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Dusty Books and Living History: Why All Those Old State Reports Really Matter

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Professor LaPiana discusses the importance of the law found in colonial and state court reports for the development of constitutional law, criminal law in the antebellum period, and the Reconstruction era amendments. He urges the use of law reports by both legal and intellectual historians.

This brief article attempts to justify why old state court records of the antebellum period[1] deserve a closer examination by American historians. These reports form part of the collection of every academic law library in the United States. The court opinions contained in these often dusty and seldom-used volumes are an excellent and largely untapped source for the intellectual history of the age, a history that may be able to tell us a good deal about the American constitutional tradition.

The Constitution as framed in Philadelphia two hundred years ago was first and foremost a plan for a government of limited powers. Even with the addition of the Bill of Rights (an addition that most of the framers believed to be at best superfluous, and in which they acquiesced in order to quiet what they saw as the unreasonable fears of some antifederalists), the Constitution did not and could not embody everything that could be said about American liberty. The Bill of Rights itself clearly states in the Ninth Amendment that "[t]he enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people."

Just what those rights were was a legal question subject to debate. At least part of the reason for the revolution was a desire to guarantee to Americans the precious history of freedom as embodied in the English common law. The common law as the embodiment of English freedom was, to some degree, the product of English political conflict. But whether or not it agrees with the canons of historical scholarship, it is hard to deny

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1. Specifically, from the Revolution until the end of Reconstruction.

that "[t]he values of the 'ancient constitution' were properly a colonial birthright, and they were intensified both by their validity in the brief American experience and their mimicry during the pervasive Anglicization of early eighteenth-century America."[2]

The close connection between common law and the Constitution did not end with the Revolution. Both before and after the ratification of the Constitution, the common law as applied by American courts continued to embody the core values of American life. Antebellum legal science was devoted to discovering and elucidating the principles of law that were proper for the new republic. This proposition carried with it at least a partial rejection of the idea of instrumentalism in antebellum law. The concept of instrumentalism was invoked by Morton Horwitz in his seminal work, *The Transformation of American Law*, to explain the use of common law rules to promote economic growth in the period before the Civil War.[3] Professor Horwitz's thesis is that one legacy of the Revolution was the understanding that judges make law rather than declare it. This realization abetted activist judges, who consciously shaped private law rules to throw the cost of economic development on the backs of those least able to bear it.

Whatever the economic consequences of the rules developed by the American courts in this period, the intellectual approach to law was based on the belief that the rules of private law—the rules that governed the daily relations of people in the world— were governed by principles that existed in a realm that judges explored, rather than one they created. For legal thinkers of the period, the principles of the law were no different from the principles of any other science. These principles were part of nature and could be explored by investigating the facts of their operation in the world. When enough facts were understood through careful observation and classification, principles could be accurately induced.

This Baconian method was the dominant approach to science in the Anglo-American world at this time.[4] Its goal was to describe Nature accurately; that, in turn, was the key to understanding the Creator. It is not an exaggeration to say that the goal of the antebellum legal scientist was understanding the mind of God. God created the rules governing human

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2. Katz, *The American Constitution: A Revolutionary Interpretation*, in BEYOND CONFEDERATION: ORIGINS OF THE CONSTITUTION AND AMERICAN NATIONAL IDENTITY 36-37 (R. Beeman, S. Botein & E. Carter eds. 1987).

3. M. HORWITZ, THE TRANFORMATION OF AMERICAN LAW, 1780-1860, at 16-30 (1977).

4. *See generally* G. DANIELS, AMERICAN SCIENCE IN THE AGE OF JACKSON (1968); T. BOZEMAN, PROTESTANTISM IN AN AGE OF SCIENCE: THE BACONIAN IDEAL AND ANTEBELLUM RELIGIOUS THOUGHT (1977).

life, just as He had created the rules governing the movements of the heavenly bodies.

