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Value of Law to Historians, The

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THE VALUE OF LAW TO HISTORIANS

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The contents of a law review ought to be examined with scarcely less attention by historians than by lawyers. Although at first glance it appears that such a review is designed only for technical specialists, historians who have in any way penetrated below the surface of past events are keenly aware of the relations between law and history. Discrepancies so far as method is concerned undoubtedly exist between the two but the importance of legal materials is such that the historian whatever his field of interest, whether country, period, or tendency, cannot possibly neglect them. Indeed he must rigorously and arduously study them since no other materials throw into variegated relief every aspect of past or of present civilization. Mr. Justice Holmes put the case for law as an historical source with intoxicating effect when he imaged

> "... a princess mightier than she who once wrought at Bayeaux, externallyweaving into her web dim figures of the everlengthening past —figures too dim to be noticed by the idle, too symbolic to be interpreted except by pupils, but to the discerning eye disclosing every painful step and every world-shaking contest by which mankind has worked and fought its way from savage isolation to organic social life.[1]"

What is true for the historian applies only slightly less to the political scientist, the economist, and the sociologist. To take a specific but comprehensive example: if there has appeared a more significant appraisal of modern political, economic, and social trends, within similar compass, than *The Modern Corporation and Private Property*, by Berle and Means, the writer is unfamiliar with it; and what is today an acute essay in political economy will tomorrow become a most valued source of social and economic, not to say legal, history.[2] Hence it can be seen that when legal

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1. HOLMES, SPEECHES (1900) 18.

2. In a somewhat different but extraordinarily revealing vein, see BORKIN and WELSH, GERMANY'S MASTER PLAN (1943) and Hamilton, *The Strange Case of Sterling Products* (Jan., 1943) 186 HARPERS. These accounts of a country's "industrial offensive," based as they are to a large extent on legal materials and certainly informed by legal insight, uncover a large area of international relations hitherto unmapped if not entirely unknown.

data provide the foundation for such a study they are not be regarded as of interest only to lawyers. Blackstone long ago observed that those who are charged with public leadership in any scene of life cannot properly discharge "their duty either to the public or to themselves, without some degree of knowledge in the laws."

Not so many years ago historians often related the history of a given country or period largely in terms of public law or, more specifically, legislation. Several notable works of that character were produced and no one seemed to notice any essential incongruity in neglecting judicial decisions. While there is no intention here to disparage or to condemn those efforts, historians themselves soon began to find such treatments inadequate. Yet at the same time it is clear that works like Spencer Walpole's *History of England* and James Schouler's *History of the United States* possessed signal merit and, even in some cases, brilliance. Those volumes often contained a wide variety of interesting information and a proper balance between men and imponderables, and perhaps because of the limited nature of their sources were marked by unusually effective exposition. Moreover, as anyone knows who has but read the table of contents of the *Parliamentary Debates* carefully, it is possible to gain a comprehensive, if not always profound, insight into the past (and the present as well) through such materials.

Nevertheless, as historians began to use other materials—private papers, economic reports, pamphlets, newspapers, and literature—they reacted against exclusive dependence on legal sources, whether legislative or juridical. They tended to feel that other documents gave much the same information in a more illuminating fashion, that legal records were often superficial or incomplete, that the inadequacy of the older historians was due in part to the nature of their sources, and that legal data compelled a kind of party allegiance which no longer seemed valid. Historians who had chiefly depended on legislative records of one sort or another came to be pointed out for their deficiencies, and such contributions as they had made were ignored as untrustworthy or oversimplified. Perhaps this reaction was both justified and healthy in so far as it touched many of the works already produced; for at least some writers had not only neglected valuable materials, but also because of that neglect, had failed to exhaust the materials they did use. On the other hand, this reaction had the unfortunate effect of pouring scorn on the sources upon which these works depended. Legal records of whatsoever kind were disregarded, and historians, whether eco-

nomic, social, institutional, or cultural, freely neglected data most fruitful in reconstructing the past.

Yet many historians with quite diverse interests have found in law a most important source, a source revealing, in the words of Santayana, that a "man's life as it flows is not a theorem to which there is any one rigid solution" but "is composed of many strands and looks to divers issues." Particularly, legal materials have contributed to an understanding of ideas, institutions, and policies, and they have accented the realization that social evolution in becoming more heterogeneous has not necessarily become more complex. In the past, concepts were not so individuated and as a result a notion was likely to be a *pot-pourri* of prejudice—legal, social, and religious. With all its value, however, no one will deny that the use of law as an historical source raises many difficulties.

Today the layman and the lawyer alike often incline to view law as a highly specialized branch of knowledge, so highly specialized in fact that it is regarded as an esoteric methodology of which only the initiates have a right to speak. In fact even a religious element has penetrated, and a distinguished psychologist, interested and informed concerning the relation and the potential contribution of psychology to law, has observed that "the lawyers are a priesthood with a prestige to maintain."[3] Such a situation contrasts strikingly with the English law of not so long ago where individuated concepts were not to be discerned. As a consequence of the modern idea the primary purpose of the law schools seems to be to "train students in mastery of method, leaving, of course the mastery of the law itself, as its nature requires, to later professional occupation."[4] While the writer is by no means suggesting that the technical details of law do not demand the most specialized discipline, the attitude of some lawyers illustrates very well George Bernard Shaw's quip that every profession is a conspiracy against the laity. After all, the historian must take his materials where he finds them; and if his path leads to cases and to legislation a mandamus should not issue against his use of them.

