Hastings Law Journal

Volume 3 | Issue 1 Article 1

1-1951

The Great Lawyer in History

Roscoe Pound

THE GREAT LAWYER IN HISTORY

By ROSCOE POUND

Law School, University of California, Los Angeles

We do not go far amiss in calling the nineteenth century the century of history. Men's minds were fascinated by the idea of evolution and history was a record of evolution. Hegel's Philosophy of History, that history recorded the process of self-realization of an idea, was a theory of evolution. But Spencer's Positivism also was made the basis of a universal theory of evolution. Every freshman, when I was a student in college, began his daily or weekly theme "History Teaches." No one doubted that history was a teacher and we were no less confident that we knew just what history taught.

In such a time the interpretation of history was something fundamental. All things were to be understood through their history. But the history itself had to be understood. It was not a mere narrative of unrelated sequences of unrelated single events. There was in one view an idea unfolding or realizing itself in the sequence of events, or, in another view, there was a process of evolution from one thing to another thing through successive events following some law discovered by observation and verified by further observation. When men thought thus, and they continued so to think well into the present century, history of philosophy stood for philosophy and interpretation of legal history was the living part of philosophy of law.

But in a way interpretation of history is as old as philosophy—as old as reflection on the nature of things. *Natura* meant coming into being, and how and why things come into being was thought about and written about long before Greek philosophers built upon it the foundations of what we now know as philosophy and science. Religious interpretation of history may be seen in the Book of Daniel. All this, however, was before history came into what in the last century we felt to be its own in the hey-day of evolution. Interpretation of history was in a large sense interpretation of evolution. It got its full development in Hegel's Philosophy of History as a theory of the evolutionary sequence of events in the self realizing of a causal idea.

Until Hegel so far as there was a generally employed interpretation of history it was a great-man interpretation. History was a record of the achievements of great men. It told us of the work of great rulers, great soldiers, great law makers, great inventors, even great artists and great writers, the sum of whose creative activities was to be seen in civilization as it was developed. Hegel replaced this great-man interpretation by an interpretation in terms of an idea—either an ethical idealistic or a political idealistic interpretation of history as the unfolding or progressive realizing of an idea on one side ethical, on another side political. This held the ground

for the most part in the nineteenth century, although other interpretations came to be urged. Some were idealistic, e.g., religious or economic (in terms of an economic idea), and some materialistic, e.g., geographical or mechanical economic. In the present century Hegel's interpretation, and idealistic interpretations following his method, have given way to different forms of economic interpretation, beginning with Marx, or psychological interpretation, based largely on Freud, or to rejection of interpretation, thinking of unique series of events or even of unique, disconnected single events. A monumental history of English law written from this standpoint was aptly described by Mr. Justice Frankfurter as postulating that all facts were created free and equal.

Even if it is not a universal solvent we cannot ignore interpretation of history. It may not enable us to chart with assurance the future course of events. Sometimes, I think, it tells us more about the interpreter and his generation than it does about the causes of things. For example, three historians have interpreted the rise and downfall of the Athenian Empire. Thucydides in the era of the great Greek tragedian interpreted it in terms of a tragedy. The tragedian portrayed the rise, prosperity, arrogance and fall of his hero. Thucydides tells of the rise, prosperity, arrogance and fall of Athens. In the nineteenth century, in the hey-day of the liberal party in England, Grote told the story in terms of his time. To him the story was one of the rise and fall of the Athenian democracy in a struggle with oligarchy and later with despotism. In the present century, in the time of the rise and hegemony of the Labor Party in England, the story has been sketched for us by Gilbert Murray. He sees instead a struggle of the Athenian workingman to raise and maintain their standard of living.

It is said that an optician, troubled, as most of us are, by Turner's later pictures which to the ordinary observer seem great unformed splashes of color, bethought himself that the artist in his later years had developed an astigmatism and made a study of how the paintings must have looked to the defective vision of the painter. Accordingly he worked out a formula and had a pair of spectacles made through which the pictures take on the aspect they had to the artist and reveal something understandable. In like manner much depends upon the spectacles through which we look at a bit of history.

