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SOME CONTEMPORARY APPROACHES TO THE STUDY OF LEGAL HISTORY AND JURISPRUDENCE

Stephen M. Fuller*

For many years, the courses in Legal History and Jurisprudence, because of their characteristically peripheral position in the law school curriculum, have suffered from a lack of active recognition among students, practitioners, and educators. While their theoretical importance to legal education has rarely been seriously challenged, the practical value of each has frequently been the subject of considerable skeptical debate. The secondary role which these courses have assumed is itself an apparent reflection of several well-known factors: (1) The thoroughly understandable emphasis in legal education on the precise, technical aspects of case analysis; (2) The pervasive fear of antiquarianism among lawyers; and, perhaps most important; (3) The traditional failure of legal historians to escape the tyranny of factual minutae far removed from any contemporary relevance.

Each of these interacting factors occurs at a time when recent political events have again shown, if additional demonstration was ever required, that the need for value-oriented instruction in the training of lawyers is more urgent than ever before. Diverse voices from the Chief Justice of the United States to prominent civic leaders throughout the nation have emphasized that the most critical deficiency among the law school graduates is a woeful lack of awareness of the ongoing interrelationship of the legal process and the larger sphere of social change. The complexity of modern industrial society, the strong desensitizing currents of the case method, the insistent demands for ever-narrowing specialties, and the reduced proportion of liberally educated graduates

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entering law school, have all combined to produce the annual bumper crop of legal technicians. Reform proposals have failed to dent these alarming tendencies, all of which are happening during a period in our national experience when the legal profession has already achieved a position of disproportionate dominance in the social process. Consequently, when some vital new directions emerge from the academic wilderness, it is a cause for great rejoicing among those who strongly believe in the essential merits of an historical and philosophical dimension in legal education. The purpose of this essay is to acquaint the reader with three of the more refreshing, contemporary innovations having an impact in the general areas of Legal History and Jurisprudence. As such, this writing is certainly not intended to be an exhaustive analysis of any of these approaches but rather only a preliminary introduction to areas of current vitality which offer a measure of hope as a partial counterbalance to the dominance of opposing trends.

The first of these changes was initially ushered in by the successive publication of two extraordinary law review articles in 1962 and 1967.[1] Both were the work of Professor Calvin Woodard, a widely recognized and influential legal historian at the University of Virginia. The first article, "Reality and Social Reform: The Transition From Laissez-Faire to the Welfare State," uses the fundamental methodology of the rapidly growing school of intellectual history to reconstruct artfully the historical consciousness and cultural milieu in which Anglo-American law developed in the late nineteenth and early twentieth centuries. Woodard stresses the social context in which legally relevant ideas produced specific changes in the common and statutory law. By asserting that such changes inevitably reflect gradual evolution of social norms, in this instance from a once vibrant capitalism allied with science in the afterglow of the eighteenth century Enlightenment to the emerging frontiers of the modern welfare state, he has properly joined the legal process to the historical soil in which it thrived. The approach is especially noteworthy in avoiding the arrogance of superficiality characteristic of non-historically based analyses. It recognizes the utter futility of blanket condemnation of the past using the often arbitrary value structure of contemporary standards and concerns. Since the legal system is itself an historical phenomenon, it is incumbent on lawyers to attempt comprehension, at least in minimum fashion, of the social context which spawned it and governed its development.

1. Woodard, *Reality and Social Reform: The Transition From Laissez-Faire to the Welfare State*, 72 YALE L.J. 286 (1962); Woodard, *History, Legal History and Legal Education*, 53 VA. L. REV. 89 (1967).

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A major theme of the article is the familiar chorus of historians that the present, let alone the future, is incomprehensible without some familiarization with the past. What is so different in Woodard's variation of this theme is that he is concerned with past consciousness and not merely a recitation of detailed information. As a skilled craftsman, he seeks a fluid, conceptual reconstruction of climates of opinion and virtually abandons the mechanical search for legal origins reminiscent of such notables as Pollock, Maitland, Holdsworth, Thorne, Milsom, and Plucknett. What emerges from his work is a masterful handling and evaluation of ideas and ideologies which conditioned specific legal change. It is all well and good for a legal historian to contrast the corporation law, for example, of a century ago with that of today, but what is of far greater importance to law students is to reconstruct in the classroom the changing attitudes which account for the difference. Woodard has focused the discussion around the larger sphere of evolving social consciousness, and, in so doing, insight has replaced rote memorization of information. Law students, attuned to the analytical mood, often experience initial difficulty with this approach because it offers few concrete facts and is little concerned with the logical consistency or inconsistency of systems of legal reasoning. It therefore tends to linger over ideas not striking from an analytical viewpoint but immensely important from the perspective of history. As is often the case, the analytical mind, not at home with the cloudy, often illogical progression of history, soon grows impatient with nebulous terms, relevant to their age, and of deepest significance for the legal dimensions of the human situation in modern times. Woodard's approach rests on the premise that, in the final analysis, there is nothing so practical as theory.