If there were any need, and I certainly do not intend to insist upon this point, no profession has exceeded the poaching activity of the lawyers. Questions involving a highly skilled knowledge of economics, social psy-

3. E. S. ROBINSON, LAW AND THE LAWYERS (1935) 28.
4. E. J. URCH, *The Effects of Methods of Learning Law Upon Appreciation of Justice* in THE HISTORICAL APPROACH TO METHODS OF TEACHING THE SOCIAL STUDIES (1935) 54-55.

chology, politics, and history have been settled by lawyers with more or less competence; and that is why historians cannot neglect the law: it is so comprehensive. By virtue of this fact then, the lawyers can scarcely resent the use of legal materials by historians. Perhaps all historians should be required to take Contracts, Real Property, or Wills, but in absence of that training they must do the best they can and bear the burden of their technical shortcomings; for, even more than philosophy in these days, history puts in order the multiple factors of human experience, especially with reference to the past.

The growing realization of the worth of legal materials to the historian appears in a variety of ways. Schools of law following the lead of eminent jurists make definite efforts to relate themselves to the social studies, and social scientists begin to take increased cognizance of law. It is scarcely necessary here to recall that such legists as Gierke, Maitland, Vinogradoff, Duguit, Pound, Holmes, and Cardozo have revealed the "social nature of legal origins and transformations, indicating how law adjusts itself to changing social conditions at large."[5] In essays, lectures, and decisions these men and others like them have shown that the law is not an end in itself but is made up of the dictates of economic or social tendencies and "the law governs the relations of men and women in an ordered society."[6]

Specifically in this connection one may emphasize how much of primitive society—whether that of Anglo-Saxon England or the Melanesians—has been reconstructed from tribal law. Perhaps at times too much, but that has been the fault less of the material than of the man. Moreover, how often when men have sought the reform of their country's institutions they have unerringly hit upon the core—the law. If that could be changed, they have seemed to say, or actually have said, other reforms would quickly follow. The soundness of such a position immediately stands revealed when we realize how many reform ideals—the diverse fields of labor organization, religious toleration, and public health come readily to mind—have had to wait for their concrete manifestation and effective application upon law.

A further example of the treatment of law as a social science comes to

5. H. E. BARNES (ed.), THE HISTORY AND PROSPECTS OF THE SOCIAL SCIENCES (1925) 50. See also POUND, AN INTRODUCTION TO THE PHILOSOPHY OF LAW (1922), LAW AND MORALS (1924), THE SPIRIT OF THE COMMON LAW (1921), INTERPRETATIONS OF LEGAL HISTORY (1923), and *Jurisprudence* in THE HISTORY AND PROSPECTS OF THE SOCIAL SCIENCES; CARDOZO, THE NATURE OF THE JUDICIAL PROCESS (1922), and THE GROWTH OF THE LAW (1924).

6. POUND, AN INTRODUCTION TO THE PHILOSOPHY OF LAW (1922) 67; Hughes, *Address of Chief Justice Hughes* (1933) 19 A. B. A. J. 325, 326,

light in a recent *Yearbook* of the National Council of the Social Studies.[7] Under the title, "The Effects of Methods of Learning Law upon Appreciation of Justice," one writer has emphasized law as a subject with social objectives. Primarily concerned with methods of teaching law, he complains that too frequently the purpose of the law schools is to train people to pass the bar examination whereas he would insist upon Cardozo's view that a knowledge of social studies must be added to logic and precedents (history!) to make good decisions. Similar testimony comes from W. P. M. Kennedy. Law, he says, "... must not be created *in vacuo;* and above all it must not be taught *in vacuo,* apart from the other social sciences. The training of lawyers apart from history, economics, sociology, political science, and philosophy—as is too generally the custom—seems to me something like throwing a medical student into clinical work before he has acquired a competent familiarity with physics, chemistry, biology and physiology."[8] Opinions of this sort coming from recognized jurists and legal philosophers have greatly modified both the curricula and the viewpoint of legal instruction; and law schools, small as well as large, have steadily insisted upon the value of social science as a prerequisite to the richest professional training.

The purpose here, however, is not to repeat what men of the caliber of Holmes, Cardozo, and Pound—to mention but the most conspicuous—have said concerning the needs of the embryonic lawyer: they are men of authority and withal effective scribes. My purpose rather is to call attention to the converse of their theorem—the value of law to one group of social scientists, the historians. Yet the two propositions impinge on one another and reference scarcely can be made to one without appreciation of the other. Inasmuch as law is the "framework of the social machine" and the "instrument of society," which must constantly be revised in order to function effectively, there is all the more reason why historians should realize that a knowledge of law needs to be added to other materials to insure a well-rounded understanding of the past. Because law has been stable yet has not stood still it provides the historian with an ideal point of departure and with untold riches for his assessment of social development and human evolution.

