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1

Introduction

I

Ever since the remote day when human beings began to live together in society, official organs of the state have been charged with the responsbility of deciding disputes between individuals who belong to the community (or are at all events temporarily within it) as well as disputes between individuals and the state. From the beginning of social time there have been institutions like courts which have generated or excreted law or something like law. In all societies beyond the most primitive a professional class of lawyers and judges has emerged and maintained itself. In most societies at most periods the legal profession has been heartily disliked by all non-lawyers: a recurrent dream of social reformers has been that the law should be (and can be) simplified and purified in such a way that the class of lawyers can be done away with. The dream has never withstood the cold light of waking reality.

Thus there has always been law and there have always been lawyers. If we are invited to think about the growth of the law within any society over a period of time, we assume, instinctively, that the growth must have been gradual, progressive, and, in some sense of the word, rational. Our instinctive assumption is wrong with respect to most societies throughout most of recorded

history. If we think only of the common law of England and its adaptation in the North American colonies which became the United States, the assumption will still be wrong unless we take as our starting point the eighteenth century (in England) and the establishment of the federal republic in this country.

We know much less about the history of the common law than, for a long time, we thought we did. We are only beginning to learn something about the confused and chaotic process which led to its eventual emergence. An English scholar has admirably summed up this extraordinary development:

> How can a system of law, a system of ideas whose hypothesis it is that rules are constant, adapt itself to a changing world? It has not been the ordered development of the jurist or the legislator, of men thinking about law for its own sake. It has been the rough free enterprise in argument of practitioners thinking about nothing beyond the immediate interest of each client; and the strength of the system has been in the doggedness, always insensitive and often unscrupulous, with which ideas have been used as weapons. . . . The life of the common law has been in the unceasing abuse of its elementary ideas.[1]

The mindless, unconscious process which Professor Milsom graphically describes did, in the end, lead to the flowering of a distinctively English law—distinctive not so much for its substance as for its technique and style of adjudication. We do not know why this should have happened. Many societies have endured as long, or longer, without having produced anything comparable.

But in England the royal courts, which had reluctantly assumed the jurisdiction abandoned by the local and ecclesiastical courts, had, by the sixteenth century, begun to produce the raw materials from which, in time, a coherent body of law could be put together.

From the seventeenth century on, abridgments, digests, and collections of cases began to appear in England—efforts to bring some sort of order to the accumulating chaos of the case law. These were modest or low-level intellectual enterprises. Lawyers continued to think of themselves, as they were thought of by others, as being plumbers or repairmen. The law books were essentially plumbers' manuals.

II

The idea that there should or could be such a thing as a generalized theory of the common law dates from the second half of the eighteenth century. Blackstone had no predecessors. By the end of the century, lawyers had put aside their plumbers' image and become philosophers—an upgrading of status which the legal mind naturally found irresistible. Indeed, we became students not merely of law but, much more grandly, of jurisprudence—an old word wrenched into a new meaning.[2]

The eighteenth century invented not only law or jurisprudence but also history, economics, and sociology—that is, the whole range of what came to be called the social sciences.[3] No doubt, the availability of a sufficient number of case reports was a precondition to the establishment of law as a proper subject for theoretical study. But the invention or discovery of history, economics, and sociology did not in any sense depend on a specialized body of materials like our case

reports. Evidently the hypothesis which commended itself to many eighteenth-century minds was that the ideas and techniques which had proved spectacularly successful in the investigation of physical phenomena could, with equal success, be applied to the investigation of social phenomena. Scientific inquiry, as the eighteenth century understood the concept, started from the assumption that there are, in whatever may be the subject matter of the investigation, observable regularities which can be identified, described, analyzed, and understood. Once that has been done, the future course of events can be predicted. And once we know what results follow from what causes, we are in a position to control, as well as to predict, the future. Extraordinary advances had been achieved in the natural sciences. The hypothesis that there are also observable regularities in the development of human societies must have been as obvious as it was attractive. Many remarkable minds set out, almost at the same time, to discover the laws of history, the laws of social and economic behavior, the laws, we might say, of law.

The eighteenth century, with good reason, thought well of itself. It was the Age of Enlightenment. It was also an age of enthusiasm and of a generally shared belief in the inevitability of progress—a belief which sustained itself throughout the nineteenth century and into our own. This pervasively optimistic intellectual ambience guaranteed that the laws which the prototypical social scientists might discover would be laws we could be proud of and live with happily, not laws which would bring us crashing down in a hopeless despair at the human condition.

