LOOKING BACKWARD, LOOKING FORWARD: A CENTURY OF LEGAL CHANGE

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INTRODUCTION

A hundred years ago, or so, the Indiana University law school began operations at Indianapolis. A hundred years is not very long in terms of fossils or galaxies; but it is more than the normal human lifetime. A lot can happen in a hundred years. In the contemporary world, a hundred years can mean an incredible amount of sheer change—social, technological, economic. I have the job of talking about those changes. I am supposed to say something about the legal world of the newborn law school; and to contrast it with the legal world of today, a century later.

First, a word of caution. In many ways it is impossible to recapture the past, even the relatively recent past. Certainly, there are documents, records, even photographs. We can look at the streets, the houses, what people wore; those faded old photographs, so eerily beautiful in their own way, capture the past in every last detail, preserving it like flies in amber. Yet in another sense, these photographs are misleading, all the more so because we think they show streets, buildings, houses, and clothing exactly as they were. But what we see, of course, are externals. We never quite see with the eyes of the people who stare at us out of the photographs. What seems old-fashioned to us was sparkling and modern to them. For them, the future was unknown; we, on the other hand, are looking backwards in time; we know how the story turned out.

I do not want to make too much of this. History is not a science, but it is possible to be scientific *about* history. It can never be exact, but we can make fair approximations. Every generation sees history differently; but there are limits beyond which revisions never go. Every generation stages *Hamlet* in its own way, but Shakespeare's text is the common core.

These points would strike historians, I suppose, as obvious, boring, and banal. But lawyers, I am afraid, desperately need some basic instruction. Lawyers are, on the whole, very bad historians; and not by accident. The working lawyer deliberately manipulates and distorts the past, for the sake of legal argument. A lawyer looks at old cases the way a cat looks at a canary. She has no interest in understanding them historically, or in context. She looks on them as food, fuel, nothing more. When these cases, or other materials, turn out the wrong way (from the lawyer's point of view) they have to be ignored, or explained away. If that takes twisting and obfuscation, well, so be it. What the client needs is paramount. Historical truth would be a luxury; or worse, a way to lose your case. But enough in the way of preambles.

I. THE LAW SCHOOL WORLD

I want to begin with a few remarks about the world of legal education into which the law school entered in 1894. There were, of course, far fewer law schools than there are

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today. But the situation was rapidly changing; the decade of the 1890s was a decade in which the market "exploded," as Robert Stevens has put it. By the turn of the century there were almost one hundred law schools. Most of them were part-time or night schools, or had part-time or night divisions. There were over 11,000 law students in attendance at these schools.[1] The apprenticeship system still claimed a substantial portion of the practicing bar; but this system was crumbling fast. Stevens notes that the "invention of the typewriter no doubt released more part-time students for day schools (the female secretary having replaced the male clerk)."[2] He might have gone further, and claimed that the typewriter, or, more broadly, changes in the way law offices were managed and run—the new technology of paper-work—doomed the apprenticeship system. There was no longer any need for these law clerks and copyists. What was needed was people who could file and type. Hence these jobs—typing, steno, and the like—became jobs in themselves; or, more accurately put, they stopped being the lowest rung on the ladder of legal success. They became dead-end jobs. At the same time, of course, they became jobs for women rather than men.

The 1890s, then, were boom times for law schools. Legal scholarship, on the other hand, was still fairly traditional—treatises and guides for the practitioners, for the most part. The case-book was a relatively new form of literature, if you can call it that. There were very few law reviews, as we know them and love them today; only a handful of legal periodicals were connected to universities and their schools. The *Harvard Law Review* was one of the pioneers; and the law review people were already considered elites of the law school world.[3] Harvard, in 1894, was busy putting out issues six through eight of volume seven, and issues one through five of volume eight (the *Review* was published monthly during the academic year). These volumes are still on the shelves of most law schools, though in the course of a year, hardly a student or faculty member is likely to look at them.

The contents of these reviews would strike the modern reader (I hope) as rather dry and dismal. Mostly the articles are about doctrine. There is a good deal of something that might barely pass as history; social history most assuredly is not present. There are far fewer footnotes than one would find today—a welcome relief—but, surprisingly, a high percentage of these are footnotes to English sources. One article by Edward Keasbey, according to my rough count, cited just about as many English as American authorities.[4] This most certainly does *not* reflect the state of American case law at the time. In the 1890s, English citations were a small and diminishing portion of the whole. It does reflect, I think, the fact that legal education and legal scholarship were pretty arid stuff, fixated on the past, on the doctrinal history of common law concepts.

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1. ROBERT STEVENS, LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S 75 (1983).