Even the very definitions of law throw light on the processes of historical evolution. Whether we take the *summa ratio* of Cicero and Coke,

7. URCH, *supra,* note 4.
8. KENNEDY, SOME ASPECTS OF THE THEORIES AND WORKINGS OF CONSTITUTIONAL LAW (1932) 25.

the thical, even spiritual, concepts of Thomas Aquinas and the Spanish jurists of the sixteenth century, the notion of law as the epitome of the *Volkgeist* and *Volkgeschichte* held by German legists of the earlier nineteenth century, or the supernatural imperative of some present-day spellbinder, we have gained insight into the state of mind not only of the particular apostle, but also of the times. When such a critical legist as Karl Llewellyn, wary of definition, characterizes law as "... the area of contract, of interaction, between official regulatory behavior and the behavior of those affecting official regulatory behavior or affected by it," he is reflecting an intellectual change that embraces more than law.[9] As law ceases to be viewed in transcendental concepts and is considered in terms of its functional application we may realize more than ever its value as an historical source. Without losing its intellectual significance it has gained broader social implications. Law as something to live by is no bed of Procrustes but, from the historian's standpoint, the motivation and the reflection of social evolution.

A wide variety of evidence bears out these generalizations but before surveying the implicit testimony mention may be made of some explicit recognition of law's relation to social development. Not long ago W. A. Robson published an informing "study of the relations between men's ideas about the universe and the institutions of law and government," in which he charted the origins of law and its connections with religion, reason, conduct, and opinions.[10] Similarly Huntington Cairns has stressed the relations of law to sociology, anthropology, economics, psychology, and political theory, and in addition has successfully illustrated his own suggestion that stagnation in method in the social sciences has been averted by the syntheses of varied data.[11] The anthropologists, Malinowski and Lowie, have indicated the importance of law for the study of primitive societies and in so doing have revealed the extent to which law may be used to discover the lineaments of societies now long since passed away.[12]

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9. Friedrich, *Remarks on Llewellyn's View of Law, Official Behavior, Political Science* (1935) 50 POL. SCI. Q. 419.

10. CIVILIZATION AND THE GROWTH OF LAW (1935). For further evidence of the same author's viewpoint, as expressed in his treatment of a concrete problem, see his JUSTICE AND ADMINISTRATIVE LAW (1928).

11. LAW AND THE SOCIAL SCIENCES (1935), and in V. F. CALVERTON (ed.), THE MAKING OF MAN (1931).

12. B. MALINOWSKI, CRIME AND CUSTOM IN SAVAGE SOCIETY (1926); Robert Lowie, *Incorporeal Property in Primitive Society* (1928) 37 YALE L. J. 551-63. The works of W. H. Rivers, Robert Briffault, and Alexander Goldenweiser, as well as Lowie's more general studies, are likewise valuable.

Constitutional and legal history constantly reveals the broader implication of its own elements, and legal materials themselves signify far less as ends than as means to understand the past. How, for example, can one discuss comprehensively various aspects of legal history without referring to the social structure illustrated by the materials on which he is commenting? As no one can understand what Marx really meant without reference to Marx's intellectual, social, and economic background, so no one can discuss either Coke or the rule in *Shelly's Case* intelligently or intelligibly without attention to the times. True, efforts are often made without such attention, but the result is only to show why legal and constitutional history, potentially a fascinating and intellectually satisfying branch of study, frequently possesses a desert-like aridity. The categorization of subject matter though breaking down still survives, and many consider it out of place in legal history to concern themselves with the broader aspects of social evolution; even though law without society is *Macbeth* with only the ghost.

The neglect of legal materials has been more characteristic of modern than of medieval historiography. The medievalists have always gone to the legal "smithy" and have discovered not only the constitutional history of the middle ages but also the social and economic and, to a lesser extent, the intellectual and cultural history. The court records have revealed both the anatomy and the physiology of feudalism; the Close Rolls have illuminated social questions; and these and similar sources provide the surest insight into medieval political theory. Judgment concerning what is called the outlook of the times is meaningless without legal evidence. Or, to take another type of instance: a thorough analysis of the law of real property could enable the historian to visualize much of the civilization of the middle ages (and of modern times as well). It has been observed (but never tested) that an adequate knowledge of that law would equip the scholar interested in social and economic history most effectively. If to this were added such assets as the law of inheritance and of contracts, such a scholar would have a magnificent foundation on which to base his generalizations.

Legal materials, it is obvious, make the historian more historically minded, less ready to leap ahead of his evidence, and more cautious about the "intrusion of untimely ideas." They reveal the danger of carrying words and concepts applicable to modern society over to earlier and more homogeneous societies; they reveal also that although "primitive" man supplemented law with magic, "civilized" man follows much the same procedure

in elevating certain institutions to a sacrosanct status and in making incantations to transcendental concepts. Not infrequently, furthermore, the historian is faced with the problem of reconstructing a past the ideals of which seem irrelevant or even superficial, the catchwords barren, the controversies unimportant, and the loyalties ridiculous; and he finds it very difficult not to be a little scornful. But law indicates greater continuity than often appears in other historical sources, for it tends to reduce the impression of a cataclysmic break with the past and to reveal the pervasive power of old ideas and institutions.

For example, the English Restoration (1660), regardless of whether authors believe it to be or not, is usually portrayed as the end of one epoch and the beginning of another. While such a picture may be true in respect to religion the social and economic life of England did not greatly change. And if one were to consult only litigious sources he might indeed have trouble discovering that any consequential change had taken place in 1660. While this of course would be going too far away from the facts, because examination of other historical materials indicates a considerable emotional and political transformation, it does show how easily superficial changes such as the restoration of the "legitimate" ruler can be taken to describe a revolution whereas in many ways the deep waters of English civilization ran on as quietly as if nothing had happened. On the other hand, it should not be assumed that nothing changed; breaks with the past do occur and law changes with society.

