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THE TWENTIETH CENTURY*

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All self-respecting legal history is supposed to end by the twentieth century. As we approach our own lives, experience and training—and those events that we have actually witnessed—we allegedly lose that "objectivity" which makes the "science" of history itself possible. Certainly, there is no point in burdening the reader with the "original" materials, including cases and statutes, that make up the bulk of any legal education. But there are good reasons to reflect on our own legal century from an "historical perspective."

First, we can already discern certain forests through the trees that surround us. The early years of this century saw the development of a powerful new school of "sociological jurisprudence," or the "new jurisprudence," growing from the writing and judicial opinions of jurists such as Oliver Wendell Holmes Jr., Louis Brandeis, and Roscoe Pound. This new approach to judicial law making set the juristic underpinnings for Franklin Roosevelt's "New Deal" and the activist Supreme Court of the post war era. Optimistic and expansive in spirit, the "new jurisprudence" combined the utilitarian philosophy of Benthamism with an aggressive new judicial instrumentalism.

* The following has been excerpted from Daniel R. Coquillette, *The Anglo-American Legal Heritage: Introductory Materials* (North Carolina Academic Press, 1999), Chapters 14 and 15, pp. 557-630, by permission of the publisher and author. The book was designed to make the history of law more accessible to legal professionals. [For information on ordering this book, please see the Carolina Academic Press website at: www.caplaw.com.]

On a very different note has been the analysis of modern legal movements developed in Germany by Georg Hegel and Max Weber and applied, at least in part, in this country by theorists such as Duncan Kennedy, Morton Horwitz, and Roberto Unger. Both Weber and Unger have identified tendencies in modern legal systems that are cutting away at belief in a neutral rule of law and are threatening the legitimacy of the legal profession and the courts alike. In many ways, the observations of these writers challenge future generations of common lawyers to either reform their heritage or revert to political and economic tribalism.

A. The "New Jurisprudence"

The life of Oliver Wendell Holmes Jr. (1841-1935) spans much of American history. He was born into the aristocratic world of old Massachusetts, and was related to four great families, the Olivers, the Wendells, the Holmeses and the Jacksons. He met men such as John Quincy Adams, who had, in turn, intimately known the founders of the Republic. Holmes himself fought and was wounded in the most terrible American experience of all time, the Civil War. Yet, his term as a Supreme Court Justice, from 1902 to 1932, saw the emergence of a new social, economic, and juristic era, whose "modern" influence we still feel strongly. Alger Hess, his law clerk, was prosecuted as a traitor by Richard Nixon. Louis Brandeis was Holmes' protégé. Many are still alive who remember clearly meeting and discussing law with the great old man, and I was once in a room with five of them. Holmes' life links us directly with the birth of the Republic.

But Holmes was always, as Commager said, "a generation ahead of his time."¹ And nothing symbolizes that better than his lectures and writings in the 1880's, particularly three: 1) the incomparable *The Spirit of the Common Law* (Boston, 1881), based on his Lowell Institute Lectures of 1880; 2) "The Path of the Law," an address at the dedication of a new hall at Boston University Law School in 1897, published in 10 *Harvard Law Review* 451 (1897); and 3) "Natural Law" published in 32 *Harvard Law*

¹Henry Steele Commager, *The American Mind* (New Haven, 1950) 376.

Review (1918). Such writing founded the "new jurisprudence," and led to the great departure from formalism that would mold American constitutional jurisprudence for the next century. The *Materials* for this chapter include excerpts from *The Common Law* (1881) and "Natural Law" (1918), written nearly forty years apart. The next chapter, XV, contains excerpts from "The Path of the Law" (1897).²

In November, 1880, Holmes addressed a hushed audience containing James Barr Ames, James Bradley Thayer, John Chipman Gray, and Christopher Columbus Langdell at the Lowell Institute Lectures. This was literally a "who's who" of the traditional natural law and common law schools of jurisprudence, jurists who emphasized the "gospel of Savigny" that the common law was fixed and immutable, almost like the laws of natural science itself. Holmes issued a direct challenge to them.

"The life of the law has not been logic; it has been experience. The felt necessities of the time, the prevalent moral and political theories, institutions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed."³

This challenge was repeated a year later by *The Common Law* (1881).

"What has been said will explain the failure of all theories which consider the law only from its formal side, whether they attempt to deduce the *corpus* from *a priori* postulates, or fall into the humbler error of supposing the science of the law to reside in the *elegantia juris*, or logical cohesion of part with part. The truth is, that the law is always approaching, and never reaching, consistency. It is forever adopting new principles from life at one end, and it always retain old ones from history at the other, which have not yet been absorbed or sloughed off. It will become entirely consistent only when it ceases to grow."⁴

²Daniel R. Coquillette, *The Anglo-American Legal Heritage* (Carolina Academic Press, Durham, NC, 1999), p.610. (Hereafter, "*Materials*".)

³*Materials, infra.*

⁴O.W. Holmes, Jr., *The Common Law* (ed. Mark D. Howe, London, 1988), 32.

This was the essence of what Roscoe Pound would call "sociological jurisprudence." As Commager put it, it was, "[A] new way of thinking about law and applying it. It was a shift from absolutes to relatives, from doctrines to practices, from passive—and therefore pessimistic-determinism to creative—and therefore optimistic-freedom."⁵

But this was far from rationalist, codified utilitarianism. Holmes believed firmly in the history and tradition of the Common law as an essential part of a growing, living body of doctrine. As he put it in *The Common Law*:

"However much we may codify the law into a series of seemingly self-sufficient propositions, these propositions will be but a phase in a continuous growth. To understand their scope fully, to know how they will be dealt with by judges trained in the past which the law embodies, we must ourselves know something of that past. The history of what the law has been is necessary to the knowledge of what the law is."⁶

Here was more of Mansfield than Bentham, and more of the secret innovative soul of Coke—who changed the law by judicial reports—than the self-declared legal science of Bacon.

