Thinking about Law Historically: Why Bother

John V. Orth

ESSAY

THINKING ABOUT LAW HISTORICALLY: WHY BOTHER?

JOHN V. ORTH*

Having taught a course in Legal History for the past dozen years, I should be able to answer the question "Why think about law historically?" And yet I find it difficult to begin—so unaccustomed am I to fundamental questions. As a teacher I have been asked, usually more than once, every imaginable question about the subject, except "Why bother?" For students already enrolled in the course it is perhaps too late to ask; those who avoid the course have plainly expressed their own opinion on the matter. So I must pose the question myself and submit my answers to a candid world.

The obvious reason for thinking about law historically is that it helps us to solve problems in the present. To one degree or another, all American states except Louisiana have accepted the common law of England as the rule for decision in state courts, except to the extent that it has been altered by later statute or case law. The North Carolina Supreme Court, interpreting the state statute receiving the common law,[1] has held that it means the common law of England as of the date of American Independence, July 4, 1776.[2] In any legal dispute in which it would matter, this would require historical research into the law as it was "long ago and far away."

Such forensic legal history interests me very little. I suspect that in any case worth contesting, the law in question would not be clear. Competing "experts" could be found by both sides, probably Professor This and Professor That from local law schools. In the clash of adversaries the fine subtleties and keen uncertainties of authentic legal history would likely be lost. No practically-minded person in such a case would really be interested in a well-balanced statement of the historical nuances and ambiguities. The case would finally be decided—at least I hope it

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1. N.C. GEN. STAT. § 4.1 (1986).

2. *See* Steelman v. City of New Bern, 279 N.C. 589, 592, 184 S.E.2d 239, 241 (1971).

would—with careful attention to what would make most sense in the present. The past would, I suspect, prove accommodating.

There is, of course, a more general sense in which legal history is said to assist us today. Benjamin Cardozo, with characteristic eloquence, put it this way: "[H]istory, in illuminating the past, illuminates the present, and in illuminating the present, illuminates the future."[3] I applaud and fully accept the shift from problem-solving to illumination; I myself have earlier written that legal history can "by explaining how we got where we are, explain more comprehensively where we are."[4] In other words, legal history can enrich our understanding of present law. To that extent, I suppose, it may assist us as we seek to peer over the fences into the future.

I do not mean to suggest that legal history as an intellectual pursuit is the open sesame to unlock the mysteries that lie ahead. To be sure, the future emerges from the present, but all the many linkages of cause and effect, the frictions, the retrograde motions, and the hidden forces that drive it forward, escape the observer's eye and always will. A well-educated human being, intuitively responding to other human beings, is our best guide to the future, whether or not the mind in question is stuffed with history, legal or otherwise. In a dozen years of observing my colleagues in higher education, I have discerned no particular discipline that is more likely than any other to prepare its practitioners for the uncertainties of the future—global, national, or personal. Recent events in Central Europe or the Soviet Union, wholly unexpected by experts of all stripes, are an example too obvious not to be mentioned.

Aside from providing a generalized guide to the future, legal history is sometimes looked to for lessons in the present. Long sought, the "lessons of history" are too often, I fear, both a snare and a delusion. Marxism's monumental embarrassment is only the most recent demonstration of the futility (not to say the fatuity) of claiming to discern objective laws of historical development. In explaining the problem we find help from an unexpected source: Tom Sawyer—not in the famous book of his *Adventures* but in its almost unbelievably bad sequel, *Tom Sawyer Abroad*. Amid the rubbish lies this gem:

> [L]ike a considerable many lessons a body gets . . . [t]hey ain't no account, because the thing don't ever happen the same way again—and can't. The time Hen Scovil fell down the chimbly and crippled his back for life, everybody said it would be a les-

3. BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 53 (1921).

4. JOHN V. ORTH, THE JUDICIAL POWER OF THE UNITED STATES: THE ELEVENTH AMENDMENT IN AMERICAN HISTORY 159 (1987).

> son to him. What kind of a lesson? How was he going to use it? He couldn't climb chimblies no more, and he hadn't no more backs to break. . . .
>
> I ain't denying that a thing's a lesson if it's a thing that can happen twice just the same way. There's lots of such things, and *they* educate a person, that's what Uncle Abner always said; but there's forty *million* lots of the other kind—the kind that don't happen the same way twice—and they ain't no real use. . . .
>
> But, on the other hand, Uncle Abner said that the person that had took a bull by the tail once had learnt sixty or seventy times as much as a person that hadn't, and said a person that started in to carry a cat home by the tail was gitting knowledge that was always going to be useful to him, and warn't ever going to grow dim or doubtful.[5]

Too many of history's lessons are like those Tom is talking about: lessons about things that never happen the same way twice—"and they ain't no real use." In the long history of the common law, forty million such lessons is probably a conservative estimate. There are other kinds of lessons that educate a person, but too often they take the form that Tom's Uncle Abner had in mind: Don't take a bull by the tail. These lessons range from the observation of a great historian that "Power tends to corrupt"[6] down to the absolute essentiality of the safeguards of due process; for example, "Never make final decisions on ex parte representations," and "Always explain the reasons behind a judgment." History is replete with illustrations of the deleterious consequences of ignoring these simple verities. The problem here is that no extended study of legal history is required to learn them, and—worse—there are a great many other disciplines that teach the same lessons more directly. Only humankind's obdurate unwillingness to learn keeps all these instructors busy.

Another reason for historical study, one we hear a great deal about these days, is what might be called history's legitimating function. Ideas seem to be taken more seriously if they have a long pedigree to back them up. A related notion is that history may supply heroes—role models, if you prefer—to inspire those who can identify with them. Neither approach is new. A century ago Louis Brandeis and Samuel Warren, Jr. published an influential article in the *Harvard Law Review* in which they provided an impressive, if somewhat dubious, parentage for the right of

5. MARK TWAIN, TOM SAWYER ABROAD 85-86 (1878).

6. BARTLETT'S FAMILIAR QUOTATIONS 615 (Emily Morison Beck ed., 15th ed. 1980) (Lord Acton).

privacy.[7] The latest biographer of Justice Joseph Story, who did so much to establish American commercial law in the early nineteenth century, describes Story as anxious to emulate the reforming British judge Lord Mansfield.[8]

To some degree this role for history shares the defects of forensic legal history. All too often it becomes a mere search for friendly faces (or compatible ideas) in the past; at its worst it involves exaggeration approaching falsification. This is not to deny that much of the older legal history is tendentious, although not quite so programmatic. The alert reader must be ever on the lookout to discern the particular tendency. What bothers me about embracing history's legitimating function is that such an approach increases the risk of violating the integrity of the past by imposing on it the agendas of the present. There is a sinister, as well as a benign, meaning to the notion that those who seek, find. As for role models, there can be no denying that for most of American history the leaders of bench and bar were middle-aged Protestant white males from the comfortable classes. Unless one can meet them on some plane that transcends the particularities of age, religion, race, sex, and economics—not to mention time—one will look to them in vain for guides. No one should underestimate the feat of historical imagination that this calls for.

Perhaps it is time for me to take the bull by the horns and provide some better answers to my question, "Why bother to think about law historically?" To begin with, one should not overlook the sheer pleasure that some minds take in contemplating the past. I say "some minds" advisedly, because I am aware from experience that the charms of the past do not appeal to all persons equally. This, by the way, is a fact to rejoice in; if all minds were turned the same way, we would have less chance to find our way out of the maze in which we wander. To return to the main point, some of us think about law historically because it is natural—and of compelling interest. The time long ago arrived when we should have shucked off the notion that if a subject interests us, it is entertainment rather than education. This joy-denying tenet of Calvinism lingers on in law school in the form of taking courses that are "good for us" instead of those that interest us. On the law review it means

7. Samuel Warren & Louis Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890). For a historian's critique of their presentation, see WALTER PRATT, PRIVACY IN BRITAIN 19-37 (1979).