Professor Woodard's greatest contribution is the attempted synthesis between the precise formulations of the law and the murky domain of historically relevant values, myths, attitudes, opinions, and ideas. If history is often illogical and difficult to analyze, it is, after all, only a compiled record of human activity and shares such characteristics with life itself. The dichotomy between analysis and synthesis confronts the fledgling lawyer from his initial contacts in law school. His efforts to resolve the dilemma and thereby reduce a growing tension usually results in a mental divorce from the social process in favor of a marriage with strict legal analysis. He simply removes himself and blots out of his mind those ideas not reducible to accurate, quantitative expression. In a former time, such a tendency might have been useful, even laudable. Today, as Woodard suggests, with the legal profession dominant

in society, it will become, if carried to extremes, eventually intolerable and immeasurably disruptive. The hour is still not too late to attempt a limited synthesis in vital areas of law and social change. To many, including some lawyers, the vast army of narrow legal specialists all too often resembles the barbarian hordes which laid waste to the Roman Empire in the first centuries of the Christian era. On their own ground, they are invincible, but, as Woodard again points out, that foundation is deceptive and potentially injurious. The legal historian does not have to shout or moralize when he urges a broader recognition of the role of law in our contemporary social landscape.

This approach is not without pitfalls, however, and indeed an experienced, seasoned historian knows the inexorable demands which the attempt to profile the evolving relationship between law and social consciousness makes on those who venture, by design or accident, into its embrace. If the traditional approach of legal history is lifeless and stuffy, the intellectual historian working in this area constantly runs the risk of over-generalization and falling victim to attractive but deceptive clichés. To avoid these dangers, as Professaor Woodard has so admirably done, one must be both a skilled legal analyst and far from an ordinary academic historian. A scholar working in this area must be capable of painting exquisitely drawn lines with a broad brush on a panoramic canvas. The fact that so few succeed in such endeavors explains, at least in part, why Woodard's pioneering efforts have not, to date, attracted the number of supporting scholars which such foundational labors usually call forth.

On the other hand, a strong suit of this approach is one that should ultimately appeal to law students and instructors alike. Legal Intellectual History is readily adapted to the classroom environment of searching dialogue and debate. Professor Woodard devotes his second article, entitled "History, Legal History and Legal Education" to the numerous ways in which the study of Legal History can fulfill student needs and take its proper place in the legal curriculum. Using the conceptual framework developed in his earlier essay, he explores its ramifications for the training of lawyers. He discusses in depth the peculiar needs of law students, the research achievements of legal historians, and the prevailing characteristics of the course as a forum for providing a necessary historial dimension to the substantive law courses encountered elsewhere in the curriculum. By encouraging mature inquiry into the history of legal institutions and ideas, an instructor can assist students to understand how the values, myths, attitudes, superstitions, and opin-

ions of a particular period in the past formed its perimeters, defined its ideological boundaries, and ultimately brought us the law as we know it today. Such a process of intellectual interaction makes it easier to conceptualize legal institutions and doctrines as historical phenomena rather than abstract creations governed by mechanical principles. The organic changing character of law is more vividly portrayed if students can properly identify and evaluate the relative urgency of social and intellectual forces responsible for change. Legal norms, like other societal standards such as custom and mores, are constantly subjected to the relentless ebb and flow of the historical process. With skill and patience, a legal historian can reconstruct lost consciousness so that law students, even those with limited backgrounds in traditional liberal arts disciplines, will be able to comprehend specific legal changes with an appreciation of the varying urgencies facing contemporaries of the events. Judges, lawyers, and legal scholars can be appreciated as mere mortals, possessed of all the customary foibles and virtues which that state suggests, as they wrestled with the difficult and urgent legal issues of their day. In no case are such reconstructive efforts easily accomplished or lightly dismissed.

By now it should be apparent that Professor Woodard's adaptation of the aims and methodology of the intellectual historian to the course in Legal History is most useful when discussion centers around the vast panorama of Anglo-American jurisprudence from the emergence of the common law in Medieval England to the complex structure of modern American judicial institutions. His approach is intimately linked to and inseparable from the unique, evolving consciousness of Western Civilization. However, there are other scholars, no less dedicated, currently working in the broad areas of Legal History and Jurisprudence, whose primary attention has centered on emerging legal systems in preliterate societies. Their basic orientation is cross-cultural rather than uni-cultural. As a result of these recent scholarly efforts, Legal Anthropology is presently enjoying a renaissance in American law schools. This trend is the second major departure from traditional legal historical inquiry.