We could not have developed any theories about law before the eighteenth century. The theories which were

developed naturally bore the stamp of the age in which they were first hammered out. They purported to be scientific and, at the same time, assumed that everything was—or soon would be—for the best in the best of all possible worlds. Over the past two hundred years these attitudes have done a great deal to color, cloud, or distort thinking about law in successive generations.

Blackstone's celebration of the common law of England glorified the past: without quite knowing what we were about, he said, we have somehow achieved the perfection of reason. Let us preserve, unchanged, the estate which we have been lucky enough to inherit. Let us avoid any attempt at reform—either legislative or judicial—since the attempt to make incidental changes in an already perfect system can lead only to harm in ways which will be beyond the comprehension of even the most well-meaning and far-sighted innovators.[4]

Blackstone wrote at a time when English law was going through a period of rapid, violent change. Indeed, the Blackstonian construct may well be taken as a conservative reaction to the fundamental changes which the English judges were making in the apparently settled rules of English law. Using the tools of eighteenth-century analytical "philosophy," Blackstone was in effect constructing a dike which, it could be hoped, would hold back the encroaching tide. (The use of revolutionary means to achieve a conservative end is a commonplace in the intellectual history of all societies.) And the important thing about the *Commentaries* is not that an obscure lecturer at Oxford wrote them, but that, for more than a hundred years, thousands upon thousands of lawyers and influential laymen on both sides of the Atlantic read them and believed them.

The reason for the dramatic change in English law

during the second half of the eighteenth century is not far to seek. We know it as the industrial revolution. Novel methods of production and distribution required that large portions of the substantive law be rewritten in each newly industrialized country—first of all in England. Almost overnight there emerged, as independent fields of law, such commercial specialties as the law of negotiable instruments (which reflected the problems of payment and credit extension generated by the vastly increased number of mercantile transactions) and the law of sales of goods (which reflected the problems of large-scale manufacture and of distribution in markets where sellers and buyers could no longer deal face-to-face). There had, of course, been cases about bills of exchange and promissory notes, as there had been cases about sales of goods, before 1750. But there is all the difference in the world between issues which arise in litigation infrequently and irregularly (where the results are of interest only to the parties litigant) and issues which arise recurrently and regularly (where it becomes of the greatest importance to lawyers and their clients to have some idea of what the law is—or, which is even more important, what it is becoming). In that sense it is only after 1750 that it becomes possible to speak of a law of negotiable instruments and a law of sales of goods. Later entries in the fields of law which the industrial revolution bequeathed us were the law of insurance, the law of secured transactions (initially chattel mortgages, pledges, and a few conditional sales), and, of course, the law of corporations.

As anyone who has the slightest familiarity with late eighteenth-century English case law knows, the judges were quite consciously aware of what they were doing:

they were making law, new law, with a sort of joyous frenzy. Lord Mansfield was, in the eyes of his contemporaries as in those of his successors, the greatest judge of the period.[5] In one of his celebrated cases Mansfield had occasion to deal with the idea that, in English law, a contractual promise is not binding on the promisor unless it is supported by something called consideration. (At the time Mansfield decided the case, the term *consideration* had been in use in English case law for a couple of hundred years but had never acquired any precise meaning.) Mansfield's method of dealing with the problem was characteristically brutal: he abolished the consideration doctrine (whatever the doctrine may have been), at least (according to the report of the case) "in commercial cases among merchants" where the defendant's promise had been given in writing. One of Mansfield's colleagues, in his own opinion in the same case, after a lengthy review of the consideration doctrine, remarked: "Many of the old cases are strange and absurd: so also are some of the modern ones. . . ."[6] In Lord Mansfield's court the judges were not true Blackstonian believers.

We might say, making use of a famous eighteenth-century formulation, that in its own time the Blackstonian thesis (which represented what the conservative establishment wanted the law to be) was confronted with its Mansfieldian antithesis (which represented what the courts were actually doing with the law during a period of extraordinary change). The resultant nineteenth-century synthesis (at the moment we are talking only of later developments in England itself) came out muddy and blurred (which is perhaps in the nature of syntheses) but with the Blackstonian elements on

the whole in the ascendant. Many of Mansfield's most original contributions to the developing law of trade and commerce (and in particular his attempt to abolish the consideration doctrine) had, within a generation of his death, been rejected, flatly overruled or simply forgotten.[7]

III

In the preceding sections, the implicit assumption has been that the "beginnings" of American law are to be counted from 1800 or thereabouts. That seems to pass over, with cavalier disregard, the nearly two hundred years of our colonial history.