8. *See* R. KENT NEWMYER, SUPREME COURT JUSTICE JOSEPH STORY: STATESMAN OF THE OLD REPUBLIC 246 (1985); *see also* CHARLES BANE, *From Holt and Mansfield to Story to Llewellyn and Mentschikoff: The Progressive Development of Commercial Law*, 37 U. MIAMI L. REV. 351, 366 (1983) (noting Story's reliance on Mansfield's opinions).

placing a premium on the tedious and obscure and assuming that the clear and appealing is not scholarly.

The joy of the past lies in part in its strangeness. When we listen with a trained ear we hear melodies undreamed of. A sentence from a familiar text illustrates the point: When the framers of the federal Constitution empowered Congress "to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries,"[9] they wrote in elegant eighteenth-century prose, as balanced and symmetrical as Palladian architecture. *Science* is promoted by *authors* in their *writings*, while *useful arts* are advanced by *inventors* in their *discoveries*. Without realizing that "science" in the eighteenth century meant any organized body of knowledge,[10] not merely that of the white-coated specialist in the laboratory, we truly hear the passage transposed into the wrong key. The excitement begins when we accept the strangeness of the past, when we realize that we are listening to a foreign language—and that it is English!

Understanding this may bring us enlightenment, and spare us embarrassment. Not so very long ago the North Carolina Supreme Court misread one of its earliest and most important precedents: *Bayard v. Singleton*,[11] the case that established judicial review in the state sixteen years before *Marbury v. Madison*[12] established it at the federal level. Speaking for the court in *Bayard* in May 1786, Judge Samuel Ashe referred to the fact that "the people of this country . . . by their delegates, met in Congress, and formed that system of those fundamental principles comprised in the constitution."[13] Two centuries later the state supreme court thought he was "[o]bviously referring to our national government";[14] this despite the fact that the federal constitution was not drafted until more than a year after Ashe spoke—and the even more obvious fact that Congress did not draft it. Judge Ashe was actually referring to the state constitution, drafted and adopted by North Carolina's Fifth Provincial Congress in 1776. In contemporary parlance "this country" meant "this state." Anyone who had not undergone a thorough process of national acculturation would have suspected as much—that is, today only non-Americans and those with historical training.

The strangeness of the past is a point easily made and readily ac-

9. U.S. CONST. art I, § 8, cl. 8.
10. *See* 9 OXFORD ENGLISH DICTIONARY 221 (1933).
11. 1 N.C. (Mart.) 5 (1787).
12. 5 U.S. (1 Cranch) 137 (1803).
13. *Bayard*, 1 N.C. (Mart.) at 6-7.
14. State *ex rel.* Wallace v. Bone, 304 N.C. 591, 599, 286 S.E.2d 79, 84 (1982).

cepted. Property teachers know better than most about the weird legacies of too long a history: the fee tail[15] and the Rule in Shelley's Case,[16] to name just two. Other disciplines have a few relics of their own, of course, often just as bizarre but less obvious because they are dressed up in the latest fashion. To quote myself once more: "It is much easier to make fun of the past than of the present, but much less important."[17]

One of the prime reasons, then, for thinking about the past is that it gives us a new viewpoint on the present; putting it irreverently, it empowers us to make fun of the present, humor depending almost wholly upon one's point of view. I will stake my soul that right up there with "fear of the Lord" at the beginning of wisdom is a sense of humor, and the sense of perspective it provides. Examples of what I have in mind abound, although you have heard less of them, for the same reason that we are more likely to make jokes about our parents' eccentricities than about our own.