But, as I said above, we cannot ignore interpretations of history. As Mr. Justice Holmes put it, historical continuity is not a duty, it is a necessity. In law the experience which we develop by reason is given us in history, and the reason with which we supplement experience is tested by further experience and puts us back in the path of history. How we look at this path and the meaning we give it exerts a decisive influence upon the context and the application of the body of authoritative models or patterns of decision which we call law. This is brought out clearly if we compare recorded experience

of the administration of justice in the common law courts as it looked to Blackstone in the eighteenth century, the age of reason, as it looked to James Coolidge Carter in the age of history, and as it looks to the juristic realists of today in an era of Marxian economic absolutism.

In the nineteenth century, in reaction from the great-man interpretation of history, the historical jurists were agreed that great lawyers were not significant factors in legal history. They were only instruments through which the idea of right or the idea of liberty realized itself in the evolution of legal institutions and legal precepts. But great lawyers could be thought of as significant instruments. With the giving up of idealistic interpretations and replacing them by mechanical economic or psychological determinist interpretation or by skeptical no-interpretations, I have begun to wonder whether we shall not have to revive the great-man interpretation. Can we not assume that great men have played a significant part in political and legal history? Can we be sure that things would have turned out as they have in five generations since independence if we had not had George Washington for our first president, to start the tradition of an American executive, Alexander Hamilton to put our national finances upon a sound basis at the outset, Thomas Jefferson to turn us from oligarchy to democracy at a crucial point in political development, Andrew Jackson to stand firm for the union when dissolution threatened, and Abraham Lincoln to guide us with wisdom and steadfast faith through the Civil War? Have things just happened? Or have they happened as they have because of the inexorable, predetermined operation of some social or economic or psychological force of which men are but playthings? Or have masterful men at crises set in action courses in which we find ourselves today?

I make no pretense to be metaphysician or historian and pretend to no competence to construct an interpretation of universal history or to argue the possibility of such an interpretation. What I do urge is that something may be said for a great-lawyer interpretation of legal history—an exposition of legal development in terms of great lawyers, law makers, judges, and jurists who have put their mark enduringly upon the law of great parts of the world.

One is tempted to begin with Roman Law, which has furnished principles, starting points for legal reasoning, modes of legal reasoning, maxims and precepts for the whole world, and tell its story in terms of Labeo, Sabinus, Julian, Ulpian, Papinian, and Paul, culminating in Justinian's Digest which is the basis of a significant Common Law of half of the world. Even if Justinian was not a maker of the codification of the matured Roman Law which bears his name, a ruler who chose Tribornian for his minister of justice, Belisarius and Narses for generals, and the architect of St. Sophia, showed a sound judgment in choosing his servants which entitles him to a conspicuous

place among rulers who have affected the course of history. Tribornian, as the moving spirit in the codification which long stood for the universal Civil Law of Christendom and made the writing of the classical Roman jurists a quarry for teachers and doctrinal writers from its revived study in twelfth century Italy to the present, may well claim a causal role.

Nex to Justinian's codification the Code Napoléon has stood for a form or at least a source of the law of a great part of the world for all but a century and a half. Napoleon, certainly a personality to be taken account of in all history, must have a place in legal history as the masterful ruler who made the framers of that epoch-making code complete their work and put it in force as a body of law when it was needed to mark the end of one era of legal development and beginning of another, as Justinian's Code had been in another time. Here, too, we come upon a great lawyer: For what made the code possible was the writings of Robert Joseph Pothier, law teacher and judge, who had covered the whole French Law and modern Roman Law of the eighteenth century by a series of treatises which the legal scholar cannot ignore even now. The French codification of the law as expounded by Pothier was the model of codes in Continental Europe and Latin America until the new German code took effect in 1900.