The development of our legal institutions during those two centuries, which makes a fascinating story, is, for a variety of reasons, irrelevant to our discussion.[8]

The law of the primitive agricultural settlements which were painfully hacked from the wilderness in the seventeenth century—indeed, the law of the westering frontier until the conquest of the continent had been completed—had no more relevance to the law of our own industrialized society than the law of the Sioux or the Cheyennes. It is true that, as the colonies prospered and their populations multiplied, courts were instituted and a professional class of lawyers and judges emerged. Even so, it is pointless to speak of an "American law" before the 1800s.

Throughout most of the eighteenth century the deepening crisis in the relationship of the colonies with England meant that our dawning national will and energy were principally focused on evading the clear mandate of the positive law. The function of colonial juries was to acquit smugglers and other violators of

the Trade and Navigation Acts. The strategy of the English government was to remove litigation to the juryless forum of the vice-admiralty courts, whose judges were appointed by the Crown. It is unlikely that a struggle for national liberation ever produces a climate which is favorable to the development of a stable legal system.

In any case, there can hardly be a legal system until the decisions of the courts are regularly published and are available to bench and bar. Even in the seaboard colonies, where the practice of law had, during the eighteenth century, become professionalized, there were no published reports;[9] consequently there was nothing which could rationally be called a legal system.

With the successful issue of the Revolution and the establishment of a centralized federal government (the degree of centralization that was intended or would be achieved was, and long remained, obscure) the stage was set for a fresh start—a fresh start in the building of political institutions, in the choice of the role which government was to play in the development of our society, in the provision of a system of law for the federal republic and its constituent states. It is entirely clear that the men who guided our affairs from the 1770s or 1780s until the 1820s or 1830s understood their unique and privileged historical situation: it does not fall to the lot of every generation to make such a fresh start in a vigorous, literate, and sophisticated society already in full flood of economic and social development, conscious of its immense potential for ever-growing power and wealth.

The fact that American law dates from the end of the eighteenth century has served to differentiate our

legal system not only from that of England but from those of the Western European countries with which we share a common intellectual tradition. We never experienced the mindless process of secular growth which characterized the reemergence of legal systems in England and Western Europe after the anarchy of the Dark Ages. We sloughed off our two hundred years of colonial tutelage as if they had never been. The post-Revolutionary generation of American lawyers approached the problem of providing a new law for a new land as convinced eighteenth-century rationalists, as "philosophers" in the tradition of Voltaire, Diderot, and Montesquieu.

American law has, from its late eighteenth-century beginnings, been self-conciously and self-critically aware of itself as a system which is supposed to make some kind of overall sense. It has never been allowed to grow in the chaotic, disorganized, unplanned, eccentric confusion which, even after Blackstone, continued to mark the growth of English law. American lawyers are and always have been rationalizers, generalizers, theorists—metaphysicians, we might say, *manqués*. Our theory of precedent, for example, came to be much stricter than its English analogue. In English courts which sit in panels each judge delivers his own opinion, and the opinion of each judge who votes with the majority is as authoritative as each of the other majority opinions. Thus there are usually several versions of what an English case is supposed to mean—which frees the system up considerably. American practice early came to be that one judge writes "the opinion of the court" and his opinion contains the only authoritative statement of the case.[10] I think it is also true that the American formulation of a legal rule has

always tended to be more rigid, more abstract, more universal, than the English formulation. The result has been that, particularly during periods when we have taken our precedents and our theories seriously, we have had much more trouble than the English have ever had in adjusting to changing conditions. It is not altogether fanciful to link these characteristics of the American approach to law to the fact that our system was, from the beginning, consciously designed as a sort of formal garden instead of being allowed to come up as it might from the compost heap of the centuries. Our English cousins have been the romantics of the law. We have been—at least we have tried to be—the classicists.

IV

In the following chapters I shall describe the course of American law from the early 1800s until the present and set out some hypotheses on why the changes which have occurred should have occurred when they did and as they did. It is hardly necessary to say that my own version of what happened and why it should have happened will be disputed by many respectable lawyers and historians.

I have adopted a tripartite division of our legal past which was, so far as I know, first put forward by the late Karl Llewellyn, whose last book, *The Common Law Tradition*, published in 1960, was principally devoted to what he called his "periodization" of American law.[11] Llewellyn's three "periods" run from, roughly, 1800 until the Civil War; from the Civil War until World War I; from World War I until the present (or, at all events, the recent past).

