

HISTORY AND LAW*

CHARLES E. WYZANSKI, JR.†

TO SPEAK of History and Law is to choose a subject already much investigated. Lord Macmillan in the last decade, Sir Frederick Pollock, F. W. Maitland, Sir William S. Holdsworth and other giants in earlier decades have taken this path. I have no wish to tread where they have cleared the way—for that would merely show with what short steps I walk.

It would be possible, were history my metier, to consider what law has meant to history. Herbert Butterfield furnishes an interesting opening in his remark that scientific history in England was begun by John Selden, the celebrated Seventeenth Century lawyer, whom we tend to appreciate even more for his civil courage than for his meticulous learning. Leopold Von Ranke in his aphoristic remark that "we often ascribe too much to government when the real work of history-making is done from below" has suggested a text for a disquisition on what lawyers in their daily professional performances have to offer to the modern school or historians who so rightly regard social and economic features of our common life as being fully the equal of political contests and military engagements in disclosing the history of a people. But inviting as this prospect is, its development must await an abler hand.

Another approach would be to consider how lawyers persistently pervert history to serve their own or their clients' interests. How often in courtroom addresses and bar association speeches we listen to lawyers praise the jury system as the quintessence of Anglo-Saxon inventiveness in the legal sphere and as the original English contribution to the system of organized justice. Surely they know, as is incontrovertibly proved by the researches of Professor Charles Homer Haskins, that the jury was Norman in origin, and was imported from France after the Battle of Hastings. With what frequency in cases presented to a judge sitting without a jury, lawyers contend that hearsay is admissible evidence, because its exclusion is, as they argue, founded on the theory that juries cannot be trusted to evaluate that type of testimony. Yet Professor Edmund M. Morgan, like others who have delved into the history of the hearsay rule, have made it clear that hearsay is excluded because it cannot be effectively cross-examined and is hence repugnant to the basic premises of our adversary system. On historical principles, exclusion of hearsay is as appropriate in a jury-waived as in a jury case. And what shall I say of what some of my superiors do with the history of the Fourteenth Amendment to the United States Constitution? Is it that they will not read, or will not learn from the articles which Professor Charles Fairman has written? But, in any case, leaving aside my carping criticism, I shall now proceed directly to the view that I *do*

* The third Ernst Freund Lecture, delivered at the University of Chicago Law School, December 1, 1958.

† Judge, United States District Court, District of Massachusetts.

propose to take of History and the Law—a view that seeks to inquire what is or can be the part history plays as the source of value in the law.

That history does make such a contribution has always been recognized—perhaps nowhere more felicitously than in one of Chief Judge Cardozo's Storrs Lectures on *The Nature of the Judicial Process*. Yet, in the long perspective of the centuries, must it not be acknowledged that history has been traded on a falling market? Ever since Jeremy Bentham entered the lists against Sir William Blackstone, history has been yielding in favor to social planning, to economic understanding, to avowed political policy. The use of history, the demand for its lessons, has been narrowed. Let us take as a conspicuous instance the greatest of our jurists, Justice Oliver Wendell Holmes, than whom no American can claim a deeper knowledge of history. In his lectures on *The Common Law*, delivered before he ascended the bench, but nonetheless the undoubted source of the fundamental ideas he later expressed as a member of the Supreme Judicial Court of Massachusetts, Holmes wrote: "I shall use the history of our law so far as it is necessary to explain a conception or to interpret a rule *but no further*."¹ (Italics added.) And in his *Collected Essays* he emphasized that "[t]he present has a right to govern itself, so far as it can. . . . Historical continuity with the past is not a duty, it is only a necessity."² Nor, read carefully, do his opinions as a Justice of the Supreme Court of the United States show a change in Holmes's outlook. When he phrased the memorable epigram that "a page of history is worth a volume of logic," the contrast he was emphasizing was only between history and logic. It is another poetic corollary to his even more celebrated dictum that "[t]he life of the law has not been logic, but experience."