2. *Id.*

3. Young Learned Hand (then known as Billings L. Hand) appeared on the masthead of the *Harvard Law Review* of 1894 for a brief time; Hand resigned after working on four issues. GERALD GUNTHER, LEARNED HAND: THE MAN AND THE JUDGE 44, 46 (1994).

4. Edward Quinton Keasbey, *The Right of a Third Person to Sue upon a Contract Made for his Benefit*, 8 HARV. L. REV. 93 (1894).

This is confirmed by another obvious but interesting fact about the *Harvard Law Review* of 1894. There may have been a lot of things happening in the country, and in the world; but you would never guess what they were from the pages of the *Law Review*. There was an article by Oliver Wendell Holmes, Jr., entitled *Privilege, Malice, and Intent*;[5] there was a certain amount of antiquarianism;[6] but current problems of the real world, even the real *legal* world, were almost totally absent. The *Harvard Law Review*, like legal education in general, reflected a particular theory about legal scholarship (and legal training). Legal scholarship was concerned with the "common law" and its development; and that was exclusively a matter of the unfolding of doctrine over time. Legal education was training in doctrine and in this sort of "common law" religion. From our standpoint, it was the last word in sterility: bare bones, with all the meat and juice blasted out of them.

Harvard was not alone in these habits. One gets essentially the same impression from Volume Three of the *Yale Law Journal*, another of the very small band of university law reviews. An article on the legal status of the oyster[7] had the virtue of novelty; but basically the rest of the articles were all of the *Harvard* type.

The students who went to law schools in those days were, of course, almost exclusively men, and almost exclusively white; and primarily good old-fashioned north European Protestants. There were a handful of women at the few schools which let them in, like the University of Michigan, but they must have been unusually persistent and able people. There were only about a thousand women practicing by the end of the century, in about twenty states.[8] Black lawyers were few and far between. There were, to be sure, a growing number of ethnic lawyers, immigrant lawyers and the children of immigrants, leavening the old-American masses; these newcomers flocked to the new night and part-time law schools. This new wave of lawyers evoked a lot of muttering from the old-timers; the bar was highly stratified then as now, and the elites looked down at the small-time lawyers, many of them ethnics, who went to the night and part-time law schools, and who were condemned as ambulance chasers, pettifoggers, and local shysters.[9] These ethnic lawyers came to dominate city and county politics, but Wall Street, La Salle Street, and the rest of the high-flown financial centers continued to ignore and disdain them; and to denounce them from their ethical pulpits.

Lawyers, law students, and law teachers in 1894 who looked back themselves might have raved about how thoroughly and completely the world had changed, in the hundred years before *them*. In 1794, there was not only no Indiana law school; there was no Indiana. There were also no railroads, no telegraphs, no telephones, no cameras, no electric light bulbs. All of these marvelous inventions had been far in the future; and when they emerged, they helped transform the legal world, in large and small ways. A legal revolution, in other words, matched the social and technological revolution that took place in the nineteenth century. The candid camera probably helped create the right of

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5. 8 HARV. L. REV. 1 (1894).

6. John Andrew Couch, *Women in Early Roman Law*, 8 HARV. L. REV. 39 (1894).

7. John H. Perry, *The Legal Status of the Oyster*, 3 YALE L. J. 87 (1894).

8. DEBORAH L. RHODE, JUSTICE AND GENDER 23 (1989).

9. *See generally*, JEROLD S. AUERBACH, UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA (1976).

privacy, because now, for the first time, it was possible to steal somebody's image without his consent.[10] In 1894, too, electricity was on its way to remaking the world; and the marvelous machines and devices that depended on electricity would produce an enormous volume of new law. At the time, this was perhaps only dimly perceived. One legal use of electricity, however, was quite gross and obvious. A few years before 1894, one William Kemmler, an unsung hero of American history, achieved an honor he probably would have been happy to forego: he was the first person to die in the new-fangled electric chair.[11]

The electric chair is, perhaps, only a minor example of legal change. But the total content and structure of the law had changed enormously in the course of the century. Whole fields, like tort law, which had barely existed in the eighteenth century, sprang up almost out of nowhere, and became pillars of curriculum and practice. In 1794 there was, practically speaking, no law of corporations—business corporations, at any rate; and, of course, the concept of a law school did not really exist in the early Republic. In short, the men who founded the new Indiana school, in 1894, were people who were used to legal and social change, and who probably believed very strongly in progress. If you asked them what the world would be like a century later, they would not know the answer—of course—but they would be sure the world would be different; very different; and probably better at that. Perhaps they would have given the same answer about the law, legal institutions, and law schools.