We may begin with an example itself drawn from the past. A hundred years ago the system known as workmen's compensation was a new idea, and many lawyers and judges thought it unconstitutional because it took property from one and gave it to another without regard to fault.[18] Oliver Wendell Holmes in a characteristic passage had foreseen the system with its "tariff for life and limb"[19]—so much for an arm, a leg, an eye—and compared it to ancient legal systems; workmen's compensation was, he observed, like the *leges barbarorum*.[20] Nothing, he implied, was

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15. *See* John V. Orth, *Does the Fee Tail Exist in North Carolina?*, 23 WAKE FOREST L. REV. 767 (1988).

16. *See* John V. Orth, *Requiem for the Rule in Shelley's Case*, 67 N.C. L. REV. 681 (1989).

17. *Id.* at 687.

18. *See, e.g.*, Ives v. South Buffalo Ry., 201 N.Y. 271, 317, 94 N.E. 431, 448 (1911).

19. O. W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 467 (1897).

20. The *leges barbarorum* were the "laws of the barbarians," so called to distinguish them from the *leges Romanae*, the "laws of the Romans." The earliest Anglo-Saxon legal compilation was the Laws of Ethelbert, promulgated about 600 A.D.

> Ethelbert's laws are remarkable for the extraordinarily detailed schedules of tariffs established for various injuries: so much for the loss of a leg, so much for an eye, so much if the victim was a slave, so much if he was a freeman, so much if he was a priest. The four front teeth were worth six shillings each, the teeth next to them four, the other teeth one; thumbs, thumbnails, forefingers, middle fingers, ring fingers, little fingers, and their respective fingernails were all distinguished, and a separate price, called a *bot*, was set for each. Similar distinctions were made among ears whose hearing was destroyed, ears cut off, ears pierced, and ears lacerated; among bones laid bare, bones damaged, bones broken, skulls broken, shoulders disabled, chins broken, collar bones broken, arms broken, thighs broken, and ribs broken; and among bruises outside the clothing, bruises under the clothing, and bruises which did not show black.

HAROLD BERMAN, LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION 54 (1983).

new under the sun—at least to one learned in the past. This was one of the reasons Holmes could transcend the furious certainties of his brethren on the bench. It permitted his famous detachment and tolerance; it helped to make him Olympian.

Let us come closer to home. Starting in the District of Columbia in the 1970s courts and legislatures suddenly began to read a warranty of habitability into residential leases. This departure was frequently explained by confident references to increased apartment dwelling, the demise of the agrarian tenant (supposedly a "jack of all trades" able to repair the leasehold), and even the decline of feudalism.[21] Few legal logicians seemed to realize that while all the changes mentioned had occurred before the doctrinal development, some had occurred so long before it as to render such explanations implausible. Could it be that the cause was not so remote? Without the federally funded legal services for the poor that became available in the 1960s, would the other causes have been sufficient to break the hardened wax of old doctrine?[22] I doubt it.

A few years ago one heard much about how busy the United States Supreme Court was. Chief Justice Warren Burger was in full cry on every occasion about how he and the brethren were overworked. To one who knew something about legal history it presented an odd contrast to the old common law courts in England, where judges for centuries complained just as loudly about not being busy enough. The explanation, as I have pointed out elsewhere, was that in those earlier days the judges reaped a sizeable part of their income from court fees that litigants paid.[23] Could it be that if judicial compensation today depended on output, we would hear less about judicial overload?

In the early 1980s the federal government experimented with block grants to the states. In North Carolina, the governor and general assembly squabbled about who should receive the money, and the justices of the state supreme court were asked by the parties for an advisory opinion.[24] Should someone knowledgeable in constitutional history have reminded them about how much blood had been spilled to secure for the legislature the power of the purse? Would a state governor with extra-legislative money to spend resemble the Stuart kings who threatened

21. Javins v. First Nat'l Realty Corp., 428 F.2d 1071, 1074 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970).

22. *See* AMERICAN LAW OF PROPERTY § 3.45 n.12 (Supp. 1977).