Here legal sources are important in offsetting the assumption made by some so-called historians that what survives is alone important and worthy of recording, and who therefore are prepared to disregard institutions and concepts simply because they seem no longer to exist. Greater dependence on law would reveal the unhistorical sterility of such a standpoint, by illustrating that what existed under certain laws, but now no longer surviving, had a tremendous significance in the earlier days and upon what has since come into being. Law likewise tends to reduce that untimely failing of historians known as predicting the past, by bringing a sense of evidence and the means of testing that evidence. It introduces into investigations a rigorous element that halts the practice of basing broader and broader generalizations on slimmer and slimmer evidence, and of finding master clues in the preoccupations of modern writers. Law describes not only what theoretically *is* but also what actually *was,* or, as Gierke put it, law is the result of a common conviction not that a thing shall be but that it is. If the statutes are not to be

taken as all-conclusive in this particular, the evidence of untold court records, local and central, ecclesiastical and civil, equity and common, supplies a reservoir of proof that cannot be disregarded.

The use of legal materials and their integration with other sources has also greatly enhanced the value of non-legal studies and has supplied a basis for criticizing rather facile generalizations. To see what can be done by the use of legal sources in the way of producing a brilliant and incisive analysis of socio-economic conditions one need go no farther than R. H. Tawney's *The Agrarian Problem in the Sixteenth Century*. Mr. Tawney could never have moved so easily amid the complications of that period nor could he have thrown so much light upon the problem had he not been thoroughly acquainted with the legal sources. More learned and more factual monographs have been written but one will seek long to find a study so suggestive both in content and method. More prosaic but in its way a valuable study illustrative of the same point is a recent volume in the *Cambridge Studies in Economic History*, a series of which any volume so far published might be mentioned as evidence.[13] In this particular work the author uses local court records to discover the incidence and the treatment of poverty in Cambridgeshire. In so doing she follows the path of some earlier students, notably Sidney and Beatrice Webb, who have found in legal sources the clue to much English social history, modern as well as medieval. Crime, poor relief, education, immorality, public health, as well as the details of administration, are only some of the problems illuminated by the wealth of these sources which in addition possess a concrete reality that other sorts of materials sometimes fail to provide.[14]

In a different fashion one should remember that it is on the side of law and the whole fabric of which law is the framework that the permanence of British imperialism is most pronounced and unique. Centuries ago —though they knew it not—English lawyers and legislators were penning writs, creating political, social, and legal institutions, even making right and wrong for primitive and darkest Africa, for the then purely legendary

13. E. M. HAMPSON, THE TREATMENT OF POVERTY IN CAMBRIDGESHIRE, 1597-1834 (1934). See also in the same series, FRANCES M. PAGE, THE ESTATES OF CROWLAND ABBEY: A STUDY IN MANORIAL ORGANIZATION (1934).

14. One of the best illustrations of this is to be seen in the records of courts leet. The orders against violation of the Sabbath, trespass, roving animals, short weight, overloading the common, tippling at unlawful hours, stopped-up ditches, breaches of the peace, and harboring vagabonds carry us readily, even vividly, into the country village of three centuries past. The rules for towns such as Southamp-

Antipodes, for the undiscovered North American continent, and for an India whose civilization was already ancient while theirs was in its infancy. Only once has this process been equaled and then by a similar expression—the spread of Roman law throughout Europe. The overwhelming majesty of such achievement refutes utterly the notion of law as a mere convention, a tricky body of mysteries evolved by a profession to cheat the layman, and establishes it as the physiology of our whole social organism. Whether we think of contracts, injuries or justice, of procedure or substance, we and tens of millions of others think in terms that Englishmen have formulated during many centuries. Upon such foundations societies of all grades of political and social maturity have built their varied non-legal institutions and enshrined their varied ideals.

The permeation of English law was largely effected by judges and administrators, either by supplementing customary law, by grafting it on local custom, or by replacing such haphazard legal devices as already existed. In many countries over which England extended her jurisdiction formal native law was at once scanty and particularistic and yet complex. English law supplied a uniformity, a simplicity, and a universality that had been lacking so that in a modified form it became the law of the land and thus the doorway to other English institutions. The impact of a completed yet not static body of law upon unsystematic, ill-defined, even though indigenous, stubborn, and complex custom has, for example, created the situation where Indian treatises on Property, Torts, Insolvency, Monopoly, and Transportation—to list no others—draw heavily upon English cases going back in some instances for several centuries.[15] The political independence of India, when it comes, will not be so complete as the most rabid Anglo-

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ton and Manchester with their concern over pavements, water supply, and refuse disposal reveal a growing urban consciousness in the seventeenth century. The silences of these records are not less important than their contents; and the insight into the machinery of local government is as fascinating as the objectives of that government. For some clues to this whole field, see F.J.C. HEARNSHAW, LEET JURISDICTION IN ENGLAND ESPECIALLY AS ILLUSTRATED BY THE RECORDS OF THE COURT LEET OF SOUTHAMPTON (1908); F. W. MAITLAND, SELECT PLEAS IN MANORIAL AND OTHER SEIGNORIAL COURTS (1889); WILLIAM HUDSON, LEET JURISDICTION IN THE CITY OF NORWICH (1892); SIDNEY and BEATRICE WEBB, ENGLISH LOCAL GOVERNMENT: THE MANOR AND BOROUGH (1924); MARY D. HARRIS, THE COVENTRY LEET BOOK: OR MAYOR'S REGISTER (1907-13); and JOHN HARLAND, COURT LEET RECORDS OF THE MANOR OF MANCHESTER (1864-65). One of the most valuable sources in this field is an unworked collection of records for the manor of Ashby de la Zouche, running from the fifteenth to the eighteenth century, preserved in the Huntington Library; I hope to do something with these in the near future.