They might or might not be consciously aware of something that seems obvious to us today. The forces that produced all those dizzying changes, between 1794 and 1894, in the curriculum, and in the body of the law, were not *internal* to the legal system, but external. The changes had very little to do with legal thought, with Oliver Wendell Holmes Jr., or even with C.C. Langdell or Joseph Story. They had everything to do with mobility, abundance of land, industrialization, heavy immigration, and, above all, the magnificent new technologies. It would hardly be an exaggeration, for example, to say that the railroad *created* tort law;[12] and the factories and mines, turning out steel, coal, machines, tools, and railroad cars, added to tort law as they went about busily injuring people and stimulating litigation; the factories and mines also created a wholly new world of "master and servant," that is, industrial relations—it was a period of labor unrest, class conflict, strikes, boycotts, injunctions, producing, one might add, a new field, labor law, that Jefferson and his contemporaries could have hardly imagined.[13]

The common law had been turned completely on its head in the course of the nineteenth century; and the body of statutes likewise. Roscoe Pound delivered a famous speech, published in 1906, in which he went on about the causes of popular dissatisfaction

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10. See the famous article by Samuel D. Warren and Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

11. *See* LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 171 (1993). The Supreme Court upheld the system of death by electrocution in *In re* Kemmler, 136 U.S. 436 (1890); *see also* Deborah W. Denno, *Is Electrocution an Unconstitutional Method of Execution? The Engineering of Death over the Century*, 35 WM. & MARY L. REV. 551 (1994).

12. *See* LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 468 (2d ed., 1985).

13. *See, e.g.*, WILLIAM E. FORBATH, LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT (1991).

with the law.[14] Pound claimed that the common law was, among other things, far too individualistic; as a consequence, it stood in the way of necessary social changes. In some ways, however, this is a most peculiar complaint about the common law. The common law, after all, developed in England, in the Middle Ages, in a monarchy, in a feudal society, long before anybody had ever heard of Adam Smith, a free market, modern individualism, and the like. If the common law had become a bastion of individualism, it was not because of anything inherent in it, or its historical roots, but because of political and social developments in the course of the nineteenth century, plain and simple.

The *federal* system had undergone considerable change in the period after the Civil War. Of course, the war itself was fought, in part at least, on an issue of federalism. American wars, especially drastic ones, strengthen the central government at the expense of the localities. Still, from our standpoint, the national government was small and feeble in 1894. Washington was basically a small town; the vast army of federal civil servants was far off in the future; and the federal tax bite was puny indeed. In 1894, the federal government did pass an income tax law; but by modern standards it was a popgun. It taxed incomes above $4000 at a flat rate of two percent; and it was declared unconstitutional in 1895.[15] In fact, the federal government had very few ways of scrounging around for dollars—excise taxes (some of them, like the tax on whiskey, were hard to collect), customs fees, land sales, and little else.

The federal government of the day did not, from our standpoint, *do* very much. Most lawmaking and law enforcement was at the state level. It was the states that regulated such businesses as the insurance companies; and whatever there was (not much) of health and safety regulation. But change was in the air. The Interstate Commerce Commission Act was passed in 1887;[16] the Sherman Antitrust Act, three years later.[17] These Acts were responses to the nationalization of the economy. State borders were meaningless to the giant railroad nets which the railroad moguls stitched together. The telephone and the telegraph helped make one country out of a collection of states. No one state could control the giant railroads, or the awesome trusts that seemed to have a strangle-hold on the economy. In frustration, fear, and anger, blocs of voters turned to the federal government for salvation. Later on, a similar burst of public emotion led to the passage of a federal food and drug law in 1906.[18]

The late nineteenth century was thus the period in which some of the foundation-stones of the modern regulatory state were laid. We have already mentioned the Interstate Commerce Commission Act. There was a growing sense of mutual interdependence in society, but also a sense of vulnerability. Economically, the small merchant, farmer, or worker felt himself at the mercy of the giant trusts. Mass-produced foods could endanger health in ways that home-cooked goods did not; this was the brute fact behind the pure food laws. The rich crop of maimed workers and passengers produced a movement for safety regulation as well as a body of tort law.

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14. Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 40 AM. L. REV. 729 (1906).

15. FRIEDMAN, *supra* note 12, at 565-66; Pollock v. Farmers Loan and Trust Co., 158 U.S. 601 (1895).

16. 24 Stats. 379 (act of Feb. 4, 1887).

17. 26 Stats. 209 (act of July 2, 1890).