Seen in this light, the nature of antebellum law takes on a slightly different shape, as does the interpretation of events and writings important to the instrumentalist thesis. One such interpretation involves the controversy over the role of the common law in the federal courts, specifically the common law of crimes. The question was whether the federal courts could entertain prosecutions for activity proscribed only by the common law. Professor Horwitz considers this debate an important intellectual event in the destruction of the theory of declaratory judging.[5] Once people understood that judges could arbitrarily create crimes, it was but a short journey to the conclusion that judges arbitrarily created all legal rules.

Those involved in the controversy, however, drew a distinction between the common law of crimes and the common law of private civil relations. Criminal law played a special role in the young republic. First, there was a strong belief that enlightened thought required criminal law to be statutory; the common law of crimes was considered crude and barbaric. Only a rationally constructed system could foster the proper ends of criminal law and create better men and a better society. More important to the debate, however, was the simple fact that the common law of crimes was the vehicle by which the government could intervene in a citizen's life and deprive him or her of liberty, property, and life itself. It could be an engine of oppression: what better tool for a tyrant than to be able to decide ex post facto that certain behavior was criminal? Criminal law thus should be written and accessible, and not allowed to reside in the bosom of the judges.

One of the most eloquent advocates of the position that a person should not be prosecuted for a crime unless it is specifically proscribed by statute was John Milton Goodenow. Yet, Goodenow had no trouble simultaneously believing that the common law of private relationships was perfect and transcendent. He blasted an Ohio court for punishing a crime not defined by statute,[6] but proclaimed his faith in the law "of *meum and tuum*," based on "[natural] justice and right reason, [which] are the same in all countries and all ages."[7]

Gulian Verplanck expressed a similar point of view in *An Essay on the Doctrine of Contracts: Being an Inquiry How Contracts Are Affected in*

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5. M. HORWITZ, *supra* note 3, at 9-16.

6. J. GOODENOW, HISTORICAL SKETCHES OF THE PRINCIPLES AND MAXIMS OF AMERICAN JURISPRUDENCE 35 (1819 & photo. reprint 1972).

7. *Id.* at 36.

Law and Morals by Concealment, Error, or Inadequate Price, published in 1825. Verplanck was deeply worried by the question posed in the title of his book. He acknowledged that certain moral duties cannot be enforced by law. Yet he formulated several principles that were based on the belief that the degree of fair dealing necessary in ordinary transactions is "perfectly well understood"[8] and that "the doctrines of sound legal ethics, and those of a strict and enlighted private honesty, must always run together, except so far as the former are modified by necessity,"[9] which does not happen often. While Verplanck sanctioned the legal recognition of some sorts of superior bargaining power and accepted the market economy, he also believed in the existence of moral principles to which law must conform.[10]

Joseph Story took a similar approach to understanding the nature of the common law, at least as it governed private affairs. He admired Lord Bacon's "method of induction, that is, . . . a minute examination of facts, or what may properly be called experimental philosophy."[11] This philosophy had liberated Bacon's age from the bondage of the intellectual timidity that led fearful men to imprison Galileo and to reject Newton.[12] Story's belief in a transcendent body of law investigated through Baconian scientific method is clearly seen even in his treatise on the conflicts of laws.[13] At first glance, the treatise seems to be predicated on the notion that laws differ among nations simply because different bodies of men make different laws. A closer reading of the justice's work, however, reveals that he believed, with Montesquieu, that the laws of a nation conformed to its "spirit" and that, for commercial nations like the United States, it was the judges' duty to investigate and apply the body of appropriate laws that existed.[14]

If this reading of the antebellum idea of law and legal science is correct, the opinions recorded in those dusty books mentioned at the outset—assuming they are the practice of the contemporary idea of legal science—

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8. G. VERPLANCK, AN ESSAY ON THE DOCTRINE OF CONTRACTS 137 (1825 & photo. reprint 1972).

9. *Id.* at 173.