But the glory of the "new jurisprudence" was its willingness to incorporate the lessons of social science and utilitarian with the goals of judicial instrumentalism. At the Lowell Lectures, along with the John Chipman Grays and the Langdells, also sat the young Louis Dembitz Brandeis (1856-1941). Although his great sociological brief in *Muller v. Oregon* (1908), the first "Brandeis Brief," was still twenty-eight years in the future, Brandeis was to become a great exponent of Holmes' principles—both in his distinguished Boston law practice and during twenty-three vitally significant years on the United States Supreme Court (1916-1939). Together with Harlan Stone, Benjamin Cardozo, and Felix Frankfurter, Brandeis was responsible for making sociological

⁵*Materials, infra.*

⁶O.W. Holmes, Jr. *The Common Law, supra*, 33.

jurisprudence, after Roosevelt's 1937 "court packing" crisis, "the all but official doctrine of the Court."⁷

Holmes' doctrines also had a great impact on legal education. Christopher Columbus Langdell, who had established the "case method" at Harvard Law School, said in 1886 that "[L]aw is a science" and that law books were "to us all that laboratories of the university are to the chemists and physicists. . . ."⁸ Langdell resigned in 1895, after twenty-five years. Twenty years later, in 1916, Roscoe Pound took the deanship. During the next twenty years, he established "sociological jurisprudence" as a corner stone of a new approach to legal education.

"Sociological jurisprudence," Pound's own term, was very different from Langdell's "science." In Pound's words, it was

"a process, an activity, not merely a body of knowledge or a fixed order of construction. It is a doing of things, not a serving as passive instruments through which mathematical formulas and mechanical laws realize themselves in the eternally appointed way. The engineer is judged by what he does. His work is judged by its adequacy to the purposes for which it is done, not by its conformity to some ideal form of a traditional plan. We are beginning . . . to think of jurist and judge and lawmaker in the same way. We are coming to study the legal order instead of debating as to nature of law. We are thinking of interests, claims, demands, not of rights; of what we have to secure or satisfy, not exclusively of the institutions by which we have sought to secure or satisfy them, as if those institutions were ultimate things existing for themselves. (*Interpretations of Legal History*, p. 152)"⁹

At its core, the new jurisprudence was, in Pound's words, "a movement for pragmatism as a philosophy of law; for the adjustment of principles and doctrines to the human condition they are to govern rather than to assure first principles; for putting the human factor in the central place and relegating logic to its true position as an

⁷*Materials*, 475.

⁸Arthur E. Sutherland, *The Law at Harvard* (Cambridge, 1967), 175.

⁹Henry Steele Commager, *The American Mind, supra*, 378.

instrument."¹⁰ Inherent in this new approach to law was both a new attitude as to the proper source of judicial principles and a new test of what made a law good or bad.

In the last century we studied law from within. The jurists of today are studying it from without. The past century sought to develop completely and harmoniously the fundamental principles which jurists discovered by metaphysics or by history. The jurists of today seek to enable and to compel lawmaking and also the interpretation and application of legal rules, to take more account and more intelligent account, of the social facts upon which law must proceed and to which it is to be applied. Where the last century studied law in the abstract, they insist upon study of the actual social effects of legal institutions and legal doctrines. Where the last century prepared for legislation by study of other legislation analytically, they insist upon sociological study in connection with legal study in preparation for legislation. Where the last century held comparative law the best foundation for wise lawmaking, they hold it not enough to compare the laws themselves, but that even more their social operation must be studied and the effects which they produce, if any, when put in action. Where the last century studied only the making of law, they hold it necessary to study as well the means of making legal rules effective.

(*The Spirit of the Common Law*, pp. 212-213).¹¹

The impact of this new approach on legal study and legal policy, particularly in the area of criminal law, was "immediate and far reaching."¹² But, in Commager's words, "[I]ts most dramatic, and perhaps its most consequential results were to be found . . . in the area of constitutional law."¹³ Formulated in lectures and legal writings of a man who had met John Quincy Adams and fought in the Civil War, the "new jurisprudence" was to become the ideological backbone of the "Warren Court," and the monumental cases of *Gideon*, *Miranda*, *Brown v. Board*, *Roe v. Wade*, and *Griswold v. Connecticut* are its lasting heritage.¹⁴

¹⁰*Id.*, 378.

¹¹*Id.*, 379.

¹²*Id.*, 380.

¹³*Id.*, 380.

¹⁴See Archibald Cox, *The Warren Court* (Cambridge, 1968).

B. The Qualities of Modern Law and the "Postliberal Society"

Just as the "new jurisprudence" grew from the instrumental optimism of nineteenth century America, but reached its full fruition decades later, so the "critical realism" movement of the last twenty years grew from the hard lesson of the economic "Great Depression" in Europe and America and the World Wars. The first to articulate the elements of modern law in ways that reflected these lessons was Max Weber (1864-1920), the great German economist and scholar.

In his *Law in Economy and Society*, Weber identified three "qualities of modern law" that clearly challenged the existence of "law" as a concept independent of raw political and economic power. The first was "specialization." In Weber's words, "the legal ignorance of the layman will increase" as legal rules became more complex and technical.¹⁵ Equally important was the "anti-formalistic tendencies of modern legal development," i.e., the tendency of courts to depart from rigid, objective rules to resolve cases, and to rely more on subjective "economical utilitarian meaning."¹⁶ Finally, there was the "lay justice and corporate tendencies in the modern legal profession," i.e., the increasing reliance on subjective lay decision making—whether by jury, arbitration or mediator—and the erosion of significant distinction between "private" and "public" legal decision making.¹⁷

Weber warns that there is a price to be paid for these developments. As law becomes increasingly obscure, technical, subjective and private, the source of its moral force is eroded. In Weber's words:

"Whatever form law and legal practice may come to assume under the impact of these various influences, it will be inevitable that, as a result of technical and economic developments, the legal ignorance of the layman will increase. The use of jurors and similar lay judges will not suffice to

¹⁵*Materials, infra.*

¹⁶*Id.*

¹⁷*Id.*

stop the continuous growth of the technical element in the law and hence of its character as a specialists' domain. Inevitably, the notion must expand that the law is a rational technical apparatus, which is continually transformable in the light of experiential considerations and devoid of all sacredness of content."¹⁸

A law "devoid of all sacredness of content" would, in the eyes of Blackstone or Coke, lead quickly to tyranny, yet Weber saw this as an inevitable result of the new "sociological jurisprudence"—the "dark side," as it were, of the promise of legal instrumentalism. Again in Weber's words:

This fate may be obscured by the tendency of acquiescence in the existing law, which is growing in many ways for several reasons, but it cannot really be stayed. All of the modern sociological and philosophical analyses, many of which are of a high scholarly value, can only contribute to strengthen this impression, regardless of the content of their theories concerning the nature of law and the judicial process.¹⁹

