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Roscoe Pound

Harvard Law School

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NEW POSSIBILITIES OF OLD MATERIALS OF AMERICAN LEGAL HISTORY*

Roscoe Pound**

More than once in the mining country it has been found profitable to work over the old dumps of tailings, the debris rejected by the first miners after extracting what they had found in the first workings and left as they went to push on to new diggings. After a time new diggings became scarce or yielded little and miners came back to and relocated the old dumps and found them profitable. With new and improved methods, some of them have been worked over more than once to good purpose.

In the writing of the history of American law, I do not say that the old materials have been worked over even once, much less that new diggings have become in the least scarce or unprofitable. We need both to discover new materials and utilize them and to make new uses of old materials. Such legal historians as Ames and Thayer and Wigmore have worked before us upon the reports and the statutes. But they worked for special purposes — for the light which the reports and statutes could throw upon problems of equity and public law and torts and evidence. Some must be busy locating new diggings and working them. Some may profitably go back to the materials with which the pioneer American legal historians worked and go over them for new purposes and with new methods.

There is no absolute history any more than, from an earthly standpoint, there is any absolute anything else. No bit of history

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** Dean of the Law School, Harvard University.
will ever be told once for all. The choice of things to tell and things to reject, the picking out of this as significant and passing by that as insignificant will be determined by the purposes of some time and place and will not fit the purposes of some other time and place for which the story will have to be retold. The nineteenth century called for a legal history which should give stability to the legal order through showing us how experience of life gave principles tried by experience of decision which were then formulated by juristic writing and legislation and further developed by judicial decision. Thus history was to show us principles of legal growth and help us chart the orbit of legal change. The twentieth century calls for a legal history which shall tell us of the origin and shaping of the legal materials which we are to reshape to the ends of today and tomorrow; how they have grown out of old ends and may be fitted to new ones, and how and how far we may proceed to develop them with some assurance of bringing about the results we seek.

What shall we say, then, is the history of American law which the jurists and practitioners and judges and lawmakers of tomorrow are going to ask of us? First they will want, as did the last century, what has been called an external history of our law, that is, a history of American legal and judicial and administrative institutions. Second, as did the last century in Continental Europe, they will want what used to be called an internal history, that is, a history of the authoritative materials of judicial and administrative action, as they had taken form in America at the end of the nineteenth century, including both the legislative and the traditional or judicially developed materials, and no less the juristically developed materials, as taken up in legislation and adjudication. Third, they will call for something of which the legal history of the last century had nothing to say, namely, a history of the judicial process in America. But these three things cannot be separated. Moreover, they need to be treated as part of a history of social control in America. One might even go further and say that this history of social control must be thought of in its place as part of the history of civilization in America, and that as part of the history of civilization of the western world. There is, however, such a thing as too much perspective. It is enough to think of a complete history of American law as a phase or part of social control in America. This is task enough and many must labor long at the foundations before it is written. The
size of the task is one reason why the history of American law has not been written.

Another reason is to be found in what Maitland called "the traditional isolation of English law from every other study." We inherited this tradition of isolation. True in the United States the universities took up professional training in law in name as far back as the end of the eighteenth century and took it up in actual endeavor certainly one hundred years ago. But the tradition of isolation lost little of its strength. Along with the tradition of apprentice training and the feeling that the common law is something apart, which came in after the Reformation and held the ground down to the nineteenth century as a political tenet, it has stood in the way of any thoroughgoing teamwork of historians and lawyers in our universities.

While the historians are at work preparing for this history of American law by discovering and making accessible records and documents, the lawyer-historian may be at work on the law reports and the statute books. American legal history suffers from the gulf in common-law thinking between legislation and the traditional law. If the lay historian sometimes gives too much faith and credit to legislative lawmaking, the lawyer-historian has been prone to give too little. He is likely to think of a growth of the law through judicial decision as the significant thing, and to overlook the creative role of legislation in our formative era. Nor is it going to be easy for him to work with the statutes as historical sources by running back from the law of the present, as Maitland saw we must do. Professor Philbrick has pointed out, and the point cannot be emphasized too much, that we sorely need a new edition of or better a new work on the general idea of Stimson's American Statute Law, in which the types of American statutes on the important subjects of private law are set forth with notes tracing their historical origin, the history of their migrations, and the details of local variations. No histories of local legislation will achieve much without this foundation.

Lawyer-historians are thoroughly familiar with and know how to use reports and statutes. They are competent to use these sources for doctrinal history, social history, economic history, what one might call systematic history, and institutional history, in preparation for the historian who will some day gather all these up into the history of American law upon which the students
and the law reformers and the jurists and the lawmakers of the future will be able to build for a long time to come.

As to doctrinal history, much has been done which lies buried in the notes of many of the older case books. Much of the beginnings will be found between the lines in Tucker's Blackstone and Kent's Commentaries. We must not forget that there was to no small extent a doctrinal as well as institutional new start after the Revolution. Many of the strongest lawyers of the colonial era were royalists, even though they had taken the lead in legal opposition or resistance to the royal governors and the acts of Parliament to which the colonists objected. In Massachusetts in 1779 there were only fourteen lawyers left who had been at the bar before the Revolution. Maryland, Pennsylvania, New York, and New Jersey lost some of their notable lawyers and many of the better type. We know of at least 130, who were of sufficient consequence to be named, who left the country. Those who remained were, as a general rule, of less standing, and after the Revolution their places were taken largely by men who came from the army and entered upon the practice with relatively less training. Comparison of the law reports after the Revolution with the colonial materials shows how complete the break often was, and this comparison needs to be carried out for many subjects of private law as well as for legal institutions.