10. *Id.* at 156-74. Professor Horwitz places sole emphasis on the pro-market aspects of Verplanck's work and his acceptance of the subjectivity of price. M. HORWITZ, *supra* note 3, at 181-83.

11. J. STORY, *Developments of Science and Mechanic Art*, in THE MISCELLANEOUS WRITINGS OF JOSEPH STORY 475, 479 (W. Story ed. 1852 & photo. reprint 1972).

12. J. STORY, *Characteristics of the Age*, in *id.* at 340, 350-51.

13. J. STORY, COMMENTARIES OF THE CONFLICT OF LAWS, FOREIGN AND DOMESTIC, IN REGARD TO CONTRACTS, RIGHTS, AND REMEDIES, AND ESPECIALLY IN REGARD TO MARRIAGES, DIVORCES, WILLS, SUCCESSIONS, AND JUDGMENTS (1834).

14. The argument made in this and the preceding sentences is elaborated at length in LaPiana, *Swift v. Tyson and the Brooding Omnipresence in the Sky: An Investigation of the Idea of Law in Antebellum America*, 20 SUFFOLK U.L. REV. 771 (1986).

are of particular worth for understanding the American mind. The essence of American liberty existed not in the guarantees of the Constitution (most of which, of course, did not even apply to the states until relatively recent times) but in the common law itself. The problems faced in these state court cases, therefore, often deal with the most basic issues of American life. For example, in investigating the state court response to Story's opinion in *Swift v. Tyson*, one can find discussions of the relative roles of commerce and agriculture in American life in the course of deciding questions of negotiability.[15] Mark Tushnet has used the private law of the antebellum South to sketch the development of a system of law centered on the perpetuation of slavery, the basic premises of which diverge in interesting ways from the law developing at the same time in the North.[16] Paul Finkelman has used cases about the private law of slavery to paint a fascinating picture of legal dissolution of the Union, well under way long before Fort Sumter.[17]

While these last two examples of historical investigation based on antebellum case law are both well done and well known, they stand almost alone in their broad approach to the sources. Most investigations of the antebellum case record seem to be shaped by the questions Professor Horwitz first asked. Several investigators have tried to test his hypotheses further.[18] Such work is important, and the contribution Professor Horwitz has made in turning attention to the role of law in economic development has been of major importance in forming the entire field of American legal history.

Historians outside the law school, however, also should be interested in the old reporters. Intellectual historians should find much grist for their mills in these documents. Court opinions are a very real part of the thought of their times and have the unique quality of being written to state the "truth" persuasively in order to settle real disputes. More importantly, these materials are relatively accessible, at least as historical materials go.[19]

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15. This point is more fully discussed in *id.*

16. M. TUSHNET, THE AMERICAN LAW OF SLAVERY, 1810-1860 (1981).

17. P. FINKELMAN, AN IMPERFECT UNION (1981). *See also* P. FINKELMAN, THE LAW OF FREEDOM AND BONDAGE: A CASEBOOK (1986).

18. *See, e.g.*, Scheiber, *Public Rights and the Rule of Law in American Legal History*, 72 CALIF. L. REV. 217 (1984); Schwartz, *Tort Law and the Economy in Nineteenth-Century America: A Reinterpretation*, 90 YALE L.J. 1717 (1981); Note, *Eminent Domain in Indiana: 1816-1865*, 54 IND. L.J. 427 (1979); Freyer, *Antebellum Commerical Law: Common Law Approaches to Secured Transactions*, 70 KY. L.J. 593 (1981-82).

19. The definition of the common law as "chaos with an index" was first coined by T.E. Holland. *See Questions & Answers*, 79 LAW LIBR. J. 599, 599-601 (1987). The usual assumption is that the definition is uttered by lawyers with a certain weary resignation. The historian, however, should utter the same phrase with a different inflection: "Chaos, but with an index!"