Certainly the "deconstruction" of "sacred texts" of the law, including Blackstone's *Commentaries*, has been one product of modern critical legal scholarship. A particularly good example is Duncan Kennedy's controversial "The Structure of Blackstone's Commentaries," 28 *Buffalo Law Review* 209 (1979), excerpted in the *Materials, supra*. Kennedy, a leader of the "critical studies movement" and now Carter Professor of General Jurisprudence at Harvard, acknowledges the influence of E.P. Thompson, discussed above in Chapter XII, and Hegel. His purpose in analyzing Blackstone is to strip away the pretense of Blackstone's "desire to legitimate the legal *status quo*" and to establish a method of "discovering hidden political intentions beneath the surface of legal exposition."²⁰

Weber's message has been further developed in the work of Roberto Mangabeira Unger, another law professor at Harvard. In his view, the rule of law has been "the soul

¹⁸*Id.*

¹⁹*Id.*

²⁰*Id.*

of the modern state."²¹ In particular, belief in a neutral, all pervading rule of law and a careful division between state and private ordering is at the heart of our notion of a liberal, constitutional state. But, argues Unger, the rule of law is currently in "disintegration," and our belief in the United States as a "liberal" state is actually belief in a myth. Rather, we are now entering a "post liberal" society which is marked by a gradual abandonment of formal, neutral, public rulemaking.²²

Two forces are leading us to this end. The first is "the overt intervention of government in areas previously regarded as beyond the proper reach of state action," a tendency that Unger labels the "welfare state" function.²³ The second is "the reverse side of the events just enumerated: the gradual approximation of state and society, of the public and the private sphere." This Unger calls the "corporatist" tendency, borrowing a term from Weber.²⁴ The latter tendency is well illustrated by nominally "private" entities, such as utilities, hospitals, private universities, and large industrial enterprises, that actually have acquired bodies of rules, powers and responsibilities that are very like public governments. According to Unger:

Corporatism's most obvious influence on the law is its contribution to the growth of a body of rules that break down the traditional distinction between public and private law. Thus, administrative, corporate, and labor law merge into a body of social law that is more applicable to the structure of private-public organizations than to official conduct or private transactions. But though this development undermines the conventional contrast of public and private law, it does not necessarily destroy the broader difference between the law of the state and the internal, privately determined regulations of private associations. Insofar as private law is laid down by the state, it too is, in this more comprehensive sense, public.

The deepest and least understood impact of corporatism is the one it has on the very distinction between the law of the state and the spontaneously produced normative order of nonstate institutions. As

²¹*Id.*

²²*Id.*

²³*Id.*

²⁴*Id.*

private organizations become bureaucratized in response to the same search for impersonal power that attracts government to the rule of law principle, they begin to acquire the features, and to suffer the problems, of the state. At the same time, the increasing recognition of the power these organizations exercise, in a quasi-public manner, over the lives of their members makes it even harder to maintain the distinction between state action and private conduct. Finally, the social law of institutions is a law compounded of state-authored rules and of privately sponsored regulations or practices; its two elements are less and less capable of being separated. All these movements, which tend to destroy the public character of law, carry forward a process that begins in the failure of liberal society to keep its promise of concentrating all significant power in government.

The tendency of large corporate organizations to become bureaucratized and to produce a body of rules with many of the characteristics of state law should not be confused with an increasing regulation of the corporation by the state. In fact, quite the opposite may be true: the bureaucratization of corporate institutions may be associated with their ability to become relatively independent power centers with decisive influence over government agencies.²⁵

The growth of the welfare state and the power of corporatism eat at the neutral rule of law in at least three ways. First, the welfare state encourages "open-ended standards and general clauses in legislation" that take away the certainty and objectivity of legal rules. Second, law in the welfare state turns "from formalistic to purposive or policy-oriented styles of legal reasoning and from concerns with formal justice to an interest in procedural and substantive justice."²⁶ Finally, the erosion of the ideals of formal justice eventually leads to a breakdown in the difference between public and private and between law and pure economic and political power.

The decline in the distinctiveness of legal reasoning is connected with the need administrators and judges have of reaching out to the

²⁵*Id.*

²⁶*Id.*, 488. Unger defines "formal," "substantive" and "procedural" justice as follows: "An ideal of justice is formal when it makes the uniform application of general rules the keystone of justice or when it establishes principles whose validity is supposedly independent of choices among conflicting values. It is procedural when it imposes conditions on the legitimacy of the processes by which social advantages are exchanged or distributed. It is substantive when it governs the actual outcome of distributive decisions or of bargains. Thus, in contract law, the doctrine that bargains are enforceable given certain externally visible manifestations of intent exemplifies formal justice; the demand that there be equality of bargaining power among contracting parties illustrates procedural justice; and the prohibition of exchanges of two performances of unequal value, however value may be assessed, represents substantive justice." *Id.*

substantive ideals of different groups, of drawing upon a conventional morality or a dominant tradition. These changes in the substance and method of law also help undercut the identity of legal institutions and of the legal profession. Courts begin to resemble openly first administrative, then other political institutions. Thus, the difference between lawyers and other bureaucrats or technicians starts to disappear.²⁷

In these predictions, Unger follows and develops the early observations of Weber.²⁸

Suddenly, however, Unger advances two extraordinarily original—and alternative—hypotheses about legal history itself. In his words:

The first hypothesis might be summarized by the metaphor of the closed circle. It would present the entire history of law as one of movement toward a certain point, followed by a return to the origin. We have seen how, in Western legal history, bureaucratic law, with its public and positive rules, builds upon customary practices, and how this bureaucratic law is in turn partly superseded by the rule of law, with its commitment to the generality and the autonomy of legal norms. The welfare trend in postliberal society moves the rule of law ideal back in the direction of bureaucratic law by undermining the social and ideological bases of that deal. The corporatist tendency and the communitarian aspirations that follow it begin to subvert bureaucratic law itself. Thus, they prepare the way for the return to the custom of each group as the fundamental and almost exclusive instrument of social order.²⁹