18. FRIEDMAN, *supra* note 12, at 681.

People who lived and wrote in 1894 sensed that they lived in an age of transition; but this was nothing new. Every generation since the industrial revolution has probably felt that way. There is no question, however, about a sense of crisis, which had gripped some members of the society, in the late nineteenth century—a sense that old-fashioned values were eroding, old arrangements crumbling. In 1893, Frederick Jackson Turner published his famous essay, "The Significance of the Frontier in American History." Turner emphasized how important the frontier had been, in terms of American character and institutions; but he also pronounced the frontier, as Americans had known it, to be dead, departed, gone.[19]

Progress no longer seemed quite so inevitable; resources no longer seemed quite so infinite. The millions of buffalo had shrunk to a precious handful. There were the beginnings of restrictions on immigration. There was also a kind of moral crisis. Public pressure (coming from respectable elites) led to new emphasis on rules and laws against victimless crime—vice, gambling, pornography, sexual license—starting around 1870, and reaching some sort of climax in the early twentieth century.[20] America, the good folks felt, was in trouble; criminals, low-lifes, the feeble-minded—and immigrants from much-too-foreign countries—threatened to swamp the old Americans and their values. The result was a kind of eugenic panic. Indiana, in fact, would become one of the pioneer states in the movement to keep inferior people from breeding. Indiana enacted a sterilization law in 1907.[21]

In 1894, there were plenty of civil war veterans around, and memories of the Civil War were still very vivid for millions of people. But whatever zeal the war kindled for racial equality was long since gone. Congress had passed a series of civil rights laws; but in the 1880s, the Supreme Court declared them unconstitutional.[22] In 1896, two years after the founding of the Indiana Law School at Indianapolis, the Supreme Court handed down *Plessy v. Ferguson*, the infamous separate-but-equal case.[23]

We have already mentioned the labor unrest of the late nineteenth century. Much of the action took place on the streets and in factories, but inevitably conflicts also spilled over into courts and legislatures.[24] The Indiana Session Laws of 1893 and 1895 reflected these labor conflicts. An amendment made it illegal for any company "manufacturing iron, steel, nails . . . machinery or tobacco" to employ any child under fourteen; or for any manufacturing company, which legally employed kids, to work them more than eight hours a day.[25] Another law required certain mining and manufacturing companies to pay employees every week, "in lawful money of the United States." The point was to outlaw payment in certificates redeemable only at the infamous company store.[26]

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19. *See* FRIEDMAN, *supra* note 12, at 338.

20. *See* FRIEDMAN, *supra* note 12, at 585-88.

21. 1907 Ind. Acts 215.

22. Civil Rights Cases, 109 U.S. 3 (1883).

23. Plessy v. Ferguson, 163 U.S. 537 (1896); *see* CHARLES A. LOFGREN, THE PLESSY CASE: A LEGAL-HISTORICAL INTERPRETATION (1987).

24. *See* FORBATH, *supra* note 13.

25. 1893 Ind. Acts 78 at 147-48.

26. 1893 Ind. Acts 114 at 201 (amending a law of March 5, 1891).

Another labor-related issue that agitated the country was the issue of convict labor.[27] Convict labor was a real thorn in the side of organized labor, which considered convict labor to be a form of unfair competition, a threat to jobs and wages. In Indiana, a Senate Concurrent Resolution, approved March 13, 1895, began with a recitation that the question was "of much importance to the prosperity of free labor."[28] The resolution went on to note that North Carolina and some counties in New York had "successfully used convict labor for improving the public highways;" it called for a Commission to "correspond with the authorities" in states using convict labor on the roads, to find out how the system was going, and report back to the General Assembly.[29] Two days later, the General Assembly adopted a bill forbidding anyone from selling convict-made goods without a license. All convict-made goods coming in from outside Indiana had to be "branded, labeled or marked" with the words "convict-made," together with the "year and name of the penitentiary, prison, reformatory . . . in which it was made, in plain English lettering."[30]

How much of this ferment, the stirring and moiling, the agitation, entered the walls of the law schools? How much of it was debated in class? How much of it found its way into the curriculum? Very little, I suspect, but it is impossible to tell. Probably, like most law schools, law was studied as a cold, detached body of principles, pure, transparent, frozen into fixed shapes, like icicles. Most of the law schools in the country either had passed over or were going to pass over to the Harvard religion: Langdellianism, and the Socratic method.[31] The use of this method practically guaranteed a total detachment of law from politics. If there was to be any discussion of the real world, with all its problems and conflicts, it would take place in the hallways and corridors, not in the classroom.

II. FAST FORWARD

That was 1894; a hundred years have gone by, and the Indiana Law School at Indianapolis is in the process of celebrating its successful voyage over time. The school is now mature, adult; and it inhabits a legal, and social, world much altered from the world of its founders.