Llewellyn's book seems to be largely unread, but

a great many people (either following him or having come independently to the same conclusion) have accepted the idea that there was one fundamental change —or mutation—in the American approach to law at about the time of the Civil War and another at about the time of World War I.[12] There has even developed a consensus on what the first two periods were like. The pre–Civil War period was our Golden Age. For Llewellyn this was the period of what he called the Grand Style: "style," in Llewellyn's lexicon, had nothing to do with literary felicity or its absence but referred to the process of adjudication—the way in which courts go about deciding cases. After the Civil War all the gold, by a sort of reverse alchemy, was transmuted into lead. The pre–Civil War Grand Style lost out to a Formal Style, which was as bad a way of deciding cases as the previous way had been good.

After World War I the formalistic approach which had been dominant in American legal thought for fifty years, went into a protracted period of breakdown and dissolution. There appears to be a general agreement that a principal feature of the new approach, which became manifest during the 1920s, was a root-and-branch rejection of the formalism or (in a term which came to have a wide vogue) the conceptualism of the preceding period.[13] There has been, not surprisingly, much less agreement about the positive accomplishments (if indeed there have been any) of the last fifty years.

Llewellyn had persuaded himself that, during his own professional lifetime, the pre–Civil War Grand Style had reemerged and had once again become dominant. He also seems to have thought that the pre–World

War I Formal Style could be dismissed as a temporary aberration which would not (or at least need not) return. In that optimistic assessment he has had no followers. One approach which has enjoyed a considerable vogue in recent years links nineteenth-century legal formalism with nineteenth-century laissez-faire economics and the decline of formalism with the transition to the twentieth-century welfare state. A writer's attitude toward the welfare state determines his view of whether the law has been changing for the better or for the worse. What might be called the social science approach has also had its fervent advocates: that the law will change (or has been changing) for the better to the extent that the legal profession adopts (or has adopted) the theoretical insights and investigative techniques which have been developed by the social scientists, particularly the sociologists. My own approach will become evident as the discussion proceeds.

The discussion which follows will be largely concerned with legal doctrine as elaborated in judicial decisions and in law books. For two or three generations past it has been the merest truism, in much American legal writing, that the doctrine which may be found enshrined in case report and treatise is neither important nor relevant. The decisions made by courts, particularly by appellate courts, in the relatively few cases which come into litigation and are appealed are insignificant when they are compared with the decisions made by legislatures, by administrative agencies, and by the people who control large business enterprises. Therefore, the argument runs, a study of what the courts do (or of what the law professors say the courts do) is a great waste of time. The only thing that is worth studying is

how decisions are made by the decision-makers who really count, among whom courts and commentators are no longer numbered.

The decisions which most dramatically affect the life of any society are not and never have been made by courts—decisions to make war (or peace), to abolish (or establish) a regime based on the private ownership of property, to enslave (or set free) all the members of a given race, to overthrow an existing government and replace it with a radically different one. These are political decisions, wise or foolish, virtuous or wicked. They have nothing to do with the concept of law, in any of the bewildering number of diverse senses in which that three-letter word is used. The need (or the opportunity) to make fundamental changes in the organization of a society occurs only at rare intervals. Most of the time we live according to established rules which will not be drawn into question until the next period of revolutionary ferment arrives. But even during periods when no one challenges the basic rules, the society we live in continues to evolve and change—in response to technological developments, to shifts in patterns of moral or religious belief, to the growth or decline of population, and so on. The process by which a society accommodates to change without abandoning its fundamental structure is what we mean by law.

In the early part of this century it was customary to draw a sharp distinction between the judicial function and the legislative function. Courts decided cases in the light of preexisting common law or statutory rules. Only the legislature could change the rules; when the legislature had spoken, the courts were bound to carry out the legislative command. We have come to see that

such a distinction is not, and never was, tenable. Courts, as Justice Holmes reminded us more than half a century ago, do and must legislate—that is, change the rules to reflect the changing conditions of life.[14] And with the progressive codification of the substantive law in this century, a significant proportion of the legislative product has come to be merely a restatement of the pre-statutory common law rules—a reworking of the judicial product designed to achieve greater simplicity and clarity.

The importance of the role which the courts have played in determining social and economic policy has varied throughout our history. Until the Civil War the legislatures, state and federal, did very little; the judges, by default, took over the task of answering the questions which someone had to answer. After the Civil War the legislatures became more active; the first administrative agencies were set up toward the end of the nineteenth century. It was also during the post–Civil War period that the idea that courts never legislate—that the judicial function is merely to declare the law that already exists—became an article of faith, for lawyers and non-lawyers alike. By the 1930s, with the prodigious legislative and regulatory effort which marked the New Deal period, it became fashionable to say that the judges had had their day, which would not come again. Nevertheless, since the end of World War II we have witnessed an extraordinary resurgence of judicial activism. The anti-judicialists of the 1930s were evidently premature in consigning the courts to the dustbin of history.

