American LAW in the 20th Century

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For Leah, Jane, Amy, Paul, Sarah, David, and Lucy

Preface

The end of the twentieth century is the occasion, or the excuse, for this book. In it, I have tried to tell at least the essence of the story of what happened to American law and the American legal system in the century just past; and why it happened as it did; how American society made and remade the law; and what the law, in turn, did to and for American society.

There are, of course, many ways to tell the story; and many different approaches. A lot depends on how one conceives of that amorphous, bulky entity we can call "the legal system." One central question concerns the autonomy of law: is this a kingdom of its own, ruled by lawyers and judges, which grows and decays in accordance with its own rules, its own inner program? Or is it, rather, an integral part of the larger society, so that changes in the world bring about, inevitably, corresponding changes in the law? I lean very heavily toward the second interpretation, for reasons that I hope will become clear as you turn these pages; and this approach, or attitude, colors the way I have written this book.

A book about law or the legal system of this sort inevitably runs up against the challenge of defining its subject. What, after all, *is* the law? What constitutes the legal system? There is no single definition that people agree on. Many people think of law and the legal system in rather narrow terms—courts, police, judges, juries, and lawyers. But law is a dominant, pervasive, massive presence in this society. Everything—absolutely everything—that is done by government (at all levels) is done by, through, under the color of, and occasionally in defiance of, law. A complete story of the role of law in society could include a complete economic history, for example, because the whole banking enterprise is governed by law, and the work of the Federal Reserve banks, to give just one example, is governed by rules and statutes. The complete story of the role of law could also include a complete political history, too: elections and parliamentary maneuvering are all part of "the legal system" in an expanded but certainly not far-fetched sense.

And this is only one rather formal view of law. In a broad sense, all rule-making and enforcement, all social control, in any organization, can be considered a kind of "law." So factories, hospitals, universities, and banks—not to mention gangs, clans, clubs, and big families—have a "legal system," a system for making rules and seeing that they are carried out; and no doubt these "legal systems" are eminently worth studying.

I am aware of these definitions, and these difficulties. But my goal is necessarily more modest. I have to deal with a more conventional idea of law—less conventional than the idea most law schools convey, but more conventional than the expanded images I have sketched in the last two paragraphs. This history will focus mostly on the main institutions and trends that people usually think of as "legal." But the exact boundaries of the legal realm will remain somewhat blurred and indistinct; and at all times there will be, in the background, an awareness that law *has* no firm, tight, visible boundaries, and that social context, and social meaning, are at the heart of the way it lives, breathes, and moves.

Even under the narrowest of definitions, the amount of material on the subject of twentieth-century law is immense—in essence, endless. The shelves of the law libraries are jammed with materials—hundreds of thousands of books, periodicals, reports of cases, statutes, municipal ordinances, and so on. In recent years, millions of bits and bytes of material have been stored in electronic memories that seem limitless and inexhaustible. The most difficult part of the job was picking and choosing among all the books and articles written about the subject, the oceans of primary material, the stacks of stuff that piled end to end could encircle the world. The results are, no doubt, somewhat idiosyncratic; they obviously reflect the things I know best or am most interested in; but that would be true for *anybody* who tried a book of this kind. The legal system has become a vast, ubiquitous presence in the twentieth century. Nobody can absorb it all, or master even a small fraction of it: not as it was in 2000, or for that matter, as it was in 1900, 1901, or 1902. Moreover, the twentieth century, and its law, were so full of chaos and incident, drama and development, stasis and change, that it is clearly impossible to capture the essence in a single modest volume.

A lot of choices must be made. Some are easy. Nobody could write a history of American law in the twentieth century and leave out the rise of the administrative state, especially under Roosevelt's New Deal; or ignore *Brown v.*

Board of Education, the civil rights movement, and the explosion of "rights" that followed it. But once you cross the frontier of the unavoidable and the obvious, there are problems of inclusion and exclusion. Most of what lawyers do is technical, humdrum, and obscure. In the aggregate, getting divorces for people or arranging for the sale of houses or filling out tax returns or organizing small corporations may mean more to society than most of the great Supreme Court dramas. But it is devilishly hard to chronicle the quiet underbelly of legal process. It will, I am sure, be easy to carp at my choices, at what was left out and what was put in. I make no apologies for the way I have chosen to tell the story.