Much of the antebellum case record has been digested, both at the time of original publication and at the time of republication in the later nineteenth century, when many of these books were considered somewhat rare. In addition, many of these reprints contain more or less extensive notes and cross-references, which are of great help in tracing the treatment of a particular point. The digests have to be used with care and often are not classified in particularly useful ways. Many of the early cases deal solely with points of pleading—an interesting study in itself, of course—and many others are grouped by fact pattern rather than concepts. On the whole, however, the existing case finding tools should be of great help.

How then does this repository of thought about private law shed light on the document that still forms the basis of our federal government? There is a relationship between the history of American thought revealed in these early cases and the understanding of the Constitution. The document written in Philadelphia two hundred years ago was an experiment. The government it created was something new in the Western world. Exactly how it would work and how it would govern the lives of the new nation's citizens was left to the trial of experience.[20] Private rights had to be adjusted, both in relation to others' private rights and the rights of the public. This balancing act, which took place between the ratification of the Constitution and the end of the Civil War, shaped American ideas of ordered liberty.

In addition, experience in both state and federal antebellum courts was the legal heritage of the framers of the Reconstruction Amendments, which to a great degree remade the Constitution.[21] The language they used, especially in the Fourteenth Amendment, perhaps can be illuminated by a careful examination of the legal context in which the framers of the amendments lived. In fact, the intentions of the framers of these crucial amendments may be more relevant to our interpretation of the Constitution than that of the original Framers of 1787. Certainly, the men of the Reconstruction Congresses and of the state legislatures that adopted the Thirteenth, Fourteenth, and Fifteenth Amendments had the advantage of having seen how the new republic had developed. They also believed that the end of the Civil War had given the nation, at least in part, a new beginning. This perspective may have given them more definite ideas about the influence of their work on the future of American life, and their views are worth investigating for that reason as well.

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20. For a careful recent discussion of this point, see Richards, *Constitutional Legitimacy and Constitutional Privacy*, 61 N.Y.U.L. REV. 800, 811-32 (1986).

21. Kaczorowski, *Revolutionary Constitutionalism in the Era of the Civil War and Reconstruction*, 61 N.Y.U.L. REV. 863 (1986).

There is yet another reason to encourage investigation of the antebellum idea of law. Even if we give up on trying to determine the relevance of "original intent," it is still important for us as Americans to try to understand how our ancestors understood the meaning of American life. Unlike many other countries, which share a common culture, all we Americans have is our history: ethnically and religiously diverse, we have nothing else to bind us. In fact, we have long invited other people to become Americans (with some regrettable exceptions) by adhering to our history and by subscribing to the concepts of liberty on which our nation presumably was founded. We are a created people, an artifact, held together by ideas of what our nation is all about.

Consequently, we tend to carry on our political discourse in terms of history. Richard Epstein, for example, recently attempted to define property rights that cannot be taken without compensation by referring to nineteenth century torts cases. Much of the work on which Professor Horwitz built—Hartz's work on Pennsylvania[22] and the Handlins' investigations of Massachusetts[23]—was produced in a conscious effort to show that state intervention in the economy was not an idea new to the 1930s. Today, of course, we debate the "original intent" of the Framers of the Constitution, a concept that was discussed publicly during the hearings on Robert Bork's nomination to the Supreme Court.

In such an intellectual atmosphere, it seems almost self- evident that we need a thorough understanding of what our ancestors thought about the basic qualities of American life. Their response to change should tell us something about our own. The extent to which they applied and molded the principles of the common law should speak to our need to formulate some balance between what should and should not change in our concepts of constitutional liberty. Their thought is locked up in those dusty books on the shelves of law libraries all over America. The time has come to dust them off and use them.

22. L. HARTZ, ECONOMIC POLICY AND DEMOCRATIC THOUGHT: PENNSYLVANIA, 1776-1860 (1948).
23. O. HANDLIN & M. HANDLIN, COMMONWEALTH: MASSACHUSETTS 1774-1861 (1947).