The judicial product and the literature that is based on it have played and continue to play a significant part

in the evolution of our society, not only during activist periods like the present but during passive periods like the one that followed the Civil War. Furthermore, the body of doctrinal material which we shall deal with has the great virtue of being available, usable, and manageable. We may concede the obvious point that legislatures, administrative agencies, and large corporations make important decisions which affect us all and which have a great deal to do with the development of our law. It does not, however, follow that much light can be shed on, say, the process of corporate decision-making by interrogating the responsible executives. They are not trained to think that way; most of the time they will have no idea how or why they arrived at a decision; if they do know, they will not necessarily be inclined to make full disclosure to an officious intermeddler. Judges are trained to explain the reasons for their decisions. They may not always be successful, but the opinions of our better judges set a model for rational and humane discourse which the rest of us can only envy.

All generalizations are oversimplifications. It is not true that, during a given fifty-year period, all the lawyers and all the judges are lighthearted innovators, joyful anarchists, and adepts of Llewellyn's Grand Style—only to be converted en masse during the next fifty-year period to formalism or conceptualism. There are formalists during innovative periods and innovators during formalistic periods—just as there are frustrated classicists during romantic periods and frustrated romantics during classical periods. When we reconstruct the past, we think we see that in one period the innovative impulse was dominant and that in another period the formalistic impulse was dominant. We are talking about temporary

swings in a continuing struggle of evenly matched forces.

Within the legal profession most practicing lawyers (who are interested in winning cases or in advising their clients in such a way that they don't have cases) prefer a formalistic approach to law. That approach holds out the promise of stability, certainty, and predictability—qualities which practitioners value highly. Judges, on the other hand, are paid to decide cases. Apart from such practices as bribery and corruption (which at times become institutionalized), judges want to decide the cases which come before them sensibly, wisely, even justly. Sense, wisdom, and justice are community values, which change as the community changes. It is a reasonable assumption that swings toward or away from legal formalism are determined by changes in community values and that such swings will be more marked in the case of the judiciary than in the case of the practicing bar.

For the past hundred years academic lawyers have constituted a third distinct segment of the profession. Professors who regularly engage in practice have disappeared from the faculties of our major law schools. (Consultation work at high fees plays the same role in academia that bribery and corruption play in the courts and, like bribery and corruption, occasionally becomes institutionalized.) Most law professors spend most of their time teaching; a few of them also write books and law review articles, whose production has for a long time been an almost exclusively academic monopoly. The academic lawyers who choose to write as well as teach lack the salutary discipline which is imposed on judges who must decide (or at least appear to decide) their cases in the light of the evidence properly introduced before them in adversary proceedings. The author of a

leading article in a law review need not fear being reversed on appeal: there is no higher court. The academic legal literature which has been produced over the past hundred years shows, even more dramatically than the judicial opinions of the same period, the periodic swings toward and away from formalism. It is, however, also true that a considerable number of quirky eccentrics end up teaching law and writing law books. These are people who instinctively deny what everyone else affirms. Thus, at any given time, the literature contains a considerable amount of writing which cuts against the prevailing grain. Nevertheless, the academic literature, viewed historically, brings us as close as we are apt to come to what Justice Holmes once referred to as "the felt necessities of the time."[15]

2

The Age of Discovery

I

English law was the only law that post-Revolutionary American lawyers knew anything about. A few had studied law in England. Most had received whatever training they had in this country—by serving as apprentices in law offices or by studying at the law schools which began to spring up toward the end of the eighteenth century. But the only available sources were English sources—from the crabbed and incomprehensible pages of Coke on Littleton to the elegant superficialities of Blackstone. Collections of English cases enjoyed a wide sale—either imported from London or republished here with (as time went on) "American annotations" added. There were no treatises on American law; there were no published collections of American case reports.[1]

However conscious American lawyers may have been of the need to make a fresh start, a system of law cannot be improvised overnight. It has to come from somewhere. Conceivably the European civil law systems, more or less vaguely derived from Roman law, could have been looked to for guidance, but few American lawyers had any familiarity with the civilian literature, available for the most part only in such outlandish languages as French, German, and Latin. (If the Na-