23. John V. Orth, *A Reverie on Medieval Judges, Milton Friedman, and the Supreme Court's Workload*, 69 A.B.A. J. 1454, 1458 (1983).

24. Advisory Opinion *in re* Separation of Powers, 305 N.C. 767, 295 S.E.2d 589 (1982). *See* John V. Orth, *"Forever Separate and Distinct": Separation of Powers in North Carolina*, 62 N.C. L. REV. 1, 19-23 (1983).

England's tradition of consultative government? And what about the state supreme court? Was there something odd (or even comic) about a court with no express constitutional or statutory authority solemnly lecturing the other branches on separation of powers? Because the "case or controversy" requirement that all other American courts observe was intended to keep the judiciary within its proper sphere, is there not something more than faintly oxymoronic about the caption *Advisory Opinion in re Separation of Powers*?[25]

One final example. A few years ago the federal courts began to wrestle with the difficult question of the free speech rights of artists. As you might have guessed, given our society's special concern with one part of human anatomy, the artwork in question involved the representation of nudes. Long before Robert Mapplethorpe there was a university art instructor who produced paintings in which human genitalia were depicted in what was described by the court as "clinical detail."[26] The work was removed from display in the student union, and the artist was denied First Amendment protection.[27] I for one was struck by the fact that it seemed to be held against this aspiring Michelangelo that his artwork was anatomically accurate. The history of Renaissance art, surely one of the West's crowning cultural achievements, was the story of hard-won victories to achieve perspective and "clinical detail." In a famous passage Justice Holmes once lectured his colleagues about reading into the Constitution the economics of Mr. Herbert Spencer.[28] Are we condemned to endure the fate—arguably more awful—of seeing our Constitution incorporate the coy aesthetics of Maxfield Parrish?

What I am suggesting, of course, is that we subject the present to the same process of radical inquiry that we are so certain would have been beneficial for our ancestors. Just as law students long ago should have challenged their torts teachers on the point of whether workers really assumed the risk of injury from the fault of fellow servants, and just as law students in the first half of the twentieth century should have challenged their constitutional law teachers on the point of whether racially separate education really was equal, so students today should be challenging their teachers on the most pervasive commonplaces—everything from the need for consideration in contract to the presuppositions of "reasonableness" in tort, even to the point of asking whether the current

25. The court may have seen the joke. *See* State *ex rel.* Martin v. Preston, 325 N.C. 438, 454, 385 S.E.2d 473, 481 (1989) (referring to "advisory opinions *formerly* issued on occasion by this Court") (emphasis added).

26. Close v. Lederle, 424 F.2d 988, 989-90 (1st Cir.), *cert. denied*, 400 U.S. 903 (1970).

27. *Id.*

28. Lochner v. New York, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting).

emphasis on individual rights has begun to frustrate humanity's deep need for community. To quote Holmes again—one of his choicest observations—"To have doubted one's own first principles is the mark of a civilized man."[29]

History is a veritable storehouse of such seditious questions. This is not to say, of course, that other avenues of attack are not provided by other disciplines. Logic alone, unaided by history, can mount powerful offensives. But logic is most persuasive when operating within the assumptions of the opponent. Consistency, in other words, is logic's strongest suit. Once outside or at odds with the opponent's assumptions, logic generally fails to persuade. What ensues is the famous (and famously unproductive) dialogue of the deaf. But the logic of history is not the logic of logic. We are all inheritors of our muddled past and therefore our allies from the past are already within the gates, so to speak.

For the conduct of legal education, legal history has its own valuable contributions. An old law professor's game is quickly to stake out a logical position and then defy all challengers more or less obnoxiously. History punctures the pretense, not just with its myriad examples of ancient and honorable civility; it also demonstrates how many such loudmouths were wrong in the past. Because history is far less likely than logic to deal in absolutes, it trains its devotees in the fine and humbling art of balancing uncertainties without being paralyzed by them.

29. *Quoted in* JEROME FRANK, LAW AND THE MODERN MIND 274 (1930).