How different are the law schools themselves? In some ways, *very* different; in some ways much the same. Some aspects of curriculum have proven to be amazingly tenacious, clinging to life like barnacles on a rock. The same old stuff is taught, particularly in the first year of law school, and in the same old way. Many of the cases, of course, are recent. A lot of teachers have abandoned the Socratic method, and the case-books are a lot fancier, more expensive, and Lord knows *longer* than in Langdell's day; but at bottom there is a certain surprising sameness. Langdell's idea of teaching "legal science" through

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27. *See* FRIEDMAN, *supra* note 12, at 602-03.

28. 1895 Ind. Acts clvii at 372.

29. *Id.*

30. 1895 Ind. Acts clxii at 379, 381.

31. On this movement, see STEVENS, *supra* note 1; Thomas C. Grey, *Langdell's Orthodoxy*, 45 U. PITT. L. REV. 1 (1983); WILLIAM P. LAPIANA, LOGIC AND EXPERIENCE: THE ORIGINS OF MODERN AMERICAN LEGAL EDUCATION (1994).

the case-method did not last very long; but the basic method was repackaged as a way to teach people how to think like lawyers, and in that form, it very definitely lives on.

This is not to say that legal education has not changed at all; the classic system which Langdell created is now considerably frayed about the edges, particularly in second and third year courses. Economics and philosophy have made shocking inroads into the classroom and the course-books; and bits of history and sociology or psychology have crept in as well. There are clinical courses and clinical experiences in most schools, something that Langdell would not have tolerated for a moment. Langdell's formalism is also in very bad odor. Everybody gives lip service to a kind of watered-down legal realism, in principle at least.

But Langdell could still take considerable comfort from the actual practice in many law schools. My impression is that, in most courses and most schools, law is still taught very much from the "internal" standpoint. The "realism" of the professors is only skin deep. Doctrine is taken seriously, is treated as an important and causal variable; classroom instruction puts heavy emphasis on legal craftsmanship, on technique, on "thinking like a lawyer." All this assumes that doctrine and craftsmanship make a real difference, a crucial difference, to the outcome of cases and to the legal order in general; the outside world, with its dirty politics, its competitive striving, its complex and messy fabric of culture, gets inside the classroom door only reluctantly and somewhat gingerly.

Legal scholarship, to be sure, is much broader than it was in 1894. There certainly is more of it. There were only a handful of law-school law reviews in 1894; in 1994, every school worth its salt has one, and a lot of schools that are not worth salt or anything else have law reviews as well. Moreover, since *everybody* has a law review, the fancier schools are no longer content to publish just *one*; they put out two, three, five, or six law reviews. There will be one all-purpose review, usually the oldest (and probably the best), supplemented by specialized journals on this, that, or the other thing.

In some ways, too, the tonier law reviews are the opposite of what they were in 1894. They pay very little attention to doctrine, except in constitutional law, the last bastion of legal theology; they tend to be very trendy; and they operate in the high, mystic world of something called "theory," whether it is critical theory or liberal theory or just plain theory. In some law review articles, you can find graphs and equations; in others, there are stories, and personal reminiscences, usually described as "narrative." There are ham-handed attempts at humor and occasionally even a poem. Nobody cites Chitty anymore, or even Blackstone, and the Brits have largely disappeared from the law review. But lots of young professors cite Wittgenstein, Clifford Geertz, Foucault, Noam Chomsky, and who knows who else.

In short, the law reviews, or some of them, have abandoned dry, dead doctrine and sailed right into some sort of post-modern or critical wonderland, without ever stopping at some rational point in between. There are, of course, dozens of practitioner journals and specialized scholarly journals, catering to other audiences. These supply needs of markets the regular law reviews have given up; or they provide a home for scholarship which can be reviewed and judged by genuine experts in the field, rather than by second or third year law students. But one cardinal fact remains: what the regular university law reviews do and say and write about has very little bearing on the work of the profession; and reflects what is happening in society at large only dimly.

Physically, the law schools may or may not look different on the outside, depending on how good deans have been at fund-raising or persuading state governments to put up

money for buildings. On the whole, they are bigger than they were a century ago. Inside the law school, the visitor from another century would be amazed by the computer terminals, and the TV sets in the courtrooms; the visitor would wander around in vain looking for a card catalogue. The student body would also look very different to this visitor. Hardly anybody wears a hat these days. More strikingly, not all of the faces are white; and almost half of the students are women. One of the most interesting research questions of the day—but far from an easy one—is, what impact do these demographic changes have, first of all, on teaching and research; second, on the profession, and last, on the body and soul of the law. The disappearance of the hat brought about very little change; the influx of women may be another story.