John Chipman Gray, one of Holmes' few nineteenth century rivals in legal historical learning, did not differ from his lifetime friend in this attitude. The Columbia lectures on *The Nature and Sources of the Law* state that "[t]he historical method has its disadvantages, it begets literary rather than practical study, it hinders the grasping of the law of the present time as a whole."³

It would perhaps not be unfair to conclude that Holmes, Gray, and their contemporaries in general hoped to learn from history not much more than the origin of rules. They valued history largely because it helped to lighten the dead weight of the past, and to leave only that residue which had discernible utilitarian purposes to serve. In our own time Professor F. H. Lawson of Oxford in *The Rational Strength of English Law*, his Hamlyn lectures, phrased this idea in these words: "historical explanations lead one to rational explanations, in the sense that there was a time when the rule in question was a sane and intelligent adjustment of means to an end."⁴ And indeed Maitland himself at times hardly claimed more for history. "Anyone who possesses what has been called the historic sense must, so it seems to me, dislike to see a rule or an idea unfittingly

¹ Holmes, *The Common Law* 2 (1881).

² Holmes, *Collected Essays* 191.

³ Gray, *The Nature and Sources of the Law* 151 (1921).

⁴ Lawson, *The Rational Strength of English Law* 12.

surviving in a changed environment. An anachronism should offend not only his reason but his taste."⁵

That this restricted view of history's function has prevailed no one can doubt who looks at today's work in the courts, in the law offices, and in the schools. A rapid glance at opinions of the Supreme Court of the United States will promptly disclose how little present justices, in comparison with their predecessors, rely on the older authorities, English or American, judicial or academic. There is far less respect not merely for precedents in their technical sense, but also for tradition, custom, and the ancient ways as good in themselves. The fashion is to exalt reason and depreciate habit. Less overt attention is devoted to the value of stability. Yet is not stability the necessary (though by itself insufficient) condition for popular respect of, and indeed for popular understanding of and obedience to, the law? And the tendencies of the Supreme Court of the United States are not without their reflection in a few state courts, though the majority of state supreme court chief justices, guided by the faculty of the University of Chicago Law School, has recently quite audibly expressed their personal condemnation of what they regard as heresies in the Supreme Court.

The smaller place that history has in the life of the private lawyer is evident to anyone who looks at the library shelves in the modern law office. Loose-leaf services supplied by Commerce Clearing House and Prentice-Hall fill many rows. Usually there is room for some West Publishing Reports—perhaps even the lowly "Fed. Pup," as Judge Augustus N. Hand always called the output of the inferior federal courts on which I sit. Works of longer reach into the past have all but disappeared.

But we are told by Professor Daniel J. Boorstin of the University of Chicago in his recently published *The Americans—The Colonial Experience* that lawyers never were a learned class, and he purports to rely on eighteenth century memoirs and inventories. Without perhaps adequate qualifications to challenge this Chicago University pundit, I venture to doubt whether he does justice to those who studied under Theophilus Parsons, Professor George Wythe, and the other great tutors who educated men for the eighteenth century and early nineteenth century Bar. What I have seen of John Adams' library, what I have read of Thomas Jefferson's, what we know of the debates in the Constitutional Convention nourish my doubt. And the evidence of the libraries of lawyers of an earlier age offers a sharp contrast with what any of us can discover of the contemporary trend by browsing in second-hand bookstores.

In law schools the evidence is of a different nature, but persuasive to the same conclusion. Although nowadays I look at the case-books and other teaching materials from afar, and lack that intense familiarity which most of my audience has, I have the strong impression that, compared with the case-books of three decades ago, when I matriculated, history is a negligible part of the required reading. The teaching of procedure, criminal law, property, torts—no

⁵ III Maitland, *Collected Essays* §66.

matter how old the subject—has become primarily the teaching of current practice and doctrine. We no longer believe either that the forms of action do, or that they should, rule us from the grave.

The sum of the matter is that we minimize the durable elements in our law. We stress the competition of present interests. We seek their resolution. And if that resolution has been made by some appropriate public body we merely seek to discern the precise contours of that decision.