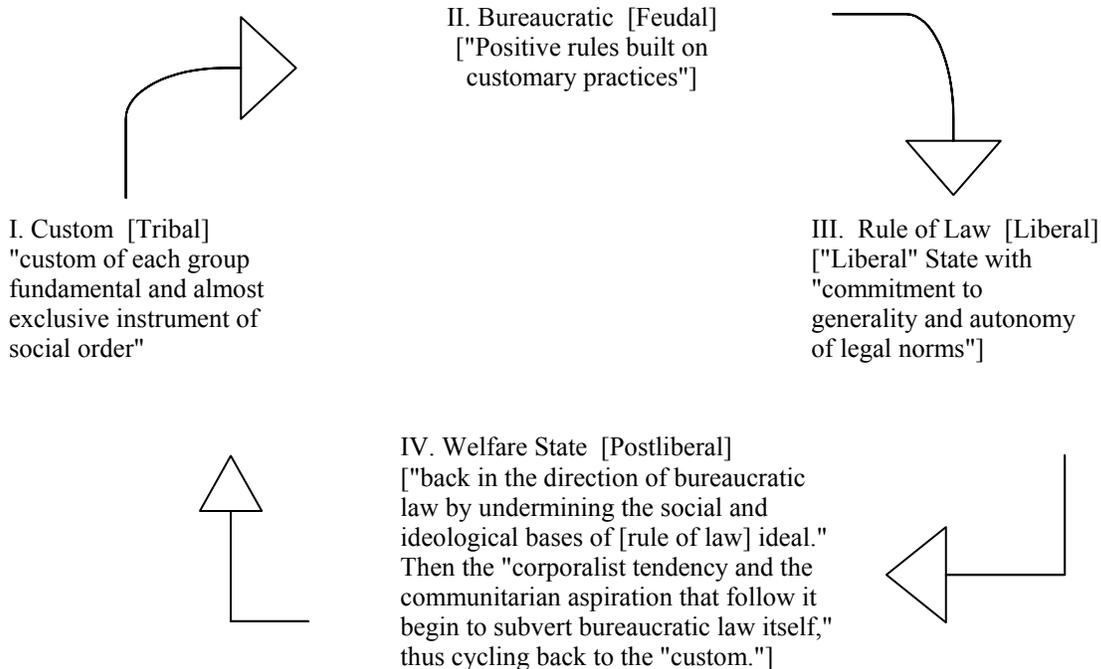
In short, Unger proposes as hypothesis that legal history could be purely cyclical, rather than progressive. This is a rather pessimistic view. Is it right?

The "stages" of Unger's cycle are worth examining closely, and they also provide a convenient way to re-examine and review the materials in this book. Here is a rough diagram of Unger's cycle:

²⁷*Id.*

²⁸Unger's observation also reflect the historical theories of scholars such as Morton Horwitz, whose *The Transformation of American Law (1780-1860)* (Cambridge, 1977) traced what he found to be an "emergence of an instrumental conception of law" which led to a breakdown in true distinctions between law and politics and economics. See *id.*, xi-xvii, 1-30.

²⁹*Materials, infra.*



I have taken one liberty with Unger's terminology and inserted the words "tribal," "feudal," "liberal" and "postliberal." In particular, I like to use "feudal" with "bureaucratic" to describe Unger's "Stage II." That is because a society with "positive rules built on customary practices" which also has a strong notion of "corporatist" and "welfare" elements—i.e., where the public and private spheres are commingled and where there is a paternalistic responsibility for collective welfare—closely resembles the "feudal" model that we discussed at length in Chapter IV.

How does this chart reflect this course and the "progression" or, if Unger's cycle is correct, the "flow" of Anglo-American legal history? Obviously, Stage I, "Custom," would correspond with our Chapter II, the "Anglo-Saxon Period," particularly the period before 900 AD. Stage II, "Bureaucratic," closely resembles the evolution of a positive law based on custom during the "feudal" period of English as pointed out above. This period is covered in our Chapters III, IV, and V. The development of royal courts, the treatise *Bracton*, the invention of formulary pleading, and the great medieval statutes, such as

Quia Emptores (1290) and *De Donis* (1285) could all be seen as part of this stage. Stage III, "Rule of Law," with a "commitment to the generality and the autonomy of legal norms," could be seen as the essence of the struggles led by Coke and other great common lawyers during the sixteenth, seventeenth and eighteenth centuries, leading to the great confrontation of the *Prohibitions del Roy*, 12 *Coke Reports*, 63 (1608),³⁰ The *Five Knights Case*, 3 *State Trials* 1 (1627),³¹ the "Petition of Right" (1628),³² the *Bill of Rights* (1689),³³ and in a very real sense, our own *Constitution*.

These three "stages" are frequently described as a progressive evolution from pure tribalism to our contemporary, modern "rule of law," as extolled in countless law school graduation and bar admissions ceremonies. But here is where Unger becomes controversial. He, like Weber, sees forces at work in our modern legal system and state that are undermining the rule of law and making it a fiction or a myth. He advances, therefore, at least one hypothesis that sees us returning to a feudal or bureaucratic ["welfare"] state, where public and private norms again commingle, and eventually, to where the "corporatist tendency and the communitarian aspirations that follow it begin to subvert bureaucratic law itself"... leading to "the return to the custom of each group as the fundamental and almost exclusive instrument of social order."³⁴ Some see today a return in America to feudal corporate entities and to vast, faceless paternal bureaucracies, each with their own rules, and then to fragmented economic, ethnic, racial, and socio-political "special interest" or "tribal" groups. Such a "balkanization" of American political life, away from consensus politics to the politics of "special interest groups," and to "fractionalized politics" would make Unger's cycle seem credible.