15. SIR WILLIAM HOLDSWORTH, SOME MAKERS OF ENGLISH LAW (1938) 1-5.

phobe might desire. English law has made a great many people brothers under the robe.

The value of legal sources in testing facile generalizations is sharply revealed by an analysis of the Turner frontier hypothesis. In turning the dry light of law upon that hypothesis (and here is meant not only the justly famous thesis of Turner himself but also the extension, none too critically made by disciples who in some cases have unwittingly been guilty of *reductio ad absurdam*) Wright has ably shown that, though much of the peculiar character of American civilization has derived from frontier influence, the frontier got much more from the East than it gave.[16] By a rigorous examination of frontier legal practice and institutions he has pointed out that what are sometimes regarded as the unique qualities of the frontier were actually legacies from the East. Without destroying the validity of the general hypothesis he has rendered impossible its blind acceptance as the master clue to American historical development. He has demonstrated again that if a lawyer should know history the historian should know law.

In addition to historians who have used law in a supplementary manner one cannot neglect two diverse historians of law itself, Maitland and Holdsworth, who reveal so much more than technical detail in their works. To read Maitland is of course to appreciate how correct was Acton's appraisal of him as the ablest of English historians and how far wrong was Samuel Johnson's remark that great abilities were not requisite for an historian who, having his facts ready to hand, required no more imagination than a mediocre poet, and needed only a little penetration, accuracy, coloring, and application. And to read Maitland is also to appreciate what insight into the past can be gained by coupling immense legal knowledge with an acute imagination and with genuine historical perspective.

Maitland used legal materials to relate the intricacies of local government, the fascinating problems of Church and State, the complex and far-reaching significance of economic history, and the intellectually stimulating vistas of political philosophy, as well as the constitutional history of England. Moreover, he understood so well the materials which he used. For him history was a seamless web in which every beginning was arbitrary and every ending a temporary halt; especially was this true of legal history.

16. B. F. WRIGHT, *Political Institutions and the Frontier* (D. R. Fox ed. 1934) SOURCES OF CULTURE IN THE MIDDLE WEST. The doctoral dissertation of W. Francis English at the University of Missouri on the frontier lawyer will illuminate this whole problem.

"The history of law must be the history of ideas. It must represent, not merely what men have done and said, but what men have thought in bygone ages."[17] In his inaugural lecture on the occasion of his appointment to the Downing Chair of the *Laws of England in 1888* he remarked that the history of forms of action ". . . ought to be a most interesting book, dealing as it would have to deal with the evolution of the great elementary conceptions, ownership, possession, contract, tort and the like."[18] He likewise stressed the significance of crime, "even vulgar crime," for "crime is a fact of which history must take note." English law then to him was English history, and no matter whether he was considering procedure or substance, public or private law, he comprehended its relation to the whole national life. For him law was no static mold but rather the foundation of a most dynamic grasp of England's historical development.

In this same inaugural lecture he also epitomized the nature and worth of legal sources.[19]

> "Legal documents, documents of the most technical kind, are the best, often the only evidence that we have for social and economic history, for the history of morality, for the history of practical religion. Take a broad subject—the condition of the great mass of Englishmen in the later middle ages, the condition of the villagers. That might be pictured for us in all truthful detail; its political, social, economic, moral aspects might all be brought out; every tendency of progress or degradation might be traced; our supply of evidence is inexhaustible: but no one will extract its meaning who has not the patience to master an extremely formal system of pleading and procedure, who is not familiar with a whole scheme of actions with repulsive names. There are large and fertile tracts of history which the historian as a rule has to avoid because they are too legal."

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17. DOOMSDAY BOOK AND BEYOND (1897) 356.

18. *Why the History of English Law is not written*, 1 COLLECTED PAPERS (1911) 484. Later on he did give a course of seven masterly lectures, *The Forms of Action at Common Law* (1909), in which he denied that obsolete procedure was an unprofitable study and insisted with Sir Henry Maine that, "Substantive law is secreted in the interstices of procedure." Forms of action, he went on to say, ". . . we have buried, but they still rule us from their graves." Those many forms, ". . . each with its uncouth name," expressed ". . . a choice between methods of procedure," a question of ". . . very great practical importance," for "Knowledge of the procedure in the various forms of action is the core of English medieval jurisprudence."

19. 1 *Collected Papers, supra* at 486.

The same viewpoint permeated the essay on "The Materials for English Legal History."[20] Here he observed that the history of history seemed to show that only late in the day had the laws of a nation become in the historian's eyes a matter demanding thorough treatment; and he regretted that, while no one would deny the "abstract proposition that law is, to say the least, a considerable element in national life," in the past historians had been apt to regard it as an element which remained constant. Historians had found "the history of external events, of wars and alliances, conquests and annexations, the lives of kings and great men, easier to write," and for appearances only they threw in a few lightly written paragraphs on "the manners and customs of the period," but these must not be very long or very serious. Only gradually did historians desire to know "the men of past times more thoroughly, to know their works and their ways, to know not merely the distinguished men, but the undistinguished also."