Another item toward our doctrinal history, on which lawyers may be working from the reports and statutes, is the development and unifying of equity after Kent and Story and the counter influences which led later to a decadence of equity, particularly the apprentice type of law school with its exaltation of local law and the unified procedure after 1847. Others are the development and decadence of spheres of influence of particular courts and of particular jurisdictions as to their legislation; the spheres of influence of particular teaching traditions, e.g., those of the Litchfield school, of the law office teachers of Massachusetts at the end of the eighteenth and beginning of the nineteenth century, of Story and Minor, and Dwight and Walker; the influence of the academic text writers, Story, Greenleaf, Parsons, Washburn, Cooley, and Pomeroy, for example; the non-academic texts of influence, such as those of Bishop and Dillon and Thompson; the decadence of text writing and rise of cyclopaedias, and the revival of text writing in the present century as shown by the works of Wigmore and Williston; the decadence of reporting under the
regime of written opinions with judicial statements of the facts and even judicial headnotes and the resulting profusion and exaltation of dicta, to the confusion of more than one subject of the law. Especially the lawyer-historian might profitably study the era of hack writing of law books; the writing of books from slips cut out of digests, without the labor of consulting the reports, both as a result and as a cause of uncritically trained practitioners seeking the short way to persuade courts wrestling with crowded dockets affording no time for thorough argument.

All these things may be studied from the reports and the text books.

Mr. Justice Miller, when asked what had been the chief factor in the development of the law in the pioneer jurisdictions of the West after the Civil War, answered: "Ignorance; the judges often did not know enough to do the wrong thing, so they did the right thing." A study of this phenomenon from the reports of those states would be enlightening.

Turning to social history of the law, it should go hand in hand with the doctrinal history and will be based on the same materials studied by the lawyer with the help of social scientists and historians of American society. Work of this sort is especially needed in criminal law and criminal procedure. Except as lawyer, criminalist, economist and sociologist work together upon the rich materials of which our reports and session laws are full, the history of American criminal law will not achieve its greatest possibilities.

One may say much the same as to economic history of our law. We sorely need such a history. So long as there is nothing better — or rather less bad — students will continue to turn to such things as Myers's History of the Supreme Court with its accumulated pretentious misinformation. The little that has been done from this standpoint, Brooks Adams's history of animus, Bohlen's economic interpretation of liability without fault, the discussions of contributory negligence and assumption of risk in connection with respondeat superior, but show us how much we need thoroughgoing historical-economic doctrinal studies, such as Wigmore's interpretation of the English and American law as to confessions, in every field of the legal order.

An untitled field, which the lawyer may cultivate with much profit from the reports is what might be called systematic history. Professor Goodhart has pointed out how a marked difference has
grown up between the English and the American technique of finding the grounds of judicial decision in the authoritative legal materials. The history of our American technique, the use of the old English books, the use of English reports before and after the Revolution, the use of text books, good and bad, the use of cyclopaedias, the use of decisions of other states and the influence of social utilitarianism in the present century and its consequence in some quarters in imitation of administrative methods and guidance by administrative ideals — all these things, studied from the reports from the Revolution to the present day, will throw much more light on the judicial process than a priori reasoning about the abstract judge on the basis of behaviorist psychology. Along with this should go study, also from the reports, of the rise and fixation of the received ideals of the American bench and bar.

Institutional legal history is the type which has appealed chiefly to English and Americans. But there is much to be done by lawyers from the reports and statutes in preparation for our history of American law. Our mining law affords an almost unique example in modern times of lawmaking by custom of popular action. The session laws, reports, proceedings of bar associations, and reminiscences and memoirs of lawyers and judges afford the material for a history of jury trial in the United States after the North Carolina Statute of 1795 and the struggle between habitual plaintiff’s lawyers and habitual defenders which has so profoundly affected the methods and practices of our courts. No history of American law will be adequate unless the way is prepared for it by history of the organization, training, and traditions of the American lawyer and the influence of these things upon the development of our legal institutions and legal doctrines. These things also are to be studied from the statutes and reports, along with the memorials of judges and lawyers in the reports, the reminiscences and memoirs of judges and lawyers, the proceedings of bar associations, and the histories of local bars.

History of legislation deserves special attention from lawyers. Lawyer and economist must co-operate in a history of the Adullamite legislation of frontier jurisdictions, which has left its mark on the administration of justice in many states. The lawyer alone may study how creative legislation on some point, beginning somewhere, gradually by copying or imitation or adaptation spreads over the country; how it then becomes covered with
a judicial gloss in which courts more and more come to find the grounds of decision, taking the gloss to be universal, so that decisions anywhere on that sort of statute pass current as authority everywhere; and how thus we get an American common law on a statutory basis. Every teacher of law has seen some part of this process in his study of some special point of law. The whole process is no small item in the growth of our law.

Just now it is fashionable in a common type of juristic thinking to make light of history, much as it was in the eighteenth century and for much the same reason. But the method of the historical school and historical method are not the same thing. Presently there will be need to find a basis for stability as well as to make room for change, and a school which seeks to reconcile stability and change on the basis of history may play no less a part in the law of the twentieth century than the historical school did in that of the nineteenth.