³⁰*Id.*

³¹*Id.*

³²*Id.*

³³*Id.*

³⁴*Id.*

But Unger had a second hypothesis. This theory is a bit more optimistic. Instead of an eternal cycle, legal history may "spiral" upward. In Unger's own words:

An alternative approach to the prospects of modern society and to their legal implications might be represented by the metaphor of a spiral that reverses direction without returning to its starting point. This would mean that individual freedom could be rescued from the demise of the rule of law and brought into harmony with the reassertion of communitarian concerns. It would also signify that the capacity to see and to treat each form of social life as a creation rather than as a fate could survive the disintegration of public and positive law reconciled with the sense of an immanent order in society.³⁵

What would be required to ensure an upward spiral rather than a continuous cycle without progress? Unger believes that legal systems must refine "ancient methods for the dispersal of power" while also distinguishing between "legitimate and illegitimate uses of power" and between "permissible and prohibited inequalities."³⁶ He also believes that the law must retain what Weber termed "sacredness of content," i.e., not just be an arbitrary exercise of power promoting arbitrary ends.³⁷ Again, in Unger's words:

The problem of power carries us to the other aspect of the spiral like process I envisage. Unless people regain the sense that the practices of society represent some sort of natural order instead of a set of arbitrary choices, they cannot hope to escape from the dilemma of unjustified power. But how can this perception of immanent order be achieved in the circumstances of modern society?³⁸

The Roman system governed the entire civilized world for centuries, but disappeared without a trace in England. There was a complete return to warring tribes. Elegantly written commercial codes which governed shipments of English tin to Syria, and Egyptian rings to the fingers of wealthy English farmers, were replaced with crude "price lists" to govern blood feud negotiations, i.e., "If an ear is cut off, 30 shillings shall

³⁵*Id.*

³⁶*Id.*

³⁷*Id.*

³⁸*Id.*

be paid..."³⁹ The bricks that formed the walls for central heating systems within the walls of spacious villas were literally quarried out to make walls to surround primitive huts. Could it happen again? Photographs in 1994 of abandoned schools and factories in the former Yugoslavia, covered with weeds as ethnic tribes fight from village to village, remind us that social order, upon which civilization and prosperity rest, can be fragile indeed.

But the Roman law chapter was not included in this book at the beginning to make some philosophical or moral point. It is there because Roman law, in fact, came before the Anglo-Saxon period. Does this confirm Unger's grimmer hypothesis? In one way, probably so. At least Western legal science as manifested in English history can not be regarded as purely "progressive." But the Roman law chapter, Chapter I, does not just conclude with Roman times. Rather, it extends to writings by Francis Bacon, during the English Renaissance, and by John Adams, during the dawn of American constitutionalism. Both relied heavily on Roman learning.⁴⁰ Indeed, throughout the history of English law we return to the influence of Roman legal science, in Bracton's *De Legibus* of 1265 AD,⁴¹ in the development of the notion of equity by St. German in his classic *Doctor and Student* (1523),⁴² in the specialized "civilian" courts of Doctors' Commons which flourished from 1511 to 1858, over three centuries,⁴³ and in the commercial law jurisprudence of Holt and Mansfield,⁴⁴ to name but a few examples. Seen from this perspective, Roman legal science was not "lost," but recycled, and

³⁹*Materials, supra*, Chapter II.

⁴⁰*Id.*, Chapter I.

⁴¹*Id.*, Chapter III.

⁴²*Id.*, Chapter VI.

⁴³*Id.*, Chapter VII.

⁴⁴*Id.*, Chapter XII. See Daniel R. Coquillette, *The Civilian Writers of Doctors' Commons, London* (Berlin, 1988), 271-296, for a full account of Roman law influence on Holt and Mansfield.

recycled in a form both more humane and arguably more sophisticated. The commercial law of Mansfield rivaled that of Ulpian and Gaius, but it did not have to be illustrated by the sale of slaves—at least in England.

Much depends on whether our legal science is progressive. "Progress" in technology can be a two-edged sword unless it is accompanied by a stable and humane social order, as the Cold War reminds us. Search for this social order unites us, as lawyers, with a long line of lawyers, extending into the distant past, who worked for the same goal. As Unger concludes:

The search for this latent and living law—not the law of prescriptive rules or of bureaucratic policies, but the elementary code of human interaction—has been the staple of the lawyer's art whenever this art was practiced with most depth and skill. What united the great Islamic 'ulama,' the Roman jurists, and the English common lawyers was the sense they shared that the law, rather than being made chiefly by judges and princes, was already present in society itself. Throughout history there has been a bond between the legal profession and the search for an order inherent in social life. The existence of this bond suggests that the lawyer's insight, which preceded the advent of the legal order, can survive its decline.

The same processes that promise to reconcile freedom and transcendence with community and immanent order also threaten to sacrifice the former to the latter. In a brief passage of his *Republic*, Plato evokes a society in which men, reduced to animal contentment, have lost the capacity of self-criticism together with the sense of incompleteness. He calls this society the City of Pigs. The significance of the historical tendencies discussed in this chapter lies in this: with a single gesture they frighten us with the image of the City of Pigs and entice us with the prospect of the Heavenly City. By offering us the extremes of good and evil, they speak at once to what is bestial and to what is sublime in our humanity.⁴⁵

This much is certainly true. The history of Anglo-American law leaves us with no easy answers. At the Saxon "Law Rock," or on the meadow at Runnymede, or in the Privy Council Chamber as Edward Coke alone stood fast before the enraged King, or in a small room in Braintree as John Adams begins to draft the Constitution, or on the picket lines,

⁴⁵*Materials, infra.*

or on the battlefields of world wars or Selma, progress in legal institutions has been won only through struggle and has been retained only through constant vigilance and effort.

C. Law and History

What is the fundamental significance of history in our law and legal system? One answer is that we are, of course, part of an historical process ourselves, a process of extraordinary continuity over centuries. As Frederick William Maitland put it, "Such is the unity of all history that any one who endeavors to tell a piece of it must feel that his first sentence tears a seamless web."⁴⁶

But what is the significance, in practical terms, of being "part of history?" This is where the true debates begin and where, in the end, legal historians and reflective lawyers make their own individual judgments.

First, I would like to return to an important hypothesis set out earlier in the *Materials*, in Chapter IX. This is Maine's theory of legal change. Sir Henry Sumner Maine (1822-1888), Corpus Professor of Jurisprudence at Oxford, was famous for his great book *Ancient Law* (1888).⁴⁷ He was a leading proponent of "historical jurisprudence" and of evolutionary views of law. Today he is largely known for some of his great sweeping "principles" of legal history, such as "[W]e may say that the movement of progressive societies has hitherto been a movement from *Status to Contract*."⁴⁸ As we have seen, feudal law was dominated by "status" relationships. Land

⁴⁶Sir Frederick Pollock, Frederick William Maitland, *The History of English Law Before the Times of Edward I* (2d ed., ed. S.F.C. Milsom, Cambridge, 1968), vol. 1, 1.

⁴⁷Maine did, of course, write many more books, including *Village Communities* (1871), *Early History of Institutions* (1875), *Dissertations on Early Law and Custom* (1883) and *International Law* (1888).

