolutes but as tentative approximations subject to change as the conditions which had called them forth themselves

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2 41 U.S. (16 Pet.) 1 (1842). If there happen to be any nonlawyers in the audience, the doctrine of Swift v. Tyson, briefly stated, was that the federal courts would exercise an independent judgment in questions of "general commercial law" and would not be bound by the rules of law followed in the state courts.
3 P. 403.
changed. And for Story, an intensely political man, policy may well have been nine points of the law. Indeed *Swift v. Tyson* itself may be taken as the prototypical example of the "policy-oriented" decision for which the realists clamored.

One of the unsolved and perhaps unsolvable problems of "judicial biography" is how much attention should go to the "man" in all his quirky eccentricity and how much to the "judge," an essentially de-humanized machine for producing judicial opinions. Mr. Dunne has made the conventional compromise, which leaves his book, like most others in this category, uneasily balanced between anecdote and jurisprudence. In Story's case the compromise may well be justifiable, since the man was at least as extraordinary as the judge.

There are crazy people whose curious fate is to end up as pillars of the establishment. Their lifelong habit of orthodoxy disguises, without quite concealing, a central core of heresy. Story may well have been a man of this disturbing type, whose endeavor is falsely to persuade his contemporaries that he is, in the last analysis, a decent, ordinary, God-fearing, trustworthy sort of chap. The essential square who masquerades as a hippie is a run-of-the-mill phenomenon. The essential hippie who masquerades as a square is altogether more complex and is apt to call forth ambivalent reactions from those who observe his act.

Mr. Dunne tells us that Story in his youth had committed poetry, indeed had published a slim volume of verse under the title *The Power of Solitude*. The title comes oddly from the pen of the man who was later known as the most gregarious socializer and the most compulsive talker of his generation. (It appears that Story later collected and burned all the copies of the book that he could find.) Mr. Dunne assures us that Story's switch from poetry to law was a clear gain for English poetry and engagingly suggests that some scholar should investigate "the seeming aptitude of second-rate poets to become first-rate jurists" (citing, as trans-Atlantic examples of the same phenomenon, Lord Mansfield and Sir William Blackstone).

Story must have been a man of amazing physical stamina as well as of a truly demonic energy. He was quite as compulsive a writer as he was a talker—once the machine had been turned on, there seems to have been no way of turning it off. It should have been possible, one would think, to explain the holding that the "admiralty and maritime jurisdiction" conferred on the federal courts by article III, section 2 of the Constitution included contracts of marine insurance in fewer than 26,000 words and with a less stupendous display of the author's erudi-

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4 P. 35.
No doubt Story's uncontrolled prolixity and his unabashed parade of his own learning are elements of his style which we find peculiarly unattractive today—although it should be said that on occasion Story could match even Marshall himself for terseness and crisp precision of statement. But he did love to let himself go—in his opinions, in his speeches, in his many articles, and finally in his treatises. (One of the many mysteries about Story is when and where and how he acquired his erudition. There seems to have been no time for it in his almost frenetically active life. And, for that matter, where did a penniless young lawyer in Salem, Massachusetts get the books?)

Between 1831, when he became the Dane Professor of Law at Harvard (while continuing to serve as a Justice of the Supreme Court), and his death in 1845, Story published a series of treatises which have almost never been matched either for bulk or for quality. The best known of them—his *Commentaries on the Constitution* (1833, three volumes), *on the Conflict of Laws* (1834), and *on Equity Jurisprudence* (1836, two volumes)—continued to be cited as authoritative, in England as well as in this country, down to the end of the century. The mystery of how Story acquired his erudition is dwarfed by the mystery of how he ever managed to get the treatises written—bearing in mind that he had to spend several months of the year in Washington for the terms of court and another several months deciding cases on circuit throughout New England, to say nothing of lecturing at Harvard in the fall and spring. Apparently the surviving records afford no explanation of how the formidable mechanics of this operation were handled—at least Mr. Dunne does not discuss them. In this century no one except Williston has written more than one major treatise. Williston wrote two. Story, working part time and before the invention of even the typewriter, to say nothing of such useful devices as the dictating machine and Xerox, wrote nine major treatises in less than fifteen years. At the time of his death he was about to begin on a tenth: Admiralty.