It isn't, of course, exclusively *my* story. Many people helped me along the way. Most of all, there are the dozens of scholars whose work I rely on here. They populate the hundreds of footnotes. I have often tried to check what scholars say against the primary sources; but life is too short to do this consistently. Anybody who writes a general account of any subject is necessarily at the mercy of and indebted to the books and essays already written. In the bibliographical note at the end of this book, I have mentioned some of the best and most useful of the works I have dipped into, as suggestions for further reading, but also as a way of saying thanks. I wish also to give special thanks to Robert W. Gordon, who made encouraging, helpful, and amazingly erudite suggestions for improving this work. Thanks, too, to Dan Heaton at Yale University Press for his great job of editing.

I have also had real help from any number of students in the past few years. Some of them worked directly on this book, scurrying about checking sources, writing memos and the like. They include Paul Berks, Paul William Davies, Shannon Petersen, Iddo Porat, and Issi Rosenzvi. I want to thank them for their contribution. I have also profited from the papers that students have written in my courses over the years. I want to mention at least a few of them who made especially valuable contributions: Lesley Barnhorn, Ari Lefkovits, Cliff Liu, Frederick Sparks, and James Sweet. My assistant, Mary Tye, helped me in innumerable ways. I want also to thank those of my colleagues who have listened to this or that talk or read this or that draft and commented. Lastly, I owe a very special word of thanks to the staff of the Stanford Law Library—especially Paul Lomio, David Bridgman, Erica Wayne, and Andrew Gurthet. They went the extra mile in trying to help me out with sources, tracking down odd bits of information, borrowing books, and so on. There are bigger law

libraries than Stanford's, but I doubt that there are better ones. I also want to thank my family, especially my wife, Leah. This help was deeper and subtler than that of my other benefactors. Despite all the perturbations in American family life—some of that story is in this book—the family remains (well, *my* family at least), as Christopher Lasch put it, a haven in a heartless world.

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Introduction

The Way We Were, the Way We Were Going to Be

Just as on December 31, 1999, on December 31, 1899, there were celebrations, festivities, and discussions of what the past century had wrought, and what the new one might bring. The celebration in 1899 was a little less feverish, perhaps—after all, it was the start of a new century, not the start of what most people considered a whole new millennium; but Americans partied and drank and hailed the new year with gusto. The *New York Times* reported that one couple, William Witt and Ann Waddilove of Jersey City, got themselves married at Leiderkrantz Hall a minute after midnight—eager to be the first couple to tie the knot in the brand-new century. It was a cold winter; and snow fell on most of the country on New Year's Day. A fresh inch of snow, for example, coated the streets of Washington, D.C., where thousands of citizens came to pay their respects to President McKinley at his gala New Year's Day reception.[1]

Nobody, of course, had a crystal ball; nobody could know what the new century was going to bring. One thing, and one thing only, was certain: it would usher in enormous change. Certainly that had been the nineteenth-century experience. This was true for society in general, and for the legal system as well. The legal system of the United States had changed in the course of the nineteenth century, and in almost revolutionary ways. In 1800 independence was new—less than a generation old—and the country was, in a sense, still wet behind the ears. It had a new Constitution, and a new court system. It was still a common-law country (what else could it be?), but it had already, during the colonial period, created its own versions or dialects of the common law; and the process of making new law, free from British models, would only accelerate in the century to come.

Economically, the United States in 1800 was a nation of farmers. It was essentially a chain of settlements, strung out along the eastern seaboard. There was, to be sure, vigorous ocean trade, and trade with the West Indies. The interior was mostly terra incognita, "wilderness." Only a few pioneers had

penetrated that wilderness. The forests and plains were, of course, the home of the native peoples. But they were for the most part beyond the reach of the coastal legal systems. The settlers in 1800 were overwhelmingly Protestant and overwhelmingly white; there was a black population, concentrated in the southern states, and the vast majority of them were slaves. There had been slaves in every northern colony as well, but slavery was never central to the economy of, say, Pennsylvania or Rhode Island; and in 1800 slavery in the North was moribund. The states were much more isolated than they would be later. Travel was slow and tortuous. Communication was just as slow.