Let us turn instead to the law of the English-speaking world. The English Common Law as a system is not merely important as giving the rules of decision of causes and providing the technique of developing and applying them all but universally wherever English is spoken. It has been effective in the rest of the world in furnishing a model for guaranties of individual right against oppressive official action by bill of rights which have been coming to be set up everywhere. In both respects it owes most of its content and for the most part its very existence as one of the two major legal systems of the world of today to lawyers whom we may identify in its history, among whom a number stand out notably as leaders.

There are few phenomena in political or social history more marked than the persistence and vitality of the taught tradition of the Common Law as a system from its beginnings in the teaching of the law of the King's Courts by lawyers practicing in those courts and organized in teaching societies which still control legal education in England. In its beginnings it encountered the strongest adversary of that time, the Universal Church. The controversy between the Common Law of England administered in the King's Courts and the law of the Universal Church administered in the ecclesiastical courts was settled in favor of the Common Law four centuries before the medieval Universal Church lost its hold in England at the Reformation. Next the Common Law stood out against the reception of Roman Law, complete on the Continent in the sixteenth century. Again it contended with the rise of political absolutism in the seventeenth and eighteenth centuries, in the

contests between the courts and the crown in seventeenth century England and between Colonists and crown in eighteenth century America. Later it prevailed against political hostility to things English after the American Revolution and against hostility to law and lawyers in the depression following the Revolution. In the nineteenth century it prevailed against the competing French and Spanish Law in the formative years of many of our states, only one of six in which French law had obtained having retained it and all four of those which had been in the domain of Spanish Law having given that law up. In the twentieth century it is contending with administrative absolutism in the rise of the executive to leadership in our American polity.

At the outset of this series of struggles the Common Law held its ground against the law of the Church through the vigorous resistance of Henry II. That masterful King was by instinct, if not by training, a lawyer. The court in which he sat to administer justice in the great Hall at Westminster was so well known for the quality of justice administered that foregin rulers came there for it. We are told that in one great day his Court entertained a case between the King of Castile and the King of Navarre. That so excellent a brand of justice was then to be had in England was due to Henry himself. In the result of his conflict with the church questions of property, of debt, and of crime were set off definitely for the courts of the state rather than for those of the church, leaving to the church courts ultimately for the chief subject of their jurisdiction, aside from the internal conduct of the church, matrimonial causes, testamentary causes, and administration of estates. But the probated will could not determine the title to real property and administration of estates had to do with personal property only.

But it was not with the church alone that the Common Law had to contend in the beginning. Local custom was administered by the assembly of the free men of the county in the county court and by the free men of the hundred in the hundred court. Also the great landlords held private courts or "hall moots" by virtue of franchises and small landlords held petty courts on their estates. Chiefly because of the better justice which the King's Courts administered as a result of Henry's innovations, his court, from which the Superior Courts of the Common Law were developed, came to prevail over the local and private courts and worked out a body of law which in its maturity went around the world. The permanent and fruitful achievements due to him are the unifying of the administration of justice in a permanent court, becoming permanent courts, of permanent, professional judges, and the "inquest" or "recognition," becoming trial by jury. These were personal achievements of a great man. The law which grew up in the Common Law Courts became so well established that it could later resist not only the reception of the Roman Law which went on elsewhere in Europe but could stand the rise of centralized absolute monarchies in the seventeenth century. So

strong had the Common Law become by the fourteenth century that the Court of King's Bench could tell Edward III that he could not write private letters to the sheriff directing him not to seize outlaws, and at the beginning of the sixteenth century the Court of Common Pleas could hold that Parliament could not make the King a parson in contravention of the then fundamental legal differentiation of spiritual from temporal jurisdiction.

