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## THE STUDY OF AMERICAN LEGAL HISTORY

JOSEPH H. BEALE\*

In the last few years there has been a very decided increase of interest in American legal history in our law schools. Columbia and Harvard now have professorships devoted to American legal history alone, and in many other schools instruction is being given in the subject. But in dealing with American Legal History as a subject of study, teaching or writing, there is a difficulty at the outset, in the very nature of the subject. The development of our legal history was not in one line but in fifty; and while in some respects there has been a similar development in different states, each state has had its own individual experiences, political, economic and social. These varied experiences have led to differences in legal history which must be separately mastered before we can understand what we are in the habit of calling "The History of American Law." This is particularly so as to origins. Each state, and particularly each of the original states, has its own materials, its own connection with the mother country and the mother law, its own political development; and no single man, or course, or book can set forth such diverse histories. Before we can make a statement as to the history of American law with the same approximation to certainty that we can state the common law, we must first of all have a thorough scientific study of the sources of the local history of each state.

These sources are in large part buried in unpublished manuscripts and archives. The first task is to assemble in some way and to arrange the material. Many of the papers are fugitive, and must be brought together.

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We may classify for our purposes all our materials as legislative, judicial and miscellaneous. The legislative records are either colonial or local. The statutes of the various colonies and provinces and of the newer states have in general been fully published, yet there are many unpublished laws here and there which ought to be put in print. The records of the General Court, or legislature, in colonial times have usually been published so far as they are now extant, but the publication of separate laws, rather important as indicating the actually used legislation, is often lacking. In Rhode Island, for instance, while the early colonial records have been printed, there is no separate printing of the laws before 1730. There were three publications of revised or codified laws before this and, as I have said, the published records of the colony, but the separate statutes from year to year are contained only in manuscript books, a copy of which was sent to each of the towns. Two copies of these statutes are now in the office of the Secretary of State, and ought to be published. It is probable that the same condition exists for several of the original colonies.

The city, county or town by-laws and ordinances, which are equally important for historical purposes as showing the trend of legal thought of the people, are to be found in the local records. Of these very few are published. In Massachusetts, perhaps, the records of possibly one-tenth of the towns existing before 1692 have been printed in whole or in part. Most of the others exist in manuscript, and local pride should lead to their being printed. The early history of our land law is embedded in these local records, and anyone who has carefully read the manuscript proceedings of a single town can testify to the light they throw on the legal life of the people. One can speak with authority on the local records only of his own state, but it is probable that many such records remain unpublished in the county or town archives of a number of the colonies.

As for the decisions of the courts, they have been printed only from a comparatively late day. The earliest reported case in New England, printed in Root's Reports, was decided in 1764. In Massachusetts, with the exception of a volume called Quincy's Reports published comparatively lately, the earliest printed volume of reports is that of Williams, beginning in 1804. A few earlier cases are preserved in the Appendix to Dane's Abridgment, but to recover most of them it will be necessary to look at the court files. In Delaware, the earliest decision actually printed

from the Court of Chancery is in 1814; and the early reports were more or less fugitive. In the regular series of law reports the earliest decision is of 1832. Nine volumes of manuscript decisions, going back to about 1793, and apparently complete from that time until publication began, are in the Harvard Law Library. In New York the earliest reports in the regular series begin in 1794 and in Pennsylvania in 1791 (although Dallas prints some cases before that date). The regular reports in New Jersey begin in 1790. Maryland and Virginia are pretty well covered by printed reports, from the middle of the 18 century. On the law side North Carolina goes back to revolutionary times. The South Carolina reports begin in 1783, and those of Georgia not until 1805. In short, there is very little material in the older states for the ante-revolutionary law, which has been the formative law in each of them. The older decisions of the courts are usually accessible in the clerks' offices, and for origins we must rely upon such records for our knowledge of the law used in the highest courts.

For the inferior courts, there is an almost total lack of publication. The records are generally in dusty bundles of ill-assorted material which have never been examined or classified. An example of what may be done is shown by the work of John Noble, clerk for many years of the Supreme Court for the County of Suffolk, Massachusetts. He had all the surviving papers from the Suffolk county court of the colony assorted so as to bring together the papers for a single case. Where the cases had been appealed to the Court of Assistants he published them in a series of "Records of the Court of Assistants". The remaining papers were filed in a long series of scrap books. The records themselves contained the pleadings, in many cases the testimony in full, and in some cases an opinion of the court. The material for that county has therefore been brought into a most usable shape, and having been adequately indexed it is now available for public use. This thorough arrangement of the papers has led a very qualified American historian, Professor Morison, to put into print the records for a considerable period of years, under the Committee of Legal History of the American Historical Society.

The records of the lowest courts, nearest the people, should be fruitful. There was, for instance, in the Massachusetts Bay Colony, for a number of years a local court, or, as it was called, a "Commission", for ending small causes. Most of the litigation during that time came into this court. It was not a court of

record. Each town had its own court and such records as there may have been of the court's action never came into public custody. A few years ago the judicial diary of a father and son, members of this small court for a considerable period of years, was offered for sale, and was purchased by the Harvard Law Library. This has proved to be a diary of enormous litigation in Springfield, Massachusetts, for a period of 40 years or more. It shows the kind of suit brought, forms of action and names given to them, and the disposition of the cases, and is of almost inestimable value in showing the very close legal connection of an interior frontier settlement in 1635-1670 with the law of the mother country. Such diaries must exist in considerable numbers; for it is natural in judges, even though inferior judges, to desire some record of their action; but up to the present time no trace has been found of any other such judicial diary. There is probably in every state the possibility of recovering such a record of the commonly used law, but these records must be sought for with the most patient care, among ancient family papers, for they have never come into public hands; or if they have, it is to local historical societies, which do not concern themselves with the legal connotations of the diaries.

As to miscellaneous records, there are many which would throw light on the legal customs of the people, and most of them are unpublished. The records of deeds and of wills would be useful as showing the forms and much of the substance of legal transactions. If there are any notary's records, as there must be in some of the states, for the 17th and early 18th centuries, these would throw great light on commercial transactions. General diaries and letters, and miscellaneous court papers would also be of value. A specimen, at least, of such documents should be published in each of the original colonies. Many of the legal archives of the states later settled have also great historical value. The county court houses in every state east of the Mississippi must be filled with valuable legal data. One need only remember the fate that almost overtook the records in the court house at Kaskaskia to tremble for what may be at this very moment on the point of disappearance.

Another class of secondary evidence of the early law may be found in the earlier local histories; and, to be sure of leaving no piece of evidence unseen, students should examine every such book to see whether there may be in it a hint as to the development of law. In a seminar in Massachusetts Colonial Legal History last

year, the students were turned loose in three libraries to read every book that seemed likely to be of use, and noted all passages from non-legal books which they found to bear upon the development of the law. This work is taken as the basis of a bibliography of early Massachusetts legal history which is being compiled this year by a competent visiting librarian, and ought to be a useful guide to fugitive references to the local law.

With this mass of unprinted material in every one of our original and many of our later states to be collected, arranged and calendared before any thorough-going study of the history of the local law can be made, American students of legal history have their first work before them. It is impossible to write a local history until an adequate collection of materials has been made or, at least, the best possible collection. Such study may greatly modify views previously held as to the origin of the colonial law. We have already learned, for instance, from the work that has been done in Massachusetts, contrary to the opinion that had been held up to a few years since, that the Colony was full of common lawyers, that it relied on these lawyers for legal advice and legal procedure, that the law administered was the common law of England, surprisingly closely followed considering the fact that there were no books and probably no lawyers who had long training at the bar. A similar study of printed and unprinted materials in each of the original colonies would enable us to start with a clear idea of the kind of law practiced at the very beginning of their history. To sum up what seems to be the first necessary step, therefore, I should say the early materials must be assembled, so far as possible published, and studied with an eye single to the legal development shown.

But it does not seem that legal history should stop with the study of beginnings. What is the real purpose of a study of legal history? It seems that it should enable us to forecast the growth of the law, as a result of a period of change, by a study of that growth in the past. It is, therefore, necessary to examine the progress of law in each state, to find when periods of rapid change have existed, caused by apparently sudden social, economic and political changes, and to study the development of law caused by these changes. The changes in law in the frontier states due to the first establishment of frontier life and customs, therefore, becomes most properly a part of American legal history. An example of this is the establishment of mining law in the new mining states. For this we have a considerable body of doctrine

in the sometimes manuscript and often printed laws of the western mining camps. These, even if printed, are rare, but procurable; but there must be somewhere accessible unpublished records of mining camps. These may have been collected into the archives of historical societies or they may still be in private hands. The search for these records and their collection in such states as Colorado and California is an essential step preliminary to study of the history of the law of those states.

Changes in the law caused by political changes would be a fruitful subject for study in many states, as, for instance, in Louisiana and Texas, where a new and alien civilization was imposed on an already existing civilization. In the early times that was, of course, true of New York and New Jersey, and if any remaining records of the legal effect of such change exist they will be doubly important. In Louisiana the local task must be largely concerned with the gradual change from French and Spanish ideas to American ideas. It will be harder to study that process in California, but there are probably still existing some records and documents which would show an interesting progress. In Indiana and Illinois the transition from French to American government should be carefully studied.

Among the changes caused by political events are the changes wrought in the law of many southern states by the gradual extinction of the power of the Confederacy, by the results of the freedom of the slaves, and by the introduction of carpet-bagging and its gradual fading out. In states like Louisiana, South Carolina, Mississippi, and Virginia, the records of such changes should be the object of search. The supreme courts of those states did not get most of the questions that were actively important during those periods. The records of the inferior courts must be examined, so far as it is possible, to establish the history of the change.

The great economic changes brought about by mass production in the financial, the industrial, and the agricultural states is worthy of a very careful study. The growing discontent in agriculture caused by the introduction of machinery, and particularly of recent machinery which enables great units of land to be cultivated by one person, have brought about very interesting and not yet fully recognizable changes in our law. The effort for agricultural cooperation, the attempts of the farmer-labor states to assist the farmers, largely by cutting out the middle

men, and the important recent legislation for the protection of farmers, are worthy of careful study from the historical aspect.

It thus appears that the task of every student of legal history involves an assembling of materials and drawing from them historical conclusions as to the law. It also appears that in every state the study has got to be made quite independently, because of the divergence of history. As a practical matter this task can best be accomplished by a sort of cooperation among scholars to determine the desirable direction of study in each of the states. As an essay towards such cooperation one may make suggestions as to the best line of study in some of the states.

In the thirteen original states the primary study must be of the beginnings, although in Massachusetts effort might be spent to see the effect of maritime enterprise on the law; in New York a study of the effect of great financial combinations, particularly of corporate reorganization in the last 50 years; in Pennsylvania a study of the effect of the great industrial organizations; in New England and Maryland a study of the effect of religious establishment and disestablishment; and in Virginia a study of reconstruction. Louisiana and Texas are examples of transition from one system of law to another; Mississippi and Alabama of problems of reconstruction. The states of the near west illustrate an agricultural frontier, and in Ohio particularly, as well as in Oklahoma, one should study the introduction of law in the new settled country. In Colorado, California and Nevada we have the mining frontier; in Minnesota and the Dakotas, Nebraska, Kansas and Iowa, a special problem of agricultural transition; and in Utah its own problem of the effect of the Mormon civilization.

As a preliminary to writing and teaching legal history, these studies must be made; and in order to get the proper cooperation, the best means is probably the formation of a national society of legal history with branches in every state. The branches could then be encouraged to do what they can best do. It might be possible through such a national organization to take care of the editorial work and the expense of publication, although a few state societies could take care of publication of their own sources.

The national organization, then, would be a publishing and a coordinating organization; but it would have the especial duty of helping the organization of local societies in each state. As a help to local interest it might be worth while for it to provide a series of lectures on legal history by a competent lecturer in every American law school that would care to accept such assistance.



An excellent method of starting such an organization is the method employed in the formation of the American Law Institute: that is, an invitation of cooperation extended by the Law School Association to individuals of the Bench and Bar who are able to carry it through, to meet and discuss the problem; leaving the entire formation of such an organization, if it is deemed practicable, to the meeting so called together. One wishes it might be possible to secure from this Association such an invitation and the appointment of a committee to bring it about.

In view of this condition of the art, one or two conclusions as to teaching the history of American law seem to be forced upon us.

First, the study of American legal history is and must for some time continue to be a study for scholars, not for beginners. This does not mean that undergraduates in our schools might not learn a great deal about the subject through lectures, through a study of selected sources, or through a personally conducted search among the records themselves. But if this were done it would be done at the expense of study of the common law of some subject, which is at once easier to teach, better adapted, in the present condition of the teaching art, to mental training, and of more practical value for the lawyer that is to be. One does not mean to decry the historical method as throwing light on the law; one wishes that every student had had a stiff seminar course in history. But one wishes him also to study the law which he needs in practice, and nothing else, for at least three years.

Second, since the study of American legal history for several years must be local, it cannot properly be pursued by the undergraduates of any school which has a national position. It might be possible, perhaps, to present in different courses the history of the law of several states; but this would not only be too expensive for most schools, but of use to those pupils only who come from the particular states selected. One would say that the history of the law of Massachusetts might be taught in the Massachusetts schools; but even that would require two courses. I suppose we might agree upon three topics of especial interest in legal history, let us say constitutional law, the law of municipal corporations and the land law. Upon each of these the history of Plymouth and the Bay were very different. In both colonies, for instance, the private title to land came (except for the original settlers) through "proprietors", and one author has studied the "propriety" for all New England, as if the law of all the colonies were one. But

it seems clear that the very meaning of the word "proprietor" differed in the Old Colony and in the Bay and that the devolution of title from the crown was different in the two. To take up the abstruse learning as to land titles in a class of beginners from various states would apparently simply confuse them and leave them agape.

But though these conclusions (which it must be confessed are entirely *a priori*, without knowledge of the actual facts of such instruction) would prevent one from offering American Legal History as an undergraduate course, they make it all the more desirable and almost imperative to offer it as a subject of research in a graduate seminar. It is distinctly in the stage of research. If it were possible to present the subject in this way in every state, it would not be long before the sources could be published, and would be so worked over that the greatly desired History of our law could be written.

This plea, then, is for research in its local legal history in every school that can find qualified researchers. The schools must generally furnish the working members of the local associations which have been suggested. These seminars must find the sources and edit them; they must, in report, thesis, article, and in monograph discuss the development of local law from the beginnings and during periods of change. From the schools must come at last adequate histories of the state law. Then the deck is clear for the inspired and learned historian of American law.