The same Constitution was in force at the end of the century as in the beginning. It had been amended from time to time, and some of the amendments were quite significant; but the basic structure of the government had been preserved—the presidency, the Congress, federalism, the system of courts. The United States, however, was not the same country. It had grown enormously. It was a continental giant, and an industrial empire; it was becoming more and more urban, and its great cities—some of which, like Chicago, had not even existed in 1800—were filled with millions of immigrants deposited on these shores from Europe. They lived in crowded neighborhoods with their many, many children. New York City was a babel of languages, religions, and cultures. In 1800 nobody had even dreamed of the railroad, the telegraph, the typewriter, the telephone; electricity was something you teased out of lightning with a kite. At the end of the century, new inventions had transformed the lives of Americans. It was the dawn of the age of the automobile. Nobody could know what was coming, but people knew, or thought they knew, that the future would be the stuff of H. G. Wells and science fiction.

Legal change had been almost equally dramatic and revolutionary—and in every field of law.[2] Tort law, corporation law, divorce law—these were tiny bumps and dots on the legal map in 1800; in 1900 they were powerful areas of law. In 1900 slavery had gone; but a bitter kind of serfdom had replaced it in the South. In 1800 *Marbury v. Madison* had not yet been decided, nor *Dred Scott*, nor the Slaughterhouse cases, the civil rights cases, and the other great decisions of the century. Nobody in 1800 had heard of the fellow-servant rule; contract and corporation law were in their infancy. A Rip van Winkle of the law who went to sleep in 1800 and woke up as the bells clanged in 1900 would have found the table talk of lawyers about their trade almost totally incomprehensible—almost, but not quite, a foreign tongue.

The twentieth century, however, would outdo its predecessor in sheer velocity of change. Change went from a walk, to a run, to travel on a supersonic jet. Indeed, in a recent book on the rights revolution, Samuel Walker invokes the Rip van Winkle theme to describe how astonished a person would be who slept a mere forty years, from 1956 to 1996.[3] This book will tell the story of those massive changes—in brief. I say "in brief" because the law is immeasurably vast, and it shifts and writhes and turns and changes from year to year. Necessarily, this book is about highlights; or rather, as I said in the preface, about one person's idea of what the highlights are.

Some of the main themes are obvious. I will tick off a few of them here. First is the rise of the welfare-regulatory state. The role of government had been growing throughout the nineteenth century. Even in the so-called period of laissez-faire, the state meddled and monitored far more than most people believe.[4] But this role swelled to bursting in the twentieth century. Most of the boards, commissions, agencies and the like that play so powerful a role in governing the economy and polity—the Securities and Exchange Commission, the Social Security Administration, OSHA, the FDA, and so on—were children of the twentieth century. So was the federal income tax. So were zoning regulations. So were environmental protection laws. So was the war on drugs. Today, there is hardly any aspect of our lives that *some* regulatory agency does not touch: the food we eat, the money we earn and how we invest it, where we live, and how; how our houses are built or our apartments managed, and so on. And most of these regulations were devised in the twentieth century.

The same is true of welfare. Perhaps we are seeing the end of "welfare as we know it"; but what we know about welfare is strictly twentieth century—a product of the New Deal, and the Great Society. And even those who fulminate against the welfare state want to keep (or do not dare attack) Social Security and Medicare, at least in some form; and no one talks much about putting an end to workers' compensation, or unemployment insurance, or disaster relief. All of these, too, are products of the twentieth century—a century of the social safety net; and of a belief in "total justice."[5]