As for the law itself, in some ways what has happened since 1894 simply continues the great master trends of the nineteenth century: the population of the country keeps on growing, fueled in part by immigration; the economy is immensely greater than it was, but still vibrantly entrepreneurial; technology is still transforming the world, in fact more so than ever before. In 1894, nobody could have predicted mass use of automobiles, or the coming of jet airplanes, antibiotics, computers, air conditioning, satellite communication, television. Each of these has had an impact on the law, sometimes an enormous one. Railroads created the tort law of the nineteenth century; the automobile had a similar influence in the twentieth. Medical malpractice, almost unknown in the nineteenth century, has been transformed in an age of miraculous medicine. It is now a subspecialty in tort law of impressive scope and reach. The primitive medical tools of the nineteenth century rarely cured anybody; but the expectations of patients were also low; and what medicine did or could do seemed not to lead to the kind of disappointments or fits of anger which bring out the lawsuit in a person.[32]

Obviously, too, the massive social upheavals of the century have left their imprint on the law: two world wars, and wars in Korea and Vietnam; Prohibition, the New Deal, the civil rights revolution, feminism, the cold war, the environmental movement, to reel off a few from the top of my head. Prohibition filled federal prisons to overflowing; the drug wars do the same dubious service today. The New Deal was a great watershed in the history of administrative law. Agency after agency was created in Washington; and very few of them have ever given up the ghost. Indeed, in later years, still more agencies were created—the New Deal was worried about jobs, not environmental protection or clean air, for example, and the EPA is a much later creation.

Is there any way to sum up all of these colossal events and all these radical changes in the legal order? Are there any aspects that bind them together? I think there are. I will mention only one or two which I consider particularly salient. The nineteenth century believed in progress, and in the march of science and technology. The twentieth century believes in ceaseless change; it knows that science and technology are transformative, but it is not quite so sure that change can be described as "progress." Still, the absolute cornerstone of our legal culture is the belief that law is not only changeable, but that it can and ought to change constantly.

The twentieth century is the century of what we might call *legalization*, for want of a better term. I use this word to refer to the expansion of the potential domain of law. In

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32. *See* LAWRENCE M. FRIEDMAN, TOTAL JUSTICE (1985), for a general treatment of the rise of liability in this and other situations.

other words, there is no issue, or almost no issue, which the law cannot reach, in the appropriate situation. There are no zones of immunity.[33] I do not mean that law in fact routinely interferes in every area of life—for example, in parent-child relationships. It mostly in fact stays out. Nor does law have anything much to say about happy marriages. But in the odd case, the extreme case, law can assert itself in places once completely beyond the pale. If I give a student a low grade in my course, he *might* eventually take me to court on this issue. This hasn't happened to me yet, and I hope it never will; it is a very, very rare type of suit; but it is not, legally speaking, impossible. And the mere fact that it *might* happen may, in subtle and not so subtle ways, change the internal atmosphere of universities—"legalize" them, in a word. The law, today, is or can be ubiquitous. Nobody and nothing is immune.

Another massive new development is what I call plural equality. The subject is complicated; the key idea is the decline and fall of a certain kind of moral and social dominance. It was once taken for granted that one group, one race, one gender, one religion, one way of life had and ought to have a special place in America; America, in a sense, belonged to the ruling strata. Other people were sometimes tolerated (sometimes not); but it was clear that the country, in an important psychological and political sense, did not belong to them. This idea is in serious trouble in the 1990s. The rival doctrine is *plural equality.* The country is conceived as a coalition of sub-nations, all of them, in theory, entitled to dignity and respect; and each of them entitled, too, to a decent shot at privilege and power.

Elsewhere I have tried to explain where this notion comes from.[34] I have tried to connect it with changes in legal culture, and, in particular, the rise of expressive individualism. Without going into great detail, I mean by this a form of individualism which stresses the development of the unique personality; the right of each of us to "do our own thing." This stands opposed to the rather austere, economic individualism of the nineteenth century.[35] But whether this explanation is convincing or not, the tendency in law (and social life) toward plural equality strikes me as absolutely beyond question.

In 1924, less than a lifetime ago, Congress passed a severe and restrictive immigration law, to hold the line against riff-raff from southern and eastern Europe.[36] It was blatantly tilted in favor of white Protestants from northern Europe. That version of immigration law is, as the saying goes, history, along with the laws that excluded Chinese altogether from immigration and citizenship.[37] Even more dramatic is the decline and fall of racial segregation, and racism in general, at least on the formal, legal side. *Plessy v. Ferguson* has been confined to the dungheap of history. A great series of Supreme Court opinions, in the years after *Brown v. Board of Education*,[38] doomed every form of legal segregation. The civil rights laws of the 1960s drew down the curtain on this shameful

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33. *Id.* at 83-87.