⁴⁸"The word Status may be usefully employed to construct a formula expressing the law of progress thus indicated, which, whatever be its value, seems to me to be sufficiently ascertained. All the forms of Status taken notice of in the Law of Persons were derived from, and to some extent are still coloured by, the powers and privileges anciently residing in the Family. If then we employ Status, agreeably with the usage of the best writers, to signify these personal conditions only, and avoid applying the term to such conditions as are the immediate or remote result of agreement, we may say that the movement of the progressive societies has hitherto been a movement *from Status to Contract*." Henry Sumner Maine, *Ancient Law* (10th ed., 1884, London) 164-165.

could not even be left by will. Your identity, or "status," or birth was all important.⁴⁹ Later developments, such as eighteenth century English commercial law, saw an emergence of "will" based legal doctrines, such as consensual contracts.⁵⁰ These doctrines put a premium on an individual's act of will, what an individual *did*, rather than *who* the person was. But does this make the law "progressive?" And what about the modern developments observed by Weber and Unger that are stripping away genuine individual autonomy, such as vast bureaucracies and a "corporate" state?⁵¹ Can anyone make the kind of assertion about legal history that Maine did and be correct?

One of Maine's other well known assertions is as follows:

"A general proposition of some value may be advanced with respect to the agencies by which Law is brought into harmony with society. These instrumentalities seem to me to be three in number, Legal Fictions, Equity and Legislation. Their historical order is that in which I have placed them."⁵²

Throughout this course we have been discussing all three of these "instrumentalities." Is Maine correct? Is he even right about their "historical order?" The famous hypothesis is set out in full in the *Materials* in Chapter IX . The judgment is yours.

Next is set out Roscoe Pound's famous queries about legal history. Pound was a leader of the "New Jurisprudence" of the twentieth century, the so-called "Sociological School," that was discussed at length in Chapter XIV, above. In this excerpt he summarizes the legal history school of the past, and advances his own "overview." He boldly rejects the "evolutionary" nineteenth-century analysis.

"We may well believe, then, that an epoch in Juristic thought has come to an end, and that the time is ripe to appraise its work, to ask what of permanent value it has achieved, to inquire what are the present demands which it is unable to satisfy, and to consider wherein its way of unifying

⁴⁹See *Materials, infra*, Chapter XII.

⁵⁰*Id.*, Chapter XII.

⁵¹*Id.*, Chapter IX.

⁵²See *Id.*, Chapter IX.

stability and change, with which men were content for a century, is no longer of service."⁵³

In its place he proposes a new perspective on the history of law, a "complex picture" informed by "psychology and sociology." "We must think not in terms of an organism, growing because of and by means of some inherent property, but once more, as in the eighteenth century, in terms of a building, built...to satisfy human desires and continually repaired, restored, rebuilt and added to...."⁵⁴ What do you think of Pound's argument?

Two great American jurists, Holmes and Cardozo, recognized clearly the power that history exercises through the law. They also perceived both the promise and the danger that this represents to judges, lawyers, and historians alike. Included here are excerpts from their two best known essays on the relationship between law and history: Holmes' essay "The Path of the Law," first given as an address at Boston University School of Law in 1897, and Cardozo's famous *The Nature of the Judicial Process* (1921). Note Holmes' controversial distinction between law and morals. Does this view influence his attitude toward legal history? Holmes' view comes from the great nineteenth-century legal philosopher, Austin. Austin's work, and that of his close friend Bentham, greatly shaped the social and political attitudes of nineteenth-century lawyers.

Following the atrocities of the twentieth century, including mass genocide and the resulting Nuremburg trials, the view that law and morals are and should be separate has come under attack. As you read these materials, keep in mind the question of law and morals. Think of how the lawyers of each generation approached this question and the institutional "vehicles" they use to solve moral problems.⁵⁵ Ask yourself if this controversy is merely a question of definitions and semantics, or does it say something fundamental about the role of law and lawyers during different historical periods?

⁵³Roscoe Pound, *Interpretation of Legal History* (Cambridge, 1923), 12.

⁵⁴*Id.*, 21.

⁵⁵See Daniel R. Coquillette, *Lawyers and Fundamental Moral Responsibility* (Cincinnati, 1995), 55-124.

Note also the view of the great legal historian, Maitland, that lawyers are fundamentally "anti-historical." "The lawyer must be orthodox," wrote Maitland, "otherwise he is not a lawyer; and orthodox history seems to me a contradiction in terms."⁵⁶ Even Holmes seems "anti-historical" in this sense. According to Holmes, "I look forward to a time when the part played by history in the explanation of dogma shall be very small, and instead of ingenious research we shall spend our energy on a study of the ends sought to be attained and the reasons for desiring them."⁵⁷ Ask yourself whether Maitland is right about a fundamental contradiction between the intellectual function of practicing lawyers and the legal historians. If so, what is the point of taking this course? Remember, according to Holmes, antiquarianism for its own sake is a "pitfall."⁵⁸

Benjamin Cardozo's great *Nature of the Judicial Process* may come to your rescue, at least in terms of providing answers to these questions. His discussion of the source of law in "the creative energy of custom" is particularly valuable.

But beware! Cardozo, a judge, characterizes scientific, rational jurisprudence as "the demon of formalism."⁵⁹ This "demon" is restrained by social policy and philosophical justice, applied, of course, by judges. These judges, in turn, rely on Cardozo's four "forces": history, philosophy, custom, and sociology, to legitimize their "flexibility," i.e., their discretionary power. Doesn't this view deny lawmakers the power to rationally plan into the future to achieve predetermined ends, free from the judicial arbitrariness and the legal fictions, which, in Holmes' view, has made the study of legal history a necessary evil? Or does this fundamentally misstate Cardozo's views? What, in the end, would Holmes say about Cardozo's arguments?

⁵⁶See S.F.C. Milsom, "Introduction," F. Pollock, F.W. Maitland, *The History of English Law* (2d ed., Cambridge, 1968), vol. 1, XXIV-XXV.

⁵⁷*Materials, infra.*

⁵⁸*Id.*

⁵⁹*Id.*

Throughout these materials, we have encountered a tension between the forces of "scientific jurisprudence," which take as their banner the power of human reason and the need for over-riding central legislation to make future planning possible, and the forces of individualism, whose *leit motifs* are scepticism of human foresight and fear of centralized forces. Legal history not only tells the tale of this eternal struggle, but becomes a valuable weapon, used and abused by both sides. You will notice that the particular philosophic position of a judge or lawyer in this struggle may determine his or her view of the "proper role" of legal history. This will be true, even in your case. Your ultimate view of legal history will probably predict a great deal about the kind of lawyer you will become, both professionally and politically, and your study of legal history may even influence this future.