Along with Henry II as a builder of the common law we must recognize that redoubtable champion of the supremacy of law and of legal guaranties of individual rights, Sir Edward Coke. In a time of aggressive administrative absolutism it has become a fashion to belittle the work of the oracle of the Common Law and to compare him disparagingly with Bacon, the advocate of royal absolute power as claimed and sought by the Stuarts. Coke is described by recent writers as a reactionary pedant, and malicious gossip of the days when he stood out against the attempts of James I and Charles I to become absolute personal rulers such as had come to be on the Continent, has been raked up to show him a cringing politician rather than a lawyer standing for law as the real and implacable foe of absolutism. But as the author of the Petition of Right, which stands with Magna Carta and the Declaration of Independence in the history of political liberty; as the spokesman of the judges of England who resisted the claims of James I to sit and decide cases in the Court of King's Bench; as the judge who had the temerity to tell the King that he ruled under God and the law, who was dismissed from the Chief Justiceship for steadfast adherence to the Common Law as against royal prerogative; and as a fearless advocate of the power of Parliament against both James I and Charles I, imprisoned by Charles as leader of opposition in the House of Commons he must be reckoned as a cause in Anglo-American legal history. His encyclopedic knowledge of the law, his ability, energy, courage, and unshakable will at a turning point in the legal and political history of England, put the English-speaking world in the path of constitutional as opposed to personal government.

Coke's commentary on Magna Carta and the exposition of it by Blackstone were the main reliance of Americans in the controversies which culminated in the American Revolution. His Institutes and Reports made him the oracle of the Common Law to the succeeding centuries. In Anglo-American legal history no less than in Anglo-American political history he gave content and shape to our fundamental institutions. Indeed his writings were a Bible in the formative period of American law. The charge that he was reactionary rests on his opposition to equity as it was developing in the Court of Chancery. But the equity he resisted was not the equity of Hardwicke and Eldon. It was the equity of clerical and lay Chancellors. It was the equity which Lord Ellesmere rested on a text of Deuteronomy, in which the Chancellor could rest his decree on a proposition that: "By the law of God, he that build

a house ought to dwell in it; and he that plants a vineyard ought to gather the grapes thereof." It was the equity of which Seldon wrote later comparing the Chancellor's conscience, as a measure of exercise of his jurisdiction, with the length of his foot. The equity systematized by Common-law lawyers as Chancellors was yet to come.

As American law developed in the formative era from independence to the Civil War we may see great lawyers shaping the legal polity made possible by Henry II and established as what was to be the law of the English-speaking world by Sir Edward Coke. Bentham says that the Common Law is manufactured by "Judge & Company." A great judge sitting in an ultimate court of review and a great lawyer appearing before him as advocate may put the law of a new jurisdiction upon an enduring foundation. The Constitution of the United States, pronouncing itself in words taken from Magna Carta and given meaning by Coke the "supreme law of the land," was made to give a solid legal structure of constitutional democracy for federal government of what was to be a country of Continental domain by the Supreme Court of the United States. No country of continental extent has been able to endure except under an autocracy or else as a federal government. It was a mighty legal-political achievement to develop the Constitution of the United States as a legal document which could later stand the strain of the Civil War and maintain itself in the melting pot of races in a land grown from thirteen to forty-eight states, from a fringe of small commonwealths along the Atlantic Coast to one of the great powers of the world, from a pioneer, rural, agricultural to an urban industrial society. In the formative time of our Constitutional Law a great judge and a great advocate appearing before him, both great lawyers, were the chief actors in making the medieval doctrine of supremacy of the law, given life by Coke, take on new and long life in a new world. John Marshall and Daniel Webster give point to Bentham's saying about "Judge & Company." Bentham believed that law making should take the form of legislation. He persistently attacked the Common Law as formed or made by judicial decision. But no legislation has been more enduring than the constitutional law developed by our Supreme Court in the formative era. Some things built upon that foundation in a later time have fallen. Some things built in their place recently may not endure. But the work of the great lawyer stands.