34. LAWRENCE M. FRIEDMAN, THE REPUBLIC OF CHOICE: LAW, AUTHORITY, AND CULTURE (1990).

35. For the concept of expressive individualism and other forms of individualism, *see* ROBERT BELLAH ET AL., HABITS OF THE HEART: INDIVIDUALISM AND COMMITMENT IN AMERICAN LIFE (1985).

36. On the background, *see* chapter six of THOMAS J. ARCHDEACON, BECOMING AMERICAN (1983).

37. On this story, *see* BILL ONG HING, MAKING AND REMAKING ASIAN AMERICA THROUGH IMMIGRATION POLICY, 1850-1900 (1993).

38. 347 U.S. 483 (1954).

episode in American history. The voting rights laws, enacted in 1965, finally made black voting power a reality. Race relations, to be sure, remain anything but smooth; but it is fair to say that the problems of today are qualitatively different from the problems faced as recently as the 1950s.

The civil rights movement has been, in a sense, a model for many other movements demanding a share of power and authority, in a regime of plural equality. Feminism is not a new idea, of course, but the gains of the last generation are more profound, and potentially more revolutionary, than those of prior generations. In the most recent decades, there have been scads of "liberation" movements, and they have achieved significant legal results. States and the federal government alike have produced laws outlawing age discrimination, protecting the disabled, and expanding prisoners' rights. Many victimless crimes, so-called, have been wiped off the books. That randy couple, two consenting adults, can do just about what they please in most states; and for that matter, three, four, or a dozen consenting adults. Prohibition (of alcoholic beverages) came and went; and the public is now free to drink itself, legally speaking, into a total drunken stupor. Many people take advantage of this glorious right.

I have been careful to talk about a *tendency* toward plural equality. There are still battles, great and small, over every single one of the movements mentioned. There are definite signs of backlash and counter-revolution. The public, outraged about crime, seems to support reductions of prisoners' rights, and almost any proposal tougher than what we have is gloriously popular with voters. Recently, some states, in a fit of pique, have even taken television sets away from prisoners. This must strike some people as the ultimate in punishment. Draconian drug laws are still on the books; and getting worse, not better. The Supreme Court drew a line in the sand, in *Bowers v. Hardwick*,[39] and refused to constitutionalize the rights of same-sex couples. Millions of black Americans remain, in effect, segregated and profoundly poor.

Examples could be multiplied. Yet, basically, plural equality and its consequences are here to stay. Whether we go forward, stand pat, or move *slightly* to the rear, is a question I decline to answer, without a crystal ball.

Legalization, too, seems here to stay; and there are no signs that the legal system is about to shrink or become less complex. On the contrary: the scale and scope of modern society breeds law. The legal system is immense, dense, and ubiquitous; and this is unlikely to change. But the sheer amount of law does not mean, as some people imagine, that we are necessarily less free than people in the nineteenth century. Take, for example, the automobile. Free spirits of various types like to curse the automobile, because of the way it ruins the cities, its danger to the environment, and because so many of us are addicted to cars. But cars also bring us unprecedented freedom. With a car, we can come and go as we please, ride in the country, visit distant relatives, live past the end of the trolley-line, travel to Disneyland, and so on. On the whole, the automobile means freedom and opportunity; it opens up horizons that were closed to most people before. Yet it also produces a huge amount of law, and tons of rules and regulations—drivers' licenses, traffic law, safety regulations, highway construction—the list of legal consequences is endless. These rules and regulations, realistically, are not simply *detractions* from freedom; many of them, on the contrary, are the very condition and

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39. 478 U.S. 186 (1986).

framework of freedom. A similar argument could be made about many other kinds of regulation: rules about safety on passenger airlines, control over the allocation of television channels, and so forth.

In short, complexity and plural equality are responsible for legalization, for the multiplicity of laws that buzz all around us like flies. Whether there is too much law is an open question. But one thing does seem clear: it is simplistic to equate the sheer *mass* of law with loss of true freedom. Village people of the nineteenth century did not need a driver's license; travel was much less "legalized," but it was harsh and difficult. Nobody but the very rich traveled for pleasure. There were no effective food and drug laws in the late nineteenth century; people who sold snake-oil and drug-laced elixirs victimized thousands and poisoned hundreds.