That Story wrote as much as he did is hard enough to believe; that what he wrote was of first-rate quality is altogether beyond belief. And yet that is the fact. To Mr. Dunne's testimony, I may add my own. I have never systematically read through any of the Story treatises—

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6 Swift v. Tyson, 41 U.S. (16 Pet.) 1 (1842), is a good example.
7 No one has ever come even near Story in his ability to roll off the names of long-forgotten authorities, particularly his beloved "civilians": Voet, Rodenburg, Bouleinois, D'Argentre, Burgundus, Hertius, Bouhier, etc., etc. The idea has not infrequently occurred to me that Story was making up his high-sounding lists. I daresay that on investigation it would turn out that all his authorities not only existed but were being accurately quoted.
deed life is hardly long enough to read what Story wrote in a few years.\footnote{As Mr. Dunne puts it: "[I]t takes a modern lawyer, engrossed with a conventional work load, almost more time to read Story's Commentaries than it took the author to write them." P. 314.} I have, on a good many occasions, consulted one or another of the treatises in attempting to reconstruct some historical sequence. I have never failed to marvel at what I found. No treatises as good as Story's were written for nearly a hundred years after his death—not until we come to the great works of Williston and Wigmore and, somewhat later, Corbin can it be said that Story has been equaled. And, at the time he wrote, nothing on Story's level had ever been written either in England or in the United States.

II

The strength of the pre–Civil War codifications movement has been largely forgotten today. No doubt most qualified observers of the period would have predicted an early and complete codification of American law along the lines proposed by David Dudley Field in the codes which he prepared for enactment in New York. After the narrow defeat of the Field codes in New York,\footnote{Bits and pieces of the Code of Procedure were in fact enacted. The heart of the codification proposed by Field was the Civil Code, drafted during the 1850s and submitted to the legislature in 1865. After a thirteen-year delay the legislature enacted the Civil Code in 1878, but the Act was vetoed by the Governor, which was the end of the story in New York. For the curious sequel in California and other Western states, see Harrison, The First Half Century of the California Civil Code, 10 CALIF. L. REV. 185 (1922).} the movement seems to have run out of steam, and little or nothing was heard about codification until the end of the century, with the series of uniform acts in the commercial field which were drafted under the auspices of the National Conference of Commissioners on Uniform State Laws.\footnote{The Conference was established in the 1890s as a subsidiary or affiliate of the American Bar Association. Its first two projects were the drafting of the Uniform Negotiable Instruments Law (promulgated in 1896) and of the Uniform Sales Act (promulgated in 1906).}

The early codification movement in the United States depended not at all on the jurisprudential enthusiasms of Jeremy Bentham. On the contrary, it was as American as apple pie. It may be, indeed, that we should speak not of one movement but of several movements. There were those who, hating everything English, saw the common law of England as an incubus with which our former imperial masters had managed to saddle us before ignominiously departing. An American codification was the obvious solution to the problem of how best to cut
ourselves loose from English law. But the real political clout of
the movement seems to have come from a pervasive popular distrust of
lawyers. The lawyers concealed the law from the people, made it in-
accessible to the honest backwoodsmen of Cooper's *Leatherstocking
Tales*, and conspired to make the rules of law dark and mysterious when
they should have been as transparently clear as the unpolluted streams
which our forefathers knew. Codification would rescue the law from the
lawyers and give it back to the people. This approach to the problem
of codification found its political expression in the Jacksonian democ-
archy of the 1830s.

There were, finally, members of the legal establishment, such as
Story, who saw codification as an inevitable necessity if we were to
escape from being buried under the accumulating mass of thousands
and tens of thousands of case reports. Not only did the sheer bulk of the
reports make it impossible for any lawyer to keep up with them; even
worse was the specter of a state-by-state fragmentation of the substantive
law which threatened as the country moved west and new court
systems came in with the newly admitted states. From this point of
view, codification seemed the best, and perhaps the only, way of keeping
current developments in American law reasonably accessible to the
harried practitioner as well as the best, and perhaps the only, way of
avoiding fragmentation and of achieving at least a tolerable degree
of national uniformity in the substantive law.

Story, of course, had little or no patience with romantic fantasies
about the pure and simple character of life on the westering frontier.
Nor did he share the anti-English bias of his more chauvinist contem-
poraries. And in later life his growing political conservatism caused him
to set his face against the increasingly populist manifestations of the
Jacksonians. Nor was Story ever a Benthamite. According to Mr.
Dunne, Story "more than any other man defeated the extreme proposals
of the American codification movement." The comment is fair
eough if we take care to emphasize the word "extreme." It would also,
I think, be fair to add that Story, more than any other man, laid the
foundation for the type of limited, pragmatic codification on the
American plan which we eventually—after 1900—achieved.