Maitland told us that taught law is tough law. The vitality of the Common Law is in large part due to the circumstance that it has been taught almost from the beginning. There are other causes of its coming to be a law of the world. But what gave it life and enabled it to prevail in the critical period of legal development in America, in the fore part of the nineteenth century, in the time of apprentice training of lawyers, was that English Common Law was the only system that was or could be taught to

young men studying for the bar with the books at hand in law office or law-office type of law-school. That the Common Law could be taught, and taught so as to arouse enthusiastic belief in it, was due above all to the writing of two other great lawyers, James Kent and Joseph Story.

Four very real dangers were overcome in three-quarters of a century of development of the Common Law in America. More than once very little would have sufficed to turn the current of American law in another direction. These dangers were: (1) The danger of a general reception of French law; (2) The danger of a debasement of the law through an untrained judiciary in the earlier part of the century and an elective and to some extent political judiciary after 1845; (3) The danger of premature and crude codification during the legislative reform movement which came to an end about 1875; and (4) the danger of loss of unity and development of separate local systems which was not wholly at an end till the close of the nineteenth century.

As late as 1856 Sir Henry Maine believed that a reception of a French or of a Roman-French law was taking place in America. That there had been a real threat of such a reception is clear enough when we read the older American law reports, particularly those of New York. But when Maine wrote in 1856 that danger was over. The Anglo-American is averse to authorities in a foreign tongue. Few American judges and lawyers who would have liked to make use of the Civil Law were able to do so effectively. Such translations of French texts as were made came too late. Before they were available Kent and Story had presented what was in substance sound Common Law in a systematic, ordered, reasoned fashion which appealed to the bar and to the courts.

A second danger, that the common law would prove inadequate, when administered by an untrained judiciary in some of the states in the earlier years after the Revolution and in the last half of the nineteenth century by an elective and to some extent political judiciary, was overcome by strong courts in the states of chief influence manned by appointed judges among whom are most of the great names in American judicial history. Before the short-term elective judges had become the rule these other judges had done their work so well that with the aid of the great textbooks of that time sound common law now was accessible in understandable form everywhere.

Along with the change in the tenure and mode of choice of the judiciary came a period of legislation and a demand for codification. This had been heard to some extent from the beginning. John Adams had repudiated the common law before the Revolution. Jefferson insisted, contrary to the general legal doctrine, that the Colonists had not brought the common law over with them. Many believed that a complete code was possible which once for all should provide in advance the one right decision for every possible controversy. Had such men as Kent and Story allowed their good sense to be over-

come by the eighteenth century Continental philosophers of law, whom they undoubtedly admired, the future of American law might have been very different. But when the movement for codification gathered strength in the Draft Codes of David Dudley Field, the common law was thoroughly received and well established and was able to resist it. In the principal jurisdiction which adopted Field's Civil Code the courts agreed in treating it as declaratory of the common law.

If American law had been without an inner unity, if there had been an entire and peculiar local law in each state, the movement for an entire Benthamite code might have swept the country as the French Civil Code swept over Europe in a not unlike situation. The attempt of the Supreme Court of the United States to preserve unity by its doctrine as to questions of general law when arising in litigation in the federal courts failed wholly. But what Story the judge failed in, Story the text writer accomplished fully. More than anything else the books of our great nineteenth-century text writers saved the common law. They gave us guides for judge and practitioner well written, learned, well ordered, and, as things were then, well reasoned. Thus at the crucial time the common law was so well presented as to make the reception easy and the energies of the courts were changed to the right channel of applying common-law principles to concrete cases. Until our case law was able to stand by itself, such aid was indispensable. Without it I doubt whether we should live under the common law today.

Coke summed up the development of the common law prior to his time and thus provided the basis for a juristic new start. The American text-writers summed up English judicial decisions of the seventeenth and eighteenth centuries and made them available as the basis of a new start in America. Of these text writers two are pre-eminent, Kent and Story.

If Marshall made our public law, Kent and Story in almost equal measure made our private law. They assured that it should develop along common-law lines by judicial rather than by legislative empiricism. What the latter might have meant the New York Code of Civil Procedure from 1876 to 1920 warns us abundantly.