The United States, like all developed countries, is a welfare-regulatory state—a state that, on the one hand, regulates many businesses and activities; and, on the other hand, provides free education, pensions, and some forms of medical benefits. Such a state, necessarily, is also an administrative and legislative state. Bureaucracy is in control of the gears and levers of power. But if the

courts have lost power, relatively speaking (and even that is debatable), they have gained tremendous power absolutely. For one thing, the United States is a common-law country; the common law is still alive and well; and in common-law countries judges wield great power. There are still areas of law where the courts make the rules—and remake them, too, as they please. And the common-law spirit is still extremely strong. The legislatures pass laws; but the courts interpret them; and although judges like to talk about how much they defer to legislatures, and how only the legislature can actually change the law, what they do contradicts their words. Indeed, they do protest too much. A determined court may turn even the most plain-spoken statute inside out and upside down. True, the legislature can almost always win this tug of war; can almost always force the courts to bend to its will, by passing new laws; but in the interim, the courts exert great power; and often it is the courts that prevail—it is their interpretation, their point of view, which ends up with more staying power.

The twentieth century was also the century of judicial review. The courts, in this country, claim the right and the power to decide whether laws passed by Congress or the states measure up to the Constitution. If these laws do not, the courts can declare them null and void. This power was asserted very rarely in the first half of the nineteenth century; more commonly, and at a growing pace, in the second half. In the twentieth century it more than came into its own. It was a century in which the Supreme Court could throw major New Deal programs into oblivion; or, later on, throw out every last state law on abortion, every last state law on segregation, every last state law about the penalty of death.

But judicial review is more than control over Congress and the state assemblies. It includes the power to review, and check, and monitor, all other branches and sub-branches of government, including the lower civil service. The courts ride herd—somewhat fitfully, to be sure—over the dozens and dozens of boards and agencies, federal, state, and local, that are so salient an aspect of twentieth-century government. This is a story that has its ups and down, but mostly (in this century) ups: the Food and Drug Administration, the local zoning board, the Social Security Agency—all of these have enormous power and discretion, but the courts are definitely there in the background, with authority to insist that the right procedures be followed, and the rules of the game obeyed.

A second theme is the shift of power and authority to Washington—to the national government. The United States began as a federation of states.

Throughout the nineteenth century, the guts of the working legal system was in the states, or perhaps even lower down the scale of authority. Washington was a swampy, drowsy village on the Potomac, snoring in its summer heat and mosquitoes. New York, Chicago, and other cities—Cincinnati, St. Louis, New Orleans—exploded with economic and cultural vitality; they were the real capitals, the capitals of money and commerce, of art and of life.

In 1900 this was still a profoundly decentralized country; but change was clearly on the way. Technology and social change had shifted the center of gravity. In 1800 it took months for news, mail, cargo, and people to travel from one end of the country to another. There were no railroads, no great canals, no turnpikes. Then came the railroad era. By 1900 the whole country was tied together with these muscular bands of iron. The telegraph and telephone made it possible to send messages from Alaska to the tip of Florida, from Maine to California. These devices seem primitive today, but they were light years beyond communication as it stood in 1800. By the year 2000, a voice and an image in one part of the country could be flashed to another part in nanoseconds. Or even less. This was the century of radio and television; then, toward the end, satellites, e-mail, and the internet. By the year 2000, by the new millennium, the whole world was linked, and words could move across continents, in basically no time at all.

If people could talk across the whole country, from one end to the other, it meant that they spoke, as it were, a common language; and shared a common culture. One country and one culture—and one economy—implied, or seemed to imply, for most of the century, one core, one central nervous system. That is, one capital; and one chief executive, the president. The process accelerated during the Great Depression. The economy collapsed and there was panic in the streets. Only the center held firm, under the charismatic leadership of Franklin D. Roosevelt. Washington, D.C., awoke from its long sleep and began to buzz with activity.

Roosevelt was a great leader, and a great *modern* leader. He made masterful use of the arts of public relations. His was a thrilling voice on radio. The presidency became, more than ever, the center of national attention. Later, there came television—and now the face, the voice, the movements of the president were everywhere. Television ensured the rise of the "imperial presidency." Not all the presidents since Roosevelt were natural-born emperors. Most of them were pygmies, intellectually and otherwise, but then so were most Roman

emperors. There were many weak and insignificant presidents; but there could no longer be a weak and insignificant presidential office. After all, the United States was a great power—by 2000, the *only* superpower. This man, this president, was the man with his finger on the button, the voice on the hot line. This man could destroy the world. Congress also passed countless acts which vested vast, almost uncontrolled power in the president; and the president, in the latter half of the century, held in his hands almost exclusive powers of peace and of war.