Civil rights laws are another good example of how an *increase* in legalization may have a positive impact on human liberty. This is a relatively new, and very complicated, field of law. In 1894, nobody dreamed of rules against sex discrimination—let alone the rights of people over forty, or of men and women in wheelchairs. Rules against discrimination are supposed to lay the basis for plural equality, which in turn (most of us think) probably makes for a more just society. Not everybody would agree with this formulation, at least not in an extreme form. Some aspects of discrimination law are hotly contested: affirmative action, for one. But still, not many people, I hope, would want to go back to the segregated world before *Brown v. Board of Education*; or to a world without ramps for the handicapped, and without job opportunities for women. There was nothing like modern civil rights law in 1894; and there was nothing like the *freedom* that women and minorities have today, freedom to explore new options; freedoms which, for all their problems, are a national civic treasure. These freedoms would not exist, practically speaking, without the new legislation. And I like to think that white men descended from the old elite are themselves more free *because* of the general increase in freedom—free in a richer, deeper sense than in the past.

A complex society, in short, must have its rules and regulations. A plural society cannot rest on easy assumptions about what "everybody" thinks or what "everybody" does. Let me take a small example, but one which is pretty close to home: the dreaded LSAT, which began its reign of terror around 1950.[40] In the background was the so-called "GI bill of rights," which gave the veterans of World War II free college educations. Higher education expanded greatly, and it became, for the first time, truly open to men (and a few women) from all walks of life, and strictly on the basis of merit. Before this, rules of admission were much less "legalized" and "formalized;" but in many places they were also based mostly on subjective considerations—who you knew and how much money you had, your class background, your connections, even the way you looked.

The LSAT, in other words, was a step toward a kind of plural equality—an end to a situation in which only the "right sort" of people monopolized the best places in the better schools. Admissions were never totally legalized. Before and after, there was always a lot of affirmative action, to use the modern phrase. But it was not affirmative on behalf of minorities—on the contrary, it was affirmative action for alumni children, children of rich donors, and children from the right prep schools. Even state universities were skewed toward middle class kids who could afford to go away to college. Not many people

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40. STEVENS, *supra* note 1, at 221.

during this period of *informal* affirmative action, as far as I know, criticized the system, on the grounds that alumni children or children of the rich who got in to elite schools would be "stigmatized" and feel inferior. (If they felt anything, it was exactly the opposite). Today, there is more red tape, more rules, more legalization, more government regulation in the admission process—but arguably, more social justice, less arbitrariness, and less class bias as well.

The general point is that freedom requires structure, in our kind of society: it requires rules, a framework, order—traffic regulation so to speak. Freedom is not anarchy. It is always limited by social norms and by custom; and it is always bracketed by a bony mass of "law." The law makes freedom possible, protects it, and facilitates its exercise.

This point, of course, should not be misunderstood. I am not defending rules and regulations per se. Many rules and regulations are stupid and counterproductive; no one could or should deny that. Each regulation, each agency or structure should be analyzed, debated, and assessed. But our legalized world, our world of rules and regulations, is both more and less than red tape. Freedom is not the absence of something. It is a positive state of opportunity and open skies. I think we have more of it today than we did in 1894; and that's all to the good.

III. Into the Future

And what about 2094? What about the bicentennial? We won't be around, and the future is the darkest of all historical mysteries. The one thing we know about the future is that it is absolutely unknowable, even unthinkable—until it comes around. A few cautious predictions about what is likely to happen next month just *might* work out. Beyond that, everything else is science fiction. Our ship drops off into a fathomless abyss.

Still, we can't help wondering, even in this darkness, what people will be saying and doing here, a hundred years from now. I hope there *is* something here at that time. We are probably not going to blow up the planet, but we might just choke it to death or run out of space.

If human beings survive, if Indiana is still here, if there is a law school, and a banquet and a celebration a century from now . . . how different will it be? Undoubtedly, the guests at that banquet, who look back on the celebrations of 1994, will think of us as quaint, primitive, old-fashioned. We will be very strange to them, very foreign. Of that I am sure. We will be dead leaves, dead data, nothing more; we will be faded old pictures, memories, lifeless objects, like flowers pressed in a book. I wonder if there will even *be* books at that time. Maybe the whole world of law will be reduced to blips on a screen. Maybe law will be taught by inserting ideas in people's heads through some sort of telepathic process.

So much of what seems natural to us will strike our descendants as . . . well, weird. Our very thought processes will be mysteries to them—something for historians to puzzle over, dope out, explain. It will be a very different world. It might be a better one. I hope so. I hope too that this school will stay around, thriving, striving, improving, doing its job, educating, researching, raising standards, deep into the unknown regions of the years to come.