Story had as early as 1821 called for a general codification as "the

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11 This aspect of the early codification movement was brilliantly discussed by the late
12 Mr. Dunne quotes a letter from Story to John Williams, written in 1836, in which
Story remarks: "We have not yet become votaries of Jeremy Bentham." P. 317. The letter
discussed Story's work on the Massachusetts codification commission referred to below.
13 P. 318.
one adequate remedy” which might avert “the fearful calamity, which threatens us, of being buried alive, not in the catacombs, but in the labyrinths of the law.”14 “A gradual digest, under legislative authority, of those portions of our jurisprudence, which, under the forming hand of the judiciary, shall from time to time acquire scientific accuracy,” might, he suggested, “pave the way to a general code, which will present, in its positive and authoritative text, the most material rules to guide the lawyer, the statesman, and the private citizen.”15 Such a code, he pointed out, would require periodic revisions “to reflect all the light which intermediate decisions may have thrown upon our jurisprudence. To attempt more than this,” he concluded, drawing the line between his own position and Bentham’s, “would be a hopeless labor, if not an absurd project. We ought not to permit ourselves to indulge in the theoretical extravagances of some well-meaning philosophical jurists, who believe that all human concerns for the future can be provided for in a code, speaking a definite language. Sufficient for us will be the achievement, to reduce the past to order and certainty; and that this is within our reach cannot be matter of doubtful speculation.”16

In 1836 Story was named to a commission to “consider and report upon the practicability and expediency of reducing to a written and systematic code the common law of Massachusetts, or any part thereof.”17 Story seems to have dominated the work of the commission and to have written its report. Maintaining his anti-Benthamism, he wrote that any attempt to reduce the entire body of the common law to a written and systematic code would be “positively mischievous, or ineffectual, or futile.”18 There were, however, certain areas of the substantive law whose codification would be both possible and desirable. “[E]minently . . . in this predicament” were what he called “commercial contracts,” in which he included the law of agency, bailment, guaranty, suretyship, bills of exchange, promissory notes, insurance, partnership, and maritime contracts.19 Criminal law and the law of evidence, he added, were also capable of being, and should be, codified. Story’s proposal for the

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14 The Progress of Jurisprudence (An Address Delivered Before the Members of the Suffolk Bar, at Their Anniversary, September 4, 1821, at Boston), in The Miscellaneous Writings of Joseph Story 198, 287 (1852). At this point Story must have been well into the third hour of his “Address.” (The Writings were edited by Justice Story’s son, William Wetmore Story.)
15 Id.
16 Id. at 238.
17 The report of the commission, entitled “Codification of the Common Law,” appears in the Writings at page 698.
18 Id. at 712.
19 Id. at 730–31.
Massachusetts commission seems in retrospect to have been extremely ambitious. Indeed in nearly 150 years we have not yet got as far as Story thought it was possible to go in the 1830s. In addition to identifying the areas of the law which he thought were ripe for codification, Story’s report contains a remarkably sophisticated discussion of the problems of living with a codified law which reads as if it might have been written in the second half of the twentieth century instead of in the first half of the nineteenth.

It may well be that Story in the 1830s had succumbed to “the hostility and insecurity of an antidemocratic pessimism,” although it seems to me that Mr. Dunne overstates his case when he remarks that “the commission episode... marks a significant point of regression at which Story’s political despair began to take its toll of his talents.” Story refused to take on the job of codifying Massachusetts law along the lines proposed in the commission’s report—a decision which is not surprising when we consider that he was already doing the work of half a dozen ordinary men—and with his refusal the Massachusetts codification project quietly died.

III

Story’s aim was, as he had put it in his 1821 speech, “to reduce the past to order and certainty.” Once that had been done, it would be possible, he hoped, to lay the foundations for a truly uniform national law despite the ugly indications, which concerned him throughout his life, of a growing nonuniformity which became even more disturbing as the Union collapsed into sectional conflict, division, and hatred. Codification, which Story had seen as the best solution to our legal ills, failed. But, as Mr. Dunne perceptively notes, Story’s achievements as writer, as teacher, and as judge were astonishingly successful in averting the “fearful calamity” which he had feared.

For one thing, Story’s Commentaries “provided a codification, par excellence, of American law.” The “American law” point is as important as the codification point. Story and others had long realized that the novel conditions of American life meant that the development of American law necessarily would, and theoretically should, diverge from the contemporaneous development of English law. In this connection Mr. Dunne comments that, at the beginning of Story’s judicial career, his

20 P. 317.
21 P. 318.
22 See text at note 16 supra.
23 P. 318.
decisions on circuit "showed a juridical nationalism in temper as well as philosophy and luminously prefigured the long and distinguished career in structuring an authentically American law."24 The need for an "authentically American legal literature" ran parallel with the coming into being of "American law." Chancellor Kent's significantly entitled *Commentaries on American Law*, which first appeared in the 1820s, had run through four editions by 1840. But Kent's slim volumes, despite their unmerited success and fame, were schoolboy stuff. It was Story, in his never-ending series of volumes, who for the first time united an impressive knowledge of both English and civil law with an intuitive understanding of and feeling for the unique circumstances of life in the United States in the nineteenth century.