Concluding these materials are excerpts from Harold J. Berman's "Introduction" to his book *Law and Revolution* (Cambridge, Mass. 1983) and from Laura Kalman's *The Strange Career of Legal Liberalism* (New Haven, 1996). According to Berman, the "history of Western law is at a turning point as sharp and as crucial as that which was marked by the French Revolution of 1789 [and] the English Revolution of 1640..."⁶⁰ Berman sees part of the reason for this crisis as "cynicism about the law, and lawlessness, [which] will not be overcome by adhering to a so-called realism which denies the autonomy, the integrity, and the ongoingness of our legal tradition."⁶¹ How would Berman view the "sociological" and "realist" approaches of Pound and Cardozo? What would he think of Holmes' "Path of the Law?" Does Berman represent a return to the world of Henry Sumner Maine, or something quite different?

Laura Kalman leads a new, brilliant generation of legal historians, many of whom hold both law degrees and graduate degrees in other disciplines and, perhaps most significantly, many of whom, are women. Some other examples are my own valued

⁶⁰*Id.*

⁶¹*Id.*

colleagues, Mary S. Bilder and Catharine Wells, and Harvard's Christine A. Desan, Mary Ann Glendon, and Martha L. Minow. This generation seeks to use interdisciplinary insights to look beyond the history of legal doctrine and use history "with an eye to its relevance for the present."⁶² Kalman repeats Bruce Ackerman's famous challenge that the task "is to locate ourselves in a conversation between generations."⁶³ Ackerman continues, "I propose. . .the beginning of a dialogue between past and present which will serve as our central technique for constitutional discovery."⁶⁴ What do you think about Laura Kalman's description of the "new historicism?" What does she mean when she says that "it would be unfortunate if law professors desert the barricades just as academics in other fields, such as historians, begin to show signs of appreciating what legal scholars are doing, and wanting to help?"⁶⁵

My view of legal history has been profoundly influenced by Felix Gilbert, a great history scholar and teacher. Gilbert poses this dilemma:

"But what is our situation, for we believe neither in history as a means of teaching ethical values nor in the possibility of discovering laws to determine the process of world history?"⁶⁶

He answers his own question as follows:

Although we may not share the views of nineteenth-century historians on the purposes of historical study and what historical scholarship might achieve, we are still their heirs insofar as we are professors of history, and, as such, accept the framework established more than one hundred years ago—that is, recognition of the relationship between research and teaching, of the necessity for employing critical methods, and of the importance of maintaining professional standards. As remote as we seem to be from the assumptions and expectations of

⁶²See *Materials*, *infra*.

⁶³*Id.*

⁶⁴*Id.*

⁶⁵*Id.*

⁶⁶Felix Gilbert, *History: Choice and Commitment* (Cambridge, 1977), 452.

nineteenth-century historical scholarship, certain aspects of the history of the professor of history may still be relevant.

One is the view that history is indivisible and that everything that happened in the past belonged to the domain of the professor of history. History became an independent and autonomous field of study because it was recognized that special methods and procedures were necessary to study the past, but also because these methods and procedures were regarded as applicable to any aspect and period of the past. Before the nineteenth century history was chiefly an auxiliary science, and as an auxiliary to other fields of knowledge, historical study and research will always remain alive—now, perhaps, as an aid to political science, sociology, and area studies, rather than, as in the past, to moral philosophy, theology, or law. But if historians want their discipline to be more than an auxiliary science and to remain an autonomous and independent field of study, we should keep in mind that isolating our subjects is only one part of our work; the other is to seek for relationships, comparisons, and analogies.

A second aspect of the history of the professor of history is that history was expected to provide not only special and factual knowledge, but also general insights about the nature of man. We might not feel that we can set our sights as high as that any longer. But, after all reservations have been made, we ought to remain aware that the man who acted and was acted upon in the past is the same man who acts in the present, and that the past is one way—and not the worst way—of acquiring the right and the criteria to judge the present. Our willingness to see the past as a whole, our willingness to take a stand, constitute our card of identity.⁶⁷

I very much agree with Gilbert about his "card of identity," but I am less sure that "the past is one way—and not the worst way—of acquiring the right and criteria to judge the present."

At the conclusion of his great *History of English Law*, Maitland made the following observation:

But of this there can be no doubt, that it was for the good of the whole world that one race stood apart from its neighbours, turned away its eyes at an early time from the fascinating pages of the *Corpus Iuris*, and, more Roman than the Romanists, made the grand experiment of a new formulary system. Nor can we part with this age without thinking once more of the permanence of its work. Those few men who were gathered at Westminster round Pateshull and Raleigh and Bracton were penning writs that would run in the name of kingless commonwealths on the other

⁶⁷*Id.*, 452.

shore of the Atlantic Ocean; they were making right and wrong for us and for our children.⁶⁸

We now represent the generations of which Maitland spoke, and we are the lawyers of those "kingless commonwealths on the other shore of the Atlantic." We can debate as long as we wish the significance of the history of our law, but we cannot escape it. It invades the sentences and the paragraphs of our cases, rules and statutes. It is, indeed, imbedded in the very words we use to describe all we do. But most of all, this history invades our legal culture, the very way we are taught to think. There is a power in this culture. Must it control us, or can we control it? Only by our understanding of our past can Cardozo's "demon of formalism" and Pound's "political" and "juristic" gods be brought to heel.⁶⁹

Understanding of our legal heritage is particularly urgent today, in this "kingless commonwealth." On March 23, 1885, David Dudley Field addressed the graduating class of Albany Law School on the topic "Reform in the Legal Profession and the Laws." His concluding words to the graduates spoke of the "portals of a new time," and he asks "whence shall come the lawgiver of the new time?"