There can be little doubt that the principal impetus for this school of legal scholarship came from the publication by Hoebel and Llewellyn of *The Cheyenne Way* in 1941.[2] By any standard it was a masterful collaborative achievement by a lawyer and an anthropologist. One tangible result of the broad acceptance of that work in recent years has

2. KARL N. LLEWELLYN & E. ADAMSON HOEBEL, THE CHEYENNE WAY (1941).

been the steady growth of courses dealing with law in primitive cultures, such as that of the American Indian. By studying the characteristics of emerging law and legal institutions in traditional Indian societies, legal anthropologists have greatly expanded our understanding of the nature of law as a primary social control mechanism. Professor Rennard J. Strickland's major work, *Fire And The Spirits: Cherokee Law From Clan To Court,*[3] has contributed significantly to legal scholarship in this area and has received wide acceptance in the larger academic community.

The anthropological approach to Legal History is also useful in that it avoids the common pitfalls of ethnocentrism so pronounced in earlier works. Once again, law assumes its rightful position as an integral part of culture and a commodity not monopolized by "civilized" societies. The tendency to view law as an autonomous phenomenon separated from any cultural matrix, a legacy of the earlier analytical school of jurisprudence, has often led lawyers and social scientists to eye each other with mutual antagonism.[4] In the final analysis, the most lasting contribution of the anthropological scholars is the reconstruction of theory. Modern lawyers, faced with the unrelenting demands of the problems of the "real" world, have all but abandoned the search for viable theoretical frameworks which provide direction and make meaningful change possible. Recent political events have again demonstrated that merely responding in haphazard fashion to specific stimuli is not a constructive way to provide guidance for legal change.

The two approaches so far discussed in this essay have had in common the fact that both are past-oriented. Legal Intellectual History is mainly concerned with the relatively recent past of Anglo-American jurisprudence while Legal Anthropology focuses on the more remote origins of law in primitive societies. The third major departure from traditional inquiry is unique in that it is primarily future-oriented. For lack of a better descriptive term, I refer to this approach as "Futuristic Jurisprudence." The main scholarly impetus for its study has come from Professor Gray L. Dorsey of the Washington University School of Law in St. Louis.[5] In his course in Jurisprudence, Professor Dorsey

3. RENNARD J STRICKLAND, FIRE AND THE SPIRITS: CHEROKEE LAW FROM CLAN TO COURT, (1975).

4. L. Pospisil, *E. Adamson Hoebel and The Anthropology of Law*, 7 LAW & SOC'Y REV. 537 (Summer 1973).

5. For a further description of Professor Dorsey's Jurisprudence course, see the curriculum section of the 1973-74 bulletin of the Washington University School of Law.

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explores possible grounds for ordering principles and legal institutions in the prevailing social conditions of a post-industrial society. He accomplishes his course aims by closely examining the philosophical premises of contemporary social critics drawn from a broad spectrum of modern thought. Discussion centers around the works of Alvin Toffler, Herbert Marcuse, Bruno Bettlehein, C. Wright Mills, Barry Commoner, Perry London, B. F. Skinner, George Kateb, V. O. Key, William Irwin Thompson, Gordon Taylor, Alain Touraine, and E. A. Burtt. From their writings, he derives the most influential contemporary thought on the likely trends characteristic of a future post-industrial society. To these fundamental premises, he adds creatively a jurisprudential dimension by investigating the probable role of law in such a society. Being concerned with the future, the discussion is highly speculative, but it does begin the task of concentrating students' attention on the likely problems which they will have to face in their own practice. As such, this approach makes a major contribution to the view of law as an organic, changing phenomenon rather than a mass of static norms. It seeks to provide young lawyers with the tools to practice competently in the unprecedented environment of a future American society.

CONCLUSION

Each of these three basic departures from traditional approaches, Legal Intellectual History, Legal Anthropology, and Futuristic Jurisprudence, have as their ultimate shared aim the training of lawyers better able to assume an expanded role in a society which demands that they be equipped to serve as much more than mere partisan advocates of private interests. Having achieved a dominant position in modern society, the legal profession now must bear the lion's share of responsibility to comprehend and provide direction for changing currents. To aim at a lower standard in legal education is, simply stated, to fail.

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