For another thing, Story practically invented the idea of the "national law school." After Story's death the Harvard Law School seems to have gone into a decline which was not reversed until the school was reorganized following Langdell's appointment as Dean in 1870. But it was during Story's tenure at Harvard that the idea of a preeminent school which would attract students from the entire country and which would train them in a national law, broadly conceived, first took root. The day of the national law school is now long since past. But we should not forget that down to the time of, say, World War I Harvard and a handful of other schools trained an inordinate number of the lawyers who went on to become the leaders of bench and bar throughout the country. The unifying effect of their early training—inoculation, brainwashing, or what not—on these future leaders should not be underestimated. And it should also be borne in mind that the production of casebooks and the writing of treatises was, for a long time, a quasi monopoly of the faculties of the half-dozen leading law schools.

From our twentieth century point of view, it is a laughable fiction that there ever was a unitary system of law, always and everywhere the same, across the immense range of the United States. But the nineteenth century graduates of our national law schools were trained to believe that there was such a thing as the one true rule of law which, by diligent study, could be discovered and, once discovered, held fast to. The absurdity of a belief, as we know, does not detract from its effectiveness or striking power. The simplistic jurisprudence which Dean Langdell and his colleagues inculcated in their students served, no doubt, the socially useful goal of imposing a skin or crust of uniformity on the chaotic diversity which lay beneath the surface. Story's

24 P. 98.
own jurisprudence was a good deal more subtle, nuanced, even con-
temporary than that which most of his successors in the Dane professor-
ship shared. But without Story's shining example it is unlikely that the
latecomers would have enjoyed the respect and acclaim which greeted
their modest efforts.

Finally, there is the immense corpus of Story's judicial work, on the
Supreme Court and on circuit, during his thirty-three years (1812–1845)
on the bench. The key to Mr. Dunne's analysis of Story's work as judge
is implicit in the subtitle of his book: “The Rise of the Supreme Court.”
I take Mr. Dunne to have more in mind than the fact that the Supreme
Court successfully assumed the power to invalidate not only acts of
state legislatures but acts of Congress as well. And indeed more than
the nationalizing fervor which led Marshall, Story, and their colleagues
to adopt an expansive view not only of the powers of the legislative
branch of the federal government but of the jurisdiction of the federal
courts.

Foreign observers of the American scene, starting with de Tocque-
ville, have been fascinated by our predilection for rephrasing political
issues (or issues which, in any other country in the world, would be
considered political issues) as questions of law and for committing the
issues, thus rephrased, for decision to the courts rather than to the
legislatures. That the judicial activists of the Warren Court took upon
themselves the thankless task of providing solutions to urgent matters
of social policy on which a stalemated Congress could not, or would
not, act was nothing new. Recurrently in the history of the Republic
we have looked to the courts—and most of all to the Supreme Court
of the United States—for salvation in times of trouble. The oracles
with which the Court has provided us have not at all times been
divinely inspired. The Justices have not, without exception, been men
of superior intellect, great learning, and compassionate wisdom. But
the practice, once established, of looking to the Court as the bulwark
of our liberties—the guardian of the ark of the covenant—has long
endured.

Such a position—at the very center of the mystery which constitutes
any government—could never have been conferred by constitutional
fiat. Since nothing quite like what the Supreme Court of the United
States ultimately became had ever existed, the framers of the Constitu-
tion obviously could not have had any such role in mind. The Court's
preeminence could only have been conferred, as it was conferred, by
popular suffrage. And it was, as Mr. Dunne suggests, during Story's
long tenure under the successive chief justiceships of Marshall and
Taney that the Court achieved its unlikely destiny—a court of law whose principal function is the resolution of political issues.

Only in the United States have judges—Marshall, Holmes, and a few others—ever become folk heroes, popularly endowed with the same mythical qualities which we attribute to our greatest political leaders. Story never shared, during his lifetime or posthumously, in this sort of apotheosis. Even in the consciousness of lawyers he has come to be looked on as a sort of superannuated research assistant to Marshall, who, after the great Chief Justice's death, succeeded in hoodwinking his gullible Jacksonian colleagues on the Court with the unconstitutional nonsense of *Swift v. Tyson*. We do not have so many great men that we can afford to consign any of them to oblivion. Mr. Dunne has put all of us in his debt by restoring to public view one of our authentic heroes. (The subsequent history of *Swift v. Tyson* is not part of Mr. Dunne's subject, but I will venture the observation that the doctrine of *Swift v. Tyson* worked with remarkable effectiveness during the better part of a hundred years toward the achievement of Story's own lifelong goal of national uniformity.)

Mr. Dunne is a practicing lawyer, not an academic. It is good to be reminded that ours is, or can be, one of the learned professions and not merely a branch of trade. And it may well be that the writing of law books is too important to be left to the professors. I do not know whether Mr. Dunne has in mind to write, like Story himself, nine large books in the next fifteen years. I do know, however, that anything Mr. Dunne is willing to write, I am more than willing to read.