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THE HUMAN COMEDY IN LEGAL HISTORY

FREDERICK BERNAYS WIENER*

It is unnecessary to insist that history involves more than antiquarianism, what John Selden called the "sterile part of antiquity";¹ or that historical study concerns neither the seeking out of quaintness nor research simply for the sake of research; or finally, in the words of Mr. Justices Holmes, that "our only interest in the past is for the light it throws upon the present."²

But in these days when resort is increasingly made to emotion and passion, in seeking to solve the insistent and ever more complex problems of a nation that is becoming more crowded with each passