AMERICAN LAW: THE THIRD CENTURY

The Law Bicentennial Volume

Editor
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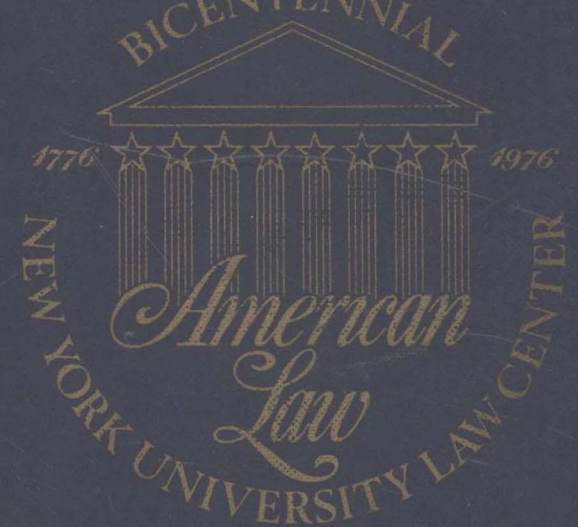

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The Law Bicentennial Volume

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INTRODUCTION

Bernard Schwartz

The Bicentennial of American independence is also the Bicentennial of American law. It is true that even before 1776 a body of American law had developed distinct from the English law from which it was derived. As early as 1704, indeed, an *Abridgement of the Laws in Force and Use in Her Majesty's Plantations* was printed in London, devoted to the laws of Virginia, Maryland, and Massachusetts, together with a smattering of items from New York and the Carolinas. Before independence, also, the law had already begun to play its crucial role in American society. We need only refer to Burke's famous words on the extent of legal influence in the American colonies: "In no country, perhaps, in the world, is the law so general a study. The profession itself is numerous and powerful, and in most provinces it takes the lead. The greater number of deputies sent to the [continental] Congress were lawyers."

Before 1776, nevertheless, the law, like the nation, could not be considered independent. In vital respects, the American system was still a legal dependency of the mother country—a situation that continued until the voting of independence. With the need to replace the royal governments which they had ousted, the Americans could fashion their own political and legal institutions. Now came the formative era of American law, when the foundations of the new legal system were fixed. This was the classical era of constitution making, with its basic American contribution to public law—the concept of fundamental law to define and limit government and its powers. It was also a period of ferment in private law, when the details of the marriage between the common law and the people and conditions of the new nation were worked out.

Celebration of the nation's Bicentennial would scarcely be

complete without commemoration of the two centuries of American law. The crucial role of the law in our society has been apparent to all observers—from Burke before independence, to Alexis de Tocqueville, to the present day. The true American contribution to human progress has not been technology, economics, or culture; it has been the development of the notion of law as a check on power. American society has been dominated by law as has no other society in history. Struggles over power that in other countries have called forth regiments of troops in this country call forth battalions of lawyers. As United States Attorney General Richard Rush put it in 1815, "The *Constitution* with Captain Hull in her, did not come down upon the *Guerriere* in a spirit of more daring and triumphal energy than the Philadelphia or New York lawyers will sometimes do upon a statute that happens to run a little amiss!"

This volume commemorates the Bicentennial of American law. It is based upon the papers delivered at the Bicentennial Conference held at the New York University School of Law, April 27-30, 1976. That Conference was the major legal event of the Bicentennial year.

The Bicentennial should be more than an occasion for congratulatory retrospective. This volume attempts both to project basic legal trends in the next century and to consider law from a broader perspective. In the first part, outstanding judges, lawyers, and law professors discuss different areas of the law as they foresee them during the nation's Third Century. In the second part, the law will be considered from the perspective of many nonlegal disciplines. The authors are all leaders in their fields, who bring to the volume points of view those engaged in the law hear only too rarely. The volume concludes with papers by the Lord Chief Justice of the country from which our legal system is inherited and the Chief Justice of the United States.

The present volume will remain a notable reminder of the Bicentennial of American law. It would, however, be a pity if it were treated as merely another Bicentennial souvenir—kept as a memento on coffee table or shelf, but never opened for serious purposes. The papers deserve a better fate. They are of a much higher caliber than those normally contained in a commemorative volume. Many of them make a real contribution to the fields to which they are devoted. The remainder

of this Introduction will try to point out these contributions. Hopefully it will help rescue these papers from the obscurity which is too often the fate of such *festschrift*-type writings.

I

The history of American law is a history of the effort to mold legal institutions and doctrines to meet the felt necessities of each period in the nation's development. The effort has not always succeeded; at times there has been an all-too-large gap between the law and public needs. Yet the gap has always ultimately been narrowed, as judges, lawyers, and legislators have worked out new principles and doctrines better adapted to the changed conditions of the day.

Will the same prove true during the Third Century?

There is no doubt that substantial changes will be required in American law to meet the needs of the next century. Virtually all the contributors to the first part of this volume agree on this point. It may surprise some that the most radical proposals for change are put forward by some of the judges who have contributed papers. Judges are, of course, conservative by tradition. They can normally not be radical innovators and remain true to the demands imposed upon the judicial process. But these are scarcely normal times. Transforming thought which implies some break with the past is needed now, even by those entrusted by society with enforcing its laws.

The papers of the federal judges who deal with the courts and judicial administration are particularly suggestive. Judge Frankel's paper makes recommendations that would alter the present adversary justice model and transform it from the legal counterpart of Adam Smith in action to a system in which public responsibility for seeking truth would become the dominant feature. Judge Kaufman puts forth suggestions that would also make for far-reaching changes. Among his recommendations deserving of further study are proposals for a Congressional office to assess the impact of legislation on the courts (with "court impact" statements comparable to the environmental impact statements now required), increased use of parajudges and professional staff, use of experts retained by the courts, an Office of Science Advisor to

the Courts (this should be compared with the proposal, now a focus of public attention, for a Science Court, by Dr. Arthur Kantrowitz of Avco Everett Research Laboratory), as well as for diverting cases from the courts (as by his suggestive proposal for a no-fault approach to consumer law). Judge Friendly projects drastic changes in federal court jurisdiction, such as the elimination of diversity jurisdiction, which will make the most important role for the federal courts the control of governmental action so that it does not infringe the Constitution or federal law.

The other papers in Part I are devoted, after a magisterial overview of the Third Century by Dean Redlich, to different areas of public law (Professor Dorsen paints with a broad brush in covering current and projected issues in separation of powers and federalism, Judge Higginbotham's moving paper deals with race, Judge Bazelon writes of the need to protect basic values in the area of civil liberties, Professor Rusk makes an eloquent plea for a meaningful role for international law, and Dean Morris contributes a provocative criminal law survey), private law (contracts, torts, and property are surveyed by acknowledged masters of those basic subjects, and there is an analysis of codification, which potentially brings all these subjects together, by Dean Mentschikoff), then to procedure and practice (with Judge Frankel's paper on trials and procedure, Judge Walsh's survey, from the perspective of his presidency of the American Bar Association, and Judge Fuchsberg's on legal services, with his plea for expansion in the profession's role of serving the public), the courts and judicial administration (Judge Friendly on the federal courts, Judge Mosk on the state courts, with his provocative prognosis of a meaningful role for those courts in the federal system), public interest law (by the man who, almost single handed, made that so relevant a subject in today's law), legal education (with Dean McKay's masterful survey), and the ends of law.

Of course, any projection of future legal trends may scarcely be taken as more than an informed guess. Judge Mosk well compares the contributor to this volume to a hieromancer who reads animal entrails for portents of the future. Or, as an editorial in the *Shreveport (La.) Times* once put it, with regard to the present writer's effort to predict future Supreme Court tendencies, "He would be on much safer ground trying to forecast the winner of the 1958 Kentucky

Derby, for which nominations have not even been made as yet."

It is, at the same time, significant that so many of the jurists contributing to this volume emphasize similar points. If there is one recurring question raised, it is that of whether the law is not trying to do too much—whether we are not imposing on the courts and the legal order tasks which are beyond the scope of the ends which may properly be attained through the law. One who reads the examples given by Judge Friendly is bound to wonder whether the judge who acts as a super-board of corrections or super-EPA is not contributing to the malaise in the legal world that is so prominent a feature in this Bicentennial year.

The judicial contributors, as well as others such as Dean Morris, join in urging that a primary need in the Third Century is to develop methods for dispute resolution outside the courts. Unless substantial measures are taken along those lines, the legal system will scarcely be able to perform its proper role. The courts cannot long continue trying to do more and more with less and less. The continuing expansion of the role of law is increasingly accompanied by increasing skepticism about its ability to keep up with society's needs.

The ends of law are starting to come full circle. The overexpansion of the legal order has militated against proper performance of the core functions of the law. The ever-more-inclusive ends sought to be attained may be rendered meaningless by the failure effectively to further the public interest in the general security. A major part of the current dissatisfaction with the law is based on the ineptitude of our legal institutions in fulfilling the elementary end of any legal order: to keep the peace.

This brings us directly to the themes enunciated by the two Chief Justices—particularly Lord Widgery. Before we discuss their concluding papers, however, we should survey the substantial contribution made by the nonlegal papers in Part II of this volume.

II

It is now almost two decades since C. P. Snow delivered his Rede Lecture, *The Two Cultures,* with its seminal expression of concern for the everincreasing gap between science

and letters. Yet, as Snow himself recognizes, "The number 2 is a very dangerous number. . . . Attempts to divide anything into two ought to be regarded with much suspicion." In truth, there are not two cultures, but as many as there are intellectual disciplines. In the second part of this volume twelve cultures are represented. All of them are directly relevant to the law, whose operation in particular cases may involve virtually every aspect of societal life. All too often, however, the law and these other disciplines remain separate worlds; between them there are gulfs of mutual incomprehension—sometimes even hostility and dislike, most of all lack of understanding.

In Part II of this book, the law is considered from the perspective of twelve other disciplines, ranging from history to philosophy. Such a look at the law from a broader perspective is also appropriate in a volume commemorating the Bicentennial of American law. From its beginnings American law has drawn its concepts and inspirations from nonlegal sources. We have only to evidence the leadership role of the clergy in the early New England polity and the part played by Biblical inspiration in the drafting of legislation there, notably in the 1641 Massachusetts Body of Liberties. Even during the nineteenth century, when American law was developing in what its molders thought of as a self-contained system, uninfluenced by nonlegal modes of thought, the picture of splendid legal isolation was inconsistent with reality. The general culture of the society, in its different spheres of intellectual activity, has always been the secret root from which American law has drawn its life. Even the black-letter judge has, perhaps unknowingly, been influenced by more than the letter of the law alone. To paraphrase Holmes's famous words, the felt necessities of the time, the prevalent philosophical theories, intuitions of what best served the public interest—all had more to do with the development of American law than the strictly analytical jurisprudence the judges professed to be applying. Our judges have always known too much to sacrifice good sense to the syllogism.

In our own day, of course, the interdisciplinary approach to law has become fully established; the black-letter judge has become an anomaly, increasingly replaced by the man of statistics and the master of economics and other disciplines.

During this century we have become increasingly aware of the proper dependence of the law upon all the other intellectual disciplines. The theme in this respect was set just before the turn of the century in the 1892 introductory lecture delivered at Cambridge by the poet A. E. Housman—a theme that may also serve for Part II of this volume: "There is no rivalry between the studies of Arts and Laws and Science but the rivalry of fellow-soldiers in striving which can most victoriously achieve the common end of all, to set back the frontier of darkness."

The list of contributors of Part II reads like a *Who's Who of Intellectual Attainment.* Each is preeminent in the field on which he writes and each brings a unique nonlegal perspective to the law. Each has something to say about the law which should broaden the understanding of both the lawyer and lay reader. The former particularly should profit by being able to approach the law from perspectives not commonly seen by those trained in the law school.

Part II starts with Professor Morris's provocative comparison of the methodology and objectives of history and law. Of especial interest is his recognition that, while history is inevitably important in the decision of legal issues, it should not be the decisive factor in judicial decision-making. This, we shall note, is a theme that recurs in other papers as well. Senator Packwood points out what too many lawyers forget—how important British constitutional history was in the development of American public law. All too few people realize the extent to which our modern liberties are based upon the crucial battles waged by our English forebears, from Magna Carta down.

Mr. Rosenthal discusses the apparent conflict between the First Amendment and the duty to ensure a fair trial from the journalist's point of view. Even after the Supreme Court's decision in *Nebraska Press Association v. Stuart* the whole question of the relations between law and journalism remains one that still must be resolved.

Two papers of particular interest to a legal reader are those by Father Greeley and Professor Commoner. Greeley emphasizes the limited role that sociology should play in the decision of cases. The disclaimer by a leading sociologist is of the greatest significance. Ever since *Brown v. Board of Educa-*

tion, with its famous footnote 11, both jurists and sociologists have overmagnified the contribution which sociological studies can make to the law. In fact, the studies referred to by Chief Justice Warren were far from having the crucial impact on the *Brown* decision that some have urged. Edmond Cahn showed this convincingly some years ago and Chief Justice Warren himself later publicly confirmed it.

Of equal interest is Professor Commoner's *mea culpa.* From the person who more than any other was responsible for awakening the national consciousness to ecology and its implications, it is revealing to have such a statement of the practical results, in terms of the bureaucratic apparatus spawned by the laws passed to protect the environment. Commoner has helped give effect to T.S. Eliot's rallying cry, "Clear the air! clean the sky! wash the wind!", but the consequence has been an administrative machine that may defeat the very purpose of ecological legislation.

The other nonlegal papers also have much to tell the reader. It is most suggestive to have a Nobel laureate like Professor Leontief note the inadequacies of laws like the antitrust laws in dealing with economic matters, to have Dr. Wallis show us the same with regard to medicine, and to have an eminent psychiatrist like Dr. Szasz so eloquently point out the dangers in undue reliance on psychiatry as the "revealed religion" of our day. These papers may be balanced by the inspiring papers of Rev. Boyd, who reminds us of the essential need for law to be based upon ethics, and Dr. Asimov who points the way to the contribution which the law can make to the conquest of space—the great frontier of the next century. Professor Ellison's paper is the rare discussion of the law by a leading literary figure—the converse, as it were, of Cardozo's noted essay, LAW AND LITERATURE. Last of all there is Professor Hart's perceptive paper on jurisprudence—a field that has threatened during this century to preempt the title of "the dismal science" from another discipline, but which is anything but that in Professor Hart's graceful hands.

To the legal reader, perhaps the most significant thing about the papers in Part II is their depreciation of the role the different disciplines should play in the decision of cases. The lawyer and the judge have too easily succumbed to this century's "cult of the expert." Legal issues in the courts are, more often than not, resolved after parades of expert wit-

nesses who give their opinions based on arcane studies conducted by them. In the papers in Part II, the experts themselves place the role of expertise, particularly in the social sciences, in proper perspective: other disciplines are a useful tool in resolving legal issues, but they should not be given undue weight by the judge in a specific case; to use a common aphorism about experts, they "should be kept on tap, but not on top."

III

The volume concludes with the papers of the two Chief Justices—the one the highest judicial officer of the United States, the other of the country from which American law is derived. With Lord Widgery's paper we are back to the point already mentioned, that of the legal system coming full circle, with increasing emphasis upon the public interest in maintaining the general security. The Lord Chief Justice's subject is the rule of law; but he rightly stresses the need for it not only in the marble palace but also in the streets. Some may find his emphasis upon "law and order" and the deterrent value of punishment old-fashioned. It may be questioned, however, whether they are the people who themselves suffer from the failure of law enforcement that has become pandemic.

It remains for the Chief Justice of the United States to make the Bicentennial summing up. Chief Justice Burger repeats the theme met in many of the other papers—that of whether we are not trying to do too much through the law. Virtually all societal demands are now accompanied by the claim, "There ought to be a law!" Further, the tendency to use the judicial process as a shortcut for the solution of problems, as distinguished from disputes, tends to deflect responsibility from the political organs and thus dilute the democratic bases of our system. The Chief Justice lists the major problems with which the law should concern itself during the next century. Not all will agree with either his catalogue of problems or the solutions which he offers. Particularly controversial are his suggestions for removing disputes from the courts, at a time when strong efforts are being made to expand access to the law, especially for those in the community who have, practically speaking, been forced to live beyond the pale of legal protection. Compare,

in this respect, the approach of the Chief Justice, as well as that of the other federal judges in this volume, with Ralph Nader's plea for the lowering of the barriers which prevent millions from entering the legal forum. We may wonder, nevertheless, whether the Chief Justice and the other judges are not correct in their contention that there is only so much that can be accomplished through legal rules and institutions. History shows that there are limits to the effectiveness of legal action; when the law tries to do too much, it leads to increasing skepticism about its ability to meet even the basic needs of a legal order. A primary task during the Third Century will be a narrowing of the goals which we seek to attain through the law.

Chief Justice Burger articulates the needs for in-depth analysis of our legal institutions. That is, of course, the primary purpose of this observance of the Bicentennial of American law. Such a commemoration should enable us to paraphrase Webster's famous question about the Union: "How stands the law now?" The reader of this volume has gotten a very broad picture not only of projected trends and issues during the Third Century, but also a good balance sheet of the law today.

One cannot help reflecting how different the balance sheet would have been if a similar commemoration had been held in 1876, at the Centennial of the nation. The leaders of the Bench and Bar then would have engaged in a stream of gushing self-congratulatory panegyric. The law, they would have said, as James C. Carter did, had progressed to "the last stage. . . . This is the stage of full enlightenment, such as is exhibited in . . . the United States at the present day." Similarly patting themselves figuratively on their backs, they would have repeated Joseph H. Choate's characterization of the American Bar as "the happiest illustration of Darwin's great theory of survival of the fittest", whose leaders were chosen "by a process of natural selection, for merit and fitness, from the whole body of the Bar."

How different it is in this Bicentennial volume! The almost Hegelian arrogance of a hundred years ago has given way to probing critique and radical suggestions for change—the most far-reaching of which are put forth by leaders of the Legal Establishment.

It should not be forgotten that the law's ability to make the changes needed to adapt to the demands of the Third Century is intimately related to the very survival of the American legal system as we know it. In 1970 the Association of the Bar of the City of New York convened a symposium, with the papers delivered published under the title, "Is Law Dead?" The symposium's answer was, as one critic pointed out, as predictable as a conclusion from a Vatican conference on whether God was dead. But the mere fact that the question was asked by the country's most prestigious bar association was significant.

The question of the death of law, like its counterpart of the death of God which agitated theologians not long ago, is more than mere word playing. Of course, we can, with utopians and revolutionaries, repeat the cry of Shakespeare's Dick the Butcher: "The first thing we do, let's kill all the lawyers." That slogan soon gives way to the realization that the law is an indispensable element of any functioning society. The Marxist goal of the disappearance of law does not mean the end of the legal order, of legal bureaucracy, and legal controls. It means instead the end of law as we know it—i.e., of the rule of law. It brings to life Engels' famous thesis that the government of persons would be replaced by the administration of things. Law, in the sense of the rule of law, is to be wholly replaced by administration.

Toward the end of the twentieth century, the danger is not yet so much that the rule of law will formally end in this country, but that it will become increasingly irrelevant. Despite the continuing efforts to modernize the law and legal institutions, the gap between need and performance is widening. Law is not dead, but its institutions are becoming increasingly ineffective.

Or, to put it more accurately, the community is becoming more aware of the inadequacies of its legal institutions. This is but one aspect of the growing hostility toward social institutions that characterizes the contemporary society. During most of the nation's history, Americans took for granted the superiority of their political, legal, economic, social, and other institutions. Now, at all levels of society, people rage at all their institutions. In every area the rise in human expectations leads people to demand more and more of institutions

and to want their demands met "Now!" The institutions alter, but never fast enough to meet the demands.

Of course, the complaints about the law's decay are not new. What is new is the institutional crisis of our time. Legal institutions, like all others, are caught in a crossfire between the need for drastic alteration and their inability to keep up with the leaping aspirations of the day. Intransigent frustration is the increasing response of the community.

This frustration is leading Americans, for perhaps the first time in their history, to question the legitimacy of their legal institutions. The twentieth century has been witness to the collapse of traditional religion; the next may see a collapse of traditional law. Whether this will happen depends in large part upon the ability of our legal institutions to transform themselves. Effective institutional reform has become the categorical imperative for survival of the law as Americans know it. "Unless something new and effective is done promptly . . . ," declared Chief Justice Warren in 1967, "the rule of law in this nation cannot endure."

Finally a word of gratitude to those who helped make the New York University Law School Bicentennial commemoration auch a success, particularly to Deans Norman Redlich and Robert B. McKay, and Gerald C. Crane, Bobbie Glover, and Pearl Rosenbaum, of the Office of Law Development, and my secretary, Barbara Ortiz.