History by trying to reproduce the political atmosphere in which great men lived and acted became "constitutional;" but it could not really stop there: already it had entered the realm of law, to find that realm an organized whole, one that could not be cut up into departments. "The public law that the historian wants as stage and scenery for his characters is found to imply private law, and private law a sufficient knowledge of which cannot be taken for granted." In answering, likewise, the demand for social and economic history, it was soon discovered that only in legal documents and under legal forms were the social and economic arrangements of remote times made visible. The history of law thus appeared to Maitland both as a means to an end and at the same time as an end in itself, "the history of one great stream of human endeavor, of a stream which can be traced through centuries, whose flow can be watched decade by decade and even year by year." Admitting that the importance of law might be exaggerated he declared that even if law was no more than the skeleton of the body politic, students of the body natural could not afford to be scornful of bones, nor even of dry bones: "they must know their anatomy."

Before leaving Maitland mention may be made of his observation that two great English historians, Froude and Freeman, who could agree about nothing else had agreed that English history must be read in the Statute Book. In the course of time, he went on, "... the amendment will be adopted

20. 2 *id.* at 2-3.

that to the Statute Book be added the Law Reports, the Court Rolls and some other little matters."

Holdsworth also has variously demonstrated the value of law to the historian both by practice and by precept. His monumental *History of English Law,* despite its deficiencies, is the most substantial contribution to the history of English civilization in print; it plots the course of Maitland's "one great stream of human endeavour," and even more: it describes the evolution of a nation. Some writers, less learned and therefore less cautious, have been more philosophical or perhaps more stimulating, but none have supplied a more solid body of facts from which insight could be gained. At a time when monographs comprise our historiography we may pay tribute to a man who has tried to see the whole. In all probability no one but a legal historian could in these days set down the history of a civilization on the scale which Holdsworth has laid out. In addition he has stated a few explicit observations on the value of law to the historian.[21] Not so brilliant here as Maitland his words lead to a similar conclusion.

It can readily be argued then that the law broadly construed is a liberal education and viewed historically is among the richest of sources. The aid which enabled Maitland to reconstruct so many aspects of English history and Holdsworth to view a long chain of English development can be used by any historian for any period or any country where the materials exist; and no materials are more likely to exist in abundance. Diaries, correspondence, tracts, account books may survive only in limited areas, but legal records flourish virtually everywhere, and no historical student whose field of interest lies in his own country or even in certain institutional or intellectual developments can plead a lack of materials. If all local records are not as rich as those of England all can be used to uncover the evolution of a particular locality. The court records of any county may throw as much light on the essential features of American civilization, and they certainly demand as much penetration and application, as the contents of the largest repository in the land.

The value of law to the historian, as already pointed out, is most apparent in ideas, institutions, and policies, and in supplementing other materials and supplying a basis for substantiation or criticism. Formal reports may often be found inadequate or even superficial; pamphlets or newspapers

21. SOME LESSONS FROM OUR LEGAL HISTORY (1928) *passim.*

are generally the pleas of interested persons or groups; and private papers may possess only a limited appeal or value. Although legal documents are by no means free of these same characteristics, on the whole they supply their own means of verification.

The deficiencies of other materials, and the corresponding value of legal sources, come to light in estimating the position of the English protestant dissenters in the period between 1660 and 1828. On the basis of statutes, tracts, and private papers one would be justified in claiming, as historians often have, that the dissenters suffered hardships without relief during that period. To a certain extent such a conclusion is well founded, yet it by no means tells the full story. It does not reveal to what degree the dissenters did suffer in many particular ways; neither does it reveal to what extent they secured relief from the courts before the legislation against them was repealed. One must have recourse to court records to discover for example how dissenters suffered in matters of legacies, evidence, trusteeships, and penalties for not serving as corporation officers. Likewise one may discover in the court records how judges like Mansfield and Foster provided relief against handicaps permitted under general statutes. For a century after the passage of the Corporation Act (1661) dissenters were liable to suffer the hardship and injustice of dual punishment for the same offence. Then such a practice came to an end. To find the explanation for the change one must go to the case of *Evans v. Harrison.*[22] There and only there, so far as the writer knows, is the key to the puzzle. Such a state of affairs no doubt might be repeated many times.

In the realm of ideas law contributes to the broader aspects of political, economic, and social theory. Furthermore it throws light on religious concepts. In the words of Maitland "the ideas of law are at bottom economic and even moral ideas applied to daily life." In the field of political theory law deserves quite as much attention as the political "classics," for though it may be true that the political theory of yesterday is the constitutional law of today, that same constitutional law is also the political theory of tomorrow. Law shows pretty clearly the rise of "statism" and the emer-

22. WILMOT, 130-62; 2 BURNS, ECCLESIASTICAL LAW (8th ed.) 207-20. For a full discussion of this matter see the present writer's article, 21 VA. L. REV. (1935) 641-64. I have treated the whole problem of the dissenters' legal position, with special reference to relief through the courts, in 22 VA. L. REV. (1936) 495; 23 VA. L. REV. (1937) 389; 25 VA. L. REV. (1939) 671. The condition of the Catholics is set forth in 9 FORDHAM L. REV. (1940) 38-64.

gence of collectivism and must be considered not only in connection with such formal though slippery concepts as "sovereignty" and "rights" but also in relation to the whole fabric of political society and the obscure springs of political action. Moreover, in ideas as in policies and in institutions, law instructs scarcely less by what it omits and neglects than by what it regulates. So far as method in political theory is concerned the lawyers contributed the historical and to a certain extent the comparative approach. Readers of Sir Henry Maine will appreciate the degree to which a lawyer can illuminate political ideas by his method not less than by the arsenal of his facts.