Nor is this a new attitude. Were not Thrasymachus and Gorgias contending for this viewpoint? Much later, did not Epicurus adopt their position when he concluded that "justice is never anything in itself," but that the system of organized justice is a mere contrivance for lessening men's well-warranted fears of powerful evil forces, of terrible threats to a peaceful existence? And, in some of their utterances, are not some of the wisest men of our times to be accounted as intellectual companions of that great Roman? What else are we to read into the declaration of Samuel Alexander, the Manchester philosopher, that "[g]oodness is the mutual adjustment of claims"? And in his memorable Holmes lectures on *The Bill of Rights*, did not Judge Learned Hand repeat his scepticism as to the objective validity of any value system.⁶ Poetry may beautify but it cannot conceal that great man's despair of ultimates of any kind. And despair—at least to my way of thinking—there is in the thought that when we weigh our joys and sorrows and choose between them our choice "is as immediate, absolute, and underived as are its component values and sacrifices."

It is perhaps easy to appreciate the deep currents in our times which have made men doubt whether there is much more to law than a system of fair procedure, a system that permits interested parties to make their own bargains upon the basis of such short-run calculations as bargains are usually made, and that confines judges and professors to discerning and elucidating the meanings inherent in the bargains. After all, our law is no longer a judge-centered law. We find it hard to believe that, according to Maitland, a century and half ago virtually all law-making that affected private persons was in the hands of 14 judges of the High Court. Today even in England, and *a fortiori* in the United States, the judge has ceased to "embody the law," and is hardly its oracle. Without reference in detail to administrative agencies and quasi-judicial tribunals of all sorts, which, by a convenient fiction, might be regarded as offshoots from the judicial power, let us note two often neglected but equally important influences which have reduced the relative importance of the judge as the ultimate formulator of law.

The first of the influences will, I know, be challenged as irrelevant to my theme. But I ask for patient consideration. My contention is that much more, in percentage terms as well as in absolute terms, much more than ever before law is being both made and administered by private groups outside of the legislative and judicial process, and almost without regular contact with such official organs of power. I refer to the actions of the corporation, of the trade union,

⁶ Hand, *The Bill of Rights* 38 (1958).

of the co-operative, and of each of the manifold types of "voluntary association" that constitute what Gunnar Myrdal so vividly describes as "the *infra* structure" of democracy. They cover the whole gamut of agreements, express and implied, ranging from pension funds, to division of profits realized from inventions, to seniority clauses, to restrictions on freedom in what had been regarded as man's most personal and private domain. We are just beginning in the law schools to realize how vast and rich in possibilities is this area—an area in which most of our graduates spend almost their whole working time. Or at any rate, I, who never see them in court and only hear at the luncheon table of their activities, have inferred that that is where our best lawyers are occupied.

This large area of social control through legal means is of the utmost significance, despite our failure to have gone far in studying it. Is it not, for example, clear that familiarity with this field of law furnishes a compelling answer to an oft-repeated charge that in our world technical scientific advance has outstripped men's social talents and their powers of understanding and control? Is not a technological society—a society, in other words, like ours—a society in which there have been at work in harmony two different kinds of progress: one is the discovery of aspects of nature and the proliferation of inventions operating in the physical world; the other is the formulation, development, and administration of social arrangements that apply these discoveries and inventions in our work-a-day world? What our lawyers have been doing, and what our law has done on its private side for several generations, and on its public side more recently, are to help found and nourish our technological society.

But this has been achieved without very much consideration of anything but present advantage to the immediately interested parties. And it is the absence in this area of any deeper notions of value, any profound historical or philosophical orientation, that contributes so powerfully, though often subconsciously, to the growing belief that law and even justice are without any more particularized principles than the central guarantee of due process—a forum free from bias, lofty in its character, willing patiently to hear all the relevant evidence, closed to secret information, undiverted by public or private pressures fair in its analysis, and candid in its announcement of the genuine reasons for—not merely the plausible rationalization of—its decisions.