Curiously, in the age of the imperial president, the *public* came to matter much more than it did in the days of, say, Lincoln or even Teddy Roosevelt. The imperial president was also the public-opinion president—more and more, in the late twentieth century, he was the president who shifted like a weather vane, who teetered this way and that as opinion polls, focus groups, and letters from the public dictated. It was also a presidency that practiced, in turn, all the dark arts of manipulation, spin control, and so on. Thus leader and public were locked in a kind of dance of reciprocity. The political elites led the public around by the nose; but they were in turn the prisoners of the public. What brought this about was the sheer immediacy of television and the media in general.

For most of the century, the forces of centralization swept everything before them. As the new century begins, are we now balanced on the brink of another turn of the wheel? Technology welded the country together; will technology now lead the way to some kind of fragmentation, or even disintegration? Is the smooth, unified surface about to be shattered into a thousand little pieces? In the "information era," nobody needs to be anyplace in particular; a woman in Detroit calls an airline, and somebody (or a machine) answers in Arizona or Florida; credit card companies route financial business through South Dakota; a few yuppie pioneers move to Montana and "access" their offices in Baltimore. Where these trends are going no one yet knows; nor how it will affect the political system, the family, the economy—and the law.

The twentieth century was the century of the "law explosion." The sheer size and scale of the legal system grew fantastically. In some ways, it is awfully hard to measure a legal system. Law is more than words on paper, it is an operating machine, a system; and its full meaning in society is too elusive to be easily captured. Still, there are some crude ways at least of getting an idea of the total dimensions; and wherever we look, we see signs of elephantiasis. Take, for

example, the Federal Register. Since the 1930s, all federal notices, orders, proposed regulations, and the like have to be recorded in the dreary pages of this yearly book. The Federal Register is truly monstrous in size; it has sometimes run to as many as 75,000 pages a year. This is probably a greater quantity of sheer legal *stuff* than the combined statutes and regulations of all the states, and the federal government, in, say, 1880. Meanwhile, every state, city, and town, as well as the federal government, is busy churning out new laws, ordinances, and rules. The books of reported cases, federal and state, are also growing faster than ever before; there are thousands and thousands of volumes on the shelves of the law libraries, and millions of bits and bytes in cyberspace.

What brought all this about? Why is there so much "law" in the United States? Is there more "law" in this country than in other developed countries—Japan, for example? Possibly. But the growth in legal stuff is pan-Western, and probably global. Changes in legal culture account for a lot of the growth. The supply of law is bigger because the demand is bigger. We will explore this issue as we go along. Once again, we have to point a finger of blame at technology. Our fancy new machines help boost the demand for law. Take, for example, the automobile. At the beginning of the century, they were rare—toys for the rich. John D. Spreckels paid a $2 fee for registering his White steamer in 1905 in California—the first in the state. In 1914 there were 123,516 automobiles registered in California; in 1924, 1,125,381, plus nearly 200,000 trucks.[6] By the end of the century everybody had a car, except the very, very poor (and some city dwellers, particularly in Manhattan). The suburban family was, typically, a two-car or three-car family. And the streets were crowded with buses, vans, "sports utility vehicles," motorcycles, taxicabs—this was, no doubt, an automotive society.

What impact has all this had on the law? To begin with, there is traffic law: a tremendous presence in our lives, something we encounter every day—parking, speed limits, rules of the road. There were traffic rules in the horse-and-buggy days, but they hardly amounted to much. Today, in each state, there is a vast traffic code. There are driver's license laws, and laws about drunken driving. There are laws about registration and license plates. There are rules and regulations on safety in the manufacture of cars. More recently, we find seat belt laws (and helmet laws for motorcycles). The indirect influences are even more vast: what the automobile has meant to mobility, to suburban growth—and to American culture and aspirations.