Social and economic theory also stands revealed by law. Some students of law and legislation interpret their history idealistically as exhibiting greater social justice while others see it as proving the existence of class interests. The purpose here is neither idealistic nor marxian but illustrative. It can be taken as axiomatic, however, that the notion that the law knows no difference between men is a myth, for both in their inception and in their application the prevailing legal doctrines and practices are those of the ruling classes. It is not merely that a utilities plunderer gets acquittal (and perhaps an LL.D.) and that a bread-stealer get five years and perpetual stigma; it is rather that as always the very nature of the crime is defined by the people in power.

As we pass from ideas to policies and institutions the significance of law is more clear though not more impressive. According to Vinogradoff "legal arrangements are a variety of social organization."[23] Although it is probably true, however, that law is the product of society, whether idealistically, economically, or ethnologically construed, it is also true that to no small degree society is the product of its laws. Mansfield supplies the evidence that English law in the eighteenth century adjusted itself to the needs and ends of a business civilization. In breaking down the barriers of the common law and building up a "system of commercial law of great beauty and equity," he became, in the words of Story, "... the jurist of the commercial world" and the architect of a most "salutary revolution."[24] By heeding the facts of economic life when he built up the law merchant Mansfield was

23. COMMON-SENSE IN LAW (New York, n. d.) 14.
24. MISCELLANEOUS WRITINGS (1835) 262; *see* 2 LIFE AND LETTERS OF JOSEPH STORY (1851) 14. For other aspects of Mansfield's opinions see the present writer's article, *Lord Mansfield and the English Dissenters,* 2 MO. L. REV. (1937) 46.

as important for future economic development as his contemporaries, Adam Smith and James Watt.

Similarly, although the Fourteenth Amendment did not enact Herbert Spencer's *Social Statics,* a great many people and especially those in influential positions have thought that it did, and social organization has been affected accordingly. The philosophy of Spencer and the ideas of those who believed that the Fourteenth Amendment did enact his philosophy had more than an accidental coincidence: Spencer and Mr. Justice McReynolds belong to the same tradition. If legislation is frequently the end product of a national crisis and as such relates much of the emotion and details of that crisis, it at the same time regulates future development. For example, the banking laws of nineteenth century England represent an effort to adapt British monetary machinery to new conditions yet in a way they sentenced England to a financial strait-jacket from which, however, the country was periodically relieved by the litigation necessitated by the deficiencies of the legislation, litigation which amplified, extended, applied, and modified the general statements. Both the laws and the lawsuits, furthermore, reveal who was in power and what were the prevailing theories and practices of the time.

Dicey's *Lectures on the Relation between Law and Public Opinion in England during the Nineteenth Century* and Pipkin's *The Idea of Social Justice, a Study of Legislation and Administration and the Labour Movement in England and France between 1900 and 1926* testify also to the same effect. In addition to the implicit evidence of his brilliant study Dicey explicitly emphasizes the place of law in society. Realizing that the ultimate sanction of law is effective social functioning he appreciates that law may result not only from public opinion but also from custom or from organized minority demands; he also appreciates that law may create opinion and that in some instances opinion does not produce legislation. In support of this last point he maintains that English law was not affected by the advance of democracy *per se.* The growth of collectivist legislation in the nineteenth century took place not because of the growth of political democracy but because a wide gap existed between social and legal conditions and because Jeremy Bentham had left a large legacy of optimism concerning the potency of legislation.

Pipkin's book presents some interesting contrasts to that of Dicey because it illustrates how an entirely different approach to the same sort of materials can produce different answers. Dicey looked upon the growth of

collectivism as an interesting phenomenon, important but a phenomenon to be viewed objectively. The proverbial legist, he refused to excite himself about a tendency that only illustrated as did many others the pervasive character of legal institutions. Pipkin by contrast limited his attention much more to the externals of legal tendencies and was frankly subjective and "progressive." He considered legislation almost entirely from the viewpoint of the "communal good" it sought to establish; and he identified "communal good" with social control. Yet admitting this social philosophy he has pointed up some of the major tendencies of our time. If his book must be checked against other studies and if it could well have depended more on litigious sources this is not to deny the value of the investigations so far as they go; and it is doubtful if any other body of sources would have told so much. Certainly no other materials would provide of themselves such adequate means of checking the inferences drawn from them.

An illustration from the history of the United States is unsurpassed for pertinence here. Joseph Story in 1842 handed down a decision, *Swift v. Tyson,* which had the effect of conferring on the Federal Courts "control over commercial transactions in diversity of citizenship cases" and thus greatly widened the scope of federal jurisdiction. In his tendency to exalt the power of the national government in the protection of commerce and to invoke the aid of the common law for that purpose Story was building up the American equivalent of Mansfield's system of commercial law. Under the leadership of such men as Story, whose views were expressed on the bench and in a Harvard classroom, Marshall, and Webster, nationalist views of laws were identified with constructive statesmanship, the opposite views with ruin and disunion, and "faith in commerce as the basis of a stable nation" was established.[25] The law then in such hands had the diverse effects of offsetting the practice of state legislatures to favor the debtor class, of increasing the confidence of business classes, and, while encouraging some tendencies to secession, of reducing other such tendencies, especially in New England where the commercial classes were the strongest.

History thus illustrates the dynamic and denies the static interpretation of law, but in grasping this fact it is necessary to admit both legislation and litigation. The two supplement one another. Where the statute

25. Waterman, *The Nationalism of Swift v. Tyson,* 11 N. C. L. REV. (1933) 125; *see* C. G. HAINES, THE REVIVAL OF NATURAL LAW CONCEPTS (1930) 196; MAX LERNER, *John Marshall's Long Shadow* (1935) THE NEW REPUBLIC (1935) 148.

seems to place arbitrary limits, the lawsuit permits special interpretation. Where the decision is palpably unjust, the statute may provide a new general definition to relieve the wrong. Dicey once declared that the views of judges were apt to correspond to the opinions of the day before yesterday; yet it is nonetheless incumbent upon the historian, as Maitland remarked, to "study the day before yesterday, in order that yesterday may not paralyse today, and today may not paralyse tomorrow." Moreover, on the whole, it appears that if one is seeking evidence of progress he is more likely to find it in the records of courts than in the statute books. Such matters as religious dissent, witchcraft, and various phases of public health received enlightened treatment by judges long before the legislature moved abreast of informed public opinion. Yet it is safer not to generalize extensively in this matter, for consistent enlightenment is not the attribute of any man or group. Lord Mansfield's judgments concerning slavery, religious dissent, and the law merchant establish him as a beacon of progress, but his attitude towards the American colonies place him in the front row of reactionaries.

But these are problems by the way. Whether liberal or conservative, law is the "framework of the social machine," and it is the especial glory of English law "that its roots are sunk deep into the soil of national history." While we learn most from substantive law we must not dismiss procedure. Private law has value not less than public law; indeed it may offer more, for where the latter is largely occupied with political and administrative questions the former deals extensively with social and economic concerns. The legislation and the state trials of the seventeenth century throw much light on many important English issues but in order to discover the more obscure but not less important features of the rise of economic individualism it is necessary to go to the records of private law. In this connection Mr. Justice Holmes has made a characteristically pertinent observation. "My keenest interest is excited," he confessed, "not by what are called great questions and great cases, but by little decisions which the common run of selectors would pass by because they did not deal with the constitution, or a telephone company, yet which have in them the germ of some wider theory, and therefore some profound interstitial change in the very tissue of the law."[26]

26. COLLECTED LEGAL PAPERS (1920) 269.

Although the writer's examples have been chosen from English and American history because of greater familiarity with the subject, instances abound in the history of other countries. In the rising tide of German nationalism in the nineteenth century no element was more important than law. The nationalist school of lawyers gave substantial meaning and foundation to vaguely patriotic hopes and claims. One could well consider also the extent to which French influence during the same century was grounded in the Code Napoleon, an influence that enabled various European countries and others to undergo a French Revolution without a reign of terror.

If one is considering the history of tendencies that cut across national boundaries he can scarcely omit reference to laws. To take a particular instance: in any narrative of the humanitarian movement in the nineteenth century a large part of the evidence comes from this source. When students seek support for their contention that earlier ages were callous they point to the innumerable brutalities in the legal system, and conversely when they seek to prove a changing viewpoint they stress the repeal of those laws. The growth of what we call political and social democracy is meaningless without attention to legislation and court decisions, either as they endow the hitherto unprivileged classes with new strength or as they subtract from the older privileged groups the favors which set them apart. Even in the more remote realm of science (and I omit all questions of patents and inventions) it is possible to gain some insight from law. During the English plague scare of 1720 parliamentary enactments showed that prevention rather than cure was the ideal and that instead of depending on magical incantations or even on the cures of leading physicians, the government adopted a policy not far different from that which has been followed under similar circumstances in the recent past. Certainly the concept of past medicine as superstition and of no public regulation receives a decisive setback from the examination of legal sources.

In conclusion then it may be said that if law only contributed to our firmer grasp of institutional history its worth would be established; but when its value extends to the better understanding of tendencies and ideas we may justly believe that few sources possess such pertinence for the his-

torian.[27] And when to this pertinence is added a large degree of dependability, a width that is not shallow and a depth that is not narrow, Mr. Justice Holmes's enthusiasm for his "eternally weaving princess" inspires no dissent.[28]

27. I might add that several pertinent explorations of the relation between law and literature have been most informing; for example, SIR PLUNKET BARTON, SHAKESPEARE AND THE LAW (1929), F. CARL RIEDEL, CRIME AND PUNISHMENT IN THE OLD FRENCH ROMANCES (1938), and HOLDSWORTH, CHARLES DICKENS AS A LEGAL HISTORIAN (1929). Moreover, the plays of W. S. Gilbert are redolent with legal quips, and in *Iolanthe* he brilliantly poses a dilemma in procedure: "The feelings of a Lord Chancellor who is in love with a ward of court are not to be envied. What is his position? Can he give his own consent to his own marriage with his own ward? Can he marry his own ward without his own consent? And if he marries his own ward without his own consent, can he commit himself for contempt of his own court? Can he appeal by counsel before himself to move for arrest of his own judgment? Ah, my lords, it is indeed painful to have to sit upon a woolsack which is stuffed with such thorns as these."

28. It should not be overlooked of course that the princess nods at her weaving now and then. We cannot invariably agree that

"The law is the true embodiment
Of everything that's excellent:
It has no kind of fault or flaw;
And I, my Lords, embody the law."

With Bumble we must concur that if the law supposes that when a wife commits a crime in the presence of her husband she did it under his coercion, ". . . it is an ass, an idiot."