The second of the influences which have made sophisticated persons doubt whether law is as closely related to principle, or to any discoverable value system, as it once was, is the growing tendency to deny to courts the last word which to such a large extent they previously enjoyed in questions of law. Now, of course, neither in the United States nor in any other country, were the courts ever "the ultimate power," "the court of last resort." Always the people and usually the legislature had the right by sufficiently large majorities to overrule a judicial decision. The text of the Amendments to the United States Constitution, the pages of the United States Statutes at Large, are replete with examples. But what was once an exceptional situation is becoming routine. The

trend in tax matters is so obvious that no one has bothered to discuss it. But it is only recently that some of us have realized how far today the courts, and particularly the Supreme Court of the United States, have their decisions revised, at least in their bearing on future controversies, by Acts of Congress. There is, as it were, a constant cross-ruff between the courts and the legislature. And in this interplay the dispute is, generally, not about a fundamental value but about the choice of insistent interests or pressing policies to be preferred. In short, here again we have an emphasis on those aspects of the law which relate to bargain and compromise, not to "absolutes" and not even to principles or "standards."

There are some who might argue that the tendencies toward the altered character of "law" to which I have adverted are inevitable in what is commonly referred to by its friends as "the welfare state," and by its foes as "the socialist state." Such an argument would at least have some color of truth. For the welfare state when it went beyond the earlier state's concern with force and fraud, inevitably broke outside the bounds of Aristotle's "*retributive* justice." It created a new area of what might be called "*prescriptive* justice." And in this affirmative form of social control and legal power, ancient value elements seemed recessive and modern policy considerations dominant.

Plausible as is this argument, its implications are bound to strike terror into a generation that remembers Hitler and Stalin and that seeks for some measure of value, some standard to which we can repair. Is the law in our times nothing but a choice of policy made in the open ring under the watchful eye of a fair boxing referee? Or, to abandon the metaphor, and to concentrate on the words "due process," shall we not exclaim with the character in Molière's play "TOUT DE CHOSES EN DEUX MOTS"?

There is in our generation, in the light of what it has seen abroad and nearly experienced at home, an irresistible pressure to find, or better still to develop, a pattern of value. We seek a measuring rod—an appraisal scale—a standard not *semper ubique* but good for more than this day and place.

Shall we find it in natural law? I watch with interest the efforts in this direction of Professors Wilber Katz and Richard McKeon of the University of Chicago and of Professor Lon Fuller of Harvard. I wish them well. But I hope for little. At best is not natural law so undifferentiated a frame of reference that it fails effectively to grip a legal problem at the detailed point where the lawyer and judge do their professional work? And, furthermore, is not confidence in natural law based on a rather too Western, too parochial outlook? In a nation as pluralistic in its composition as ours, in a world as pluralistic and yet as intertwined as the one in which we are finding ourselves, what do we mean by natural law? Is it something universal—or something which means different things to different sects, to different peoples, to different ages? If all that natural law means is the product of tested insight and experience, then I, too, am a believer; only I call my religion "history" not "natural law."

And so, at long last, I come to consider history as a source of value—as an

affirmative constituent in the final formula, not merely (as Holmes seems to have treated it) as a chemical agent for the dissolution of now irrelevant elements, and not merely (as Judge Learned Hand seems to have treated it) as coloring matter which disguises and makes palatable a compound of self regarding interests.