You stand, moreover, in the very portals of a new time. The world is soon to take its impulses from this side of the ocean. The language we speak, the institutions in which we participate, are to spread with our dominion—

From the World's girdle to the frozen pole—and beyond our dominion to remote islands and continents. Whence shall come the lawgiver of the new time? From our own soil, I would fain hope and believe. The materials are at hand, and the time is propitious. A new people, grown suddenly to the strength and civilization of the oldest and mightiest, with laws for the most part borrowed, finds that they need to be reexamined, simplified, and reconstructed. The task is great, the object is greater, and the reward is ample. Let us, then, be up and doing, that we may have the merit and the satisfaction of having accomplished something toward it, before we rest from our labors.⁷⁰

⁶⁸Sir Frederick Pollock, Frederick William Maitland, *The History of English Law Before the Time of Edward I* (2d ed., S.F.C. Milson ed., Cambridge, 1968) vol. 11, 674.

⁶⁹Roscoe Pound, *Interpretation of Legal History*, supra, 4,6.

There is a touch of imperialism in these sentences, but, like Field's graduates, we surely do stand on the "portals of a new time," a time whose rate of change, opportunities and dangers far exceed even the propitious and perilous years that followed Field's 1855 address. And there can be no doubt from "whence shall come the lawgivers of the new time," for they are you.

⁷⁰*Materials, infra*, Chapter XIII.

FOR FURTHER READING

I. THE "NEW JURISPRUDENCE"

See the classic articulation of the "New Jurisprudence" in Henry Steele Commager, *The American Mind: An Interpretation of American Thought and Character Since the 1880's* (New Haven, 1950) 374-390. There is also a good summary of the historical context in an "Epilogue: American Law in the 20th Century" in Lawrence M. Friedman, *A History of America's Law* (New York, 2d. ed., 1985) 655-695.

Friedman has called Oliver Wendell Holmes Jr.'s *The Common Law* (Boston, 1881) "the most important 19th century [law] book." *Id.*, 545. But, as Commager pointed out, Holmes' "thought was a generation ahead of his time," and Holmes only began his thirty years on the Supreme Court in 1902. See Henry Steele Commager, *The American Mind*, *supra*, 376. Thus, Holmes was a genuine figure of the twentieth century. *The Common Law* remains in print. See the excellent edition by Mark DeWolfe Howe, O.W. Holmes, *The Common Law* (ed. M. DeWolfe Howe, London, 1968). Also powerfully impressive are Holmes' less well known legal addresses, including several on legal scholarship and the legal profession in O.W. Holmes, *Speeches* (Boston, 1891). See also O.W. Holmes, *Collected Legal Papers* (Harold J. Laski ed., New York, 1920). Holmes' brilliance is also preserved in his great correspondence with Sir Frederick Pollock and with Harold Laski. See *Holmes - Pollock Letters* (ed. Mark De Wolfe Howe, Cambridge, 1961); *Holmes - Laski Letters 1916-1935* (ed. Mark DeWolfe Howe, Cambridge, 1923). See also "The Early Critical and Philosophical Writings of Justice Holmes" (ed. with introduction by Michael H. Hoffheimer, 30 *Boston College Law Review* (1989) 1221). For a modern analysis, see the incomparable Holmes Lectures of 1981 of Benjamin Kaplan, Patrick Atiyah, and Jay Vetter printed in *Holmes and The Common Law: A Century Later* (Cambridge, 1983). There is also David J. Seipp's brilliant essay on the 125th anniversary of "The Path of the Law." See David J. Seipp, "Holmes's Path," 77 *Boston Univ. L. Rev.* 515 (1997), and the fine work of my valued

colleague, Catharine Wells. See Catharine P. Wells, "Old-Fashioned Postmodernism and the Legal Theories of Oliver Wendell Holmes, Jr.," 63 *Brooklyn Law Rev.* 63 (1997). Finally, there is Catherine Drinker Bowen's wonderful *Yankee from Olympus* (Boston, 1944), a biography as insightful as it is accessible.

There are many surviving books and articles of Roscoe Pound (1870-1964), including his monumental five volume *Jurisprudence* (Cambridge, 1959). By far the most important, however, is the little treatise containing a series of his lectures called *The Spirit of the Common Law* (Cambridge, 1921). See also Pound's *Interpretations of Legal History* (Cambridge, 1923), his famous Trinity College, Cambridge, lecture of 1922. The scholarly biography is Paul L. Sayre, *Life of Roscoe Pound* (Iowa City, 1948). For a guide to the great canon of Supreme Court decisions and articles by Louis Dembitz Brandeis, see Alpheus T. Mason, *Brandeis, A Free Man's Life* (New York, 1946).

II. "POST-LIBERAL SOCIETY"

The patron saint of modern law analysis remains Max Weber (1869-1920). See particularly his *Law in Economy and Society* (trans. From *Wirtschaft and Gesellschaft* by Shik) (Rheinstein, ed., Cambridge, Mass. 1969). See also Max Weber, *General Economic History* (trans. Knight, New York, 1961), 249-258. The leading contemporary commentator on the legal characteristics of "post liberal society" is Roberto Mangabera Unger who, with other scholars such as Duncan Kennedy and Morton Horwitz, formed the "critical legal studies" group at Harvard in the late 1970s. See Roberto M. Unger's *Law in Modern Society* (New York, 1976) and *Knowledge and Politics* (New York, 1975), Morton Horwitz's *The Transformation of American Law: 1780-1860* (Cambridge, Mass., 1977), and Duncan Kennedy's, *Legal Education and the Reproduction of Hierarchy* (Cambridge, Mass., 1983).

For those wishing to complete their overview of English developments up through the aftermath of World War II, see R.M. Jackson's classic *The Machinery of Justice in England* (Cambridge, 1940), Sir Carleton Kemp Allen's equally distinguished *Law and*

Orders (3d ed., London, 1965) and Robert Stevens' fascinating *Law and Politics: The House of Lords as a Judicial Body, 1800-1976* (Chapel Hill, 1978).

III. "LAW AND HISTORY"

A concise bibliography covering most of the recent controversies about legal history, from Grant Gilmore's "The Age of Antiquarius: On Legal History in the Time of Troubles" to Robert W. Gordon's "Historicism in Legal Scholarship" can be found in the notes to the excerpt from my "Introduction" to *Law in Colonial Massachusetts* set out below in the *Materials*. Laura Kalman's *The Strange Career of Legal Liberalism* (Yale, 1996), published since my "Introduction," is worth reading from cover to cover. There is also a great new scholarly biography of Cardozo by Andrew Kaufman. See Andrew L. Kaufman, *Cardozo* (Cambridge, Mass., 1998).