I approach the central theme of my thesis aware of the disapproval of many who have better credentials. In the wings I hear Ranke reciting that history supplies "no instruction beyond its own domain," H. A. L. Fisher warning that history "teaches no lesson but change," and S. E. Morison (to me the greatest of our American historians) telling his colleagues at the American Historical Association that he has found no durable philosophy of history uncovered by historians. I am reminded by those who are masters of their calling that it is even doubtful if there is objective history. Collingwood suggests that the "learning by inquiry" which etymologically is "history" is in its essential character always directed by men whose times and conditions and ways of thought differ so from those about whom they write that the result is in one sense inevitably a fiction. The Marchesa Iris Origo points out that even when history reduces itself to the supposedly more manageable scale of a biography, the biographer knows so little of his subject because so few of us, perhaps none of us, can communicate by word or symbol the deepest motives that govern our conduct. And more seriously disturbing than any of these *caveats*, I hear pounding in my ears the most philosophical of all the warnings with which a judge can be faced—the warning that if I invite "history" to supply a chief element in the value pattern of the law I am, either consciously or unconsciously, tipping the scales of justice in favor of conservatism. I shall, I am told, in Hobbes' majestic phrase, have "the ghost of old Rome sitting crowned upon the ruins thereof." Or as Nietzsche put it, history will stand athwart "the mighty impulse to a new deed."

Despite those who argue that history is nothing but the double beat of creation and destruction, hardly more than "a tale told by an idiot," and despite those who find history an inevitable partisan of the past, I remain unconvinced that history cannot serve as a red thread in the pattern of ultimate value.

This is not to say that I am prepared to ally myself unreservedly with the great optimists of the world before 1914. I am not sure I understand, but I am sure that, so far as I do understand, I do not agree with, Lord Acton's dictum that "to develop and perfect and arm conscience is the great achievement of history." Nor am I able to subscribe to the neo-Darwinian theory that history is the story of an almost inevitable progress in the world of values in the world of biology. Bury's *Idea of Progress* quite rightly has a large reading public—but that public recognizes it as a description of what was once believed by intelligent Englishmen, not what now is acceptable doctrine. Croce's *History of Liberty* while still a rallying-point has a much more limited present worth than its author intended. It shows that from Hegel as a premise, one can derive not merely Karl Marx's theorem, but a quite opposite outlook. And both deriva-

tions suggest the unsoundness of the axioms of Hegel from which they were deduced.

I am not unmindful that minds more attuned to our ways of thinking than those of Hegel, Marx, and even Croce, have for a time been seduced by the vision of man's journey from pre-history to now as a passage from cruelty and tyranny toward sympathy and freedom. An outstanding example, is A. N. Whitehead's *Adventures of Ideas*. But I cannot accept, and I doubt if my audience accepts, his postulate that recorded history reveals an increasing respect for men as individuals and an increasing attention by society to the deformed, the handicapped, the weak. How can we subscribe to this version of history in the face of the gas chambers at Buchenwald and the atomic explosion at Hiroshima? May we not wonder with Gibbon whether the Age of the Antonines was not more advanced than ours in its understanding of man? May we not consider with Trevelyan that the medieval liberties afforded men more freedom of mind than do some of our social and legal institutions?

Rejecting then all such optimistic accounts of the story of mankind, I still urge that there is in history a meaning, and a meaning that has value for law, as it has for the spirit of man in many another aspect.

First history reminds us—and this the conservatives have always stressed—that Thomas Jefferson was profoundly in error when he announced that "the world belongs to the living." Society is, in Burke's phraseology, "a partnership not only between those who are living, but between those who are living, those who are dead, and those who are to be born." We who are alive are not in any sense masters of the world. We have no title in fee. Ours is a life estate. And we have no license to commit waste. All our actions, including those governed by law, are to be tested in the light of this "standard" or, if you please, "absolute."

Second, history gives us another perspective or value against which to measure law. History teaches us the nature of legitimate authority. There is in the experience of the human race, in the insights of the gifted men who have been our leaders, more than the play of self-interest and the force of coercion. History reminds us that in addition to the alternatives of the carrot and the stick there is a middle way—the high road of legitimate authority—the road laid out by persuasive tradition. How perceptive are the words of the one hundred and twenty-second Psalm: "Jerusalem is builded as a city that is compact together."

I would like to suggest that in every great school of jurisprudence, the ultimate subject matter is not technique but philosophy—and that history is philosophy writ in a form comprehensible to us laymen. The glory of all best-rate law schools is that (in words John Aubrey applied to Thomas Hobbes) they have been concerned not solely with making men "rare at definitions" but eager in search of "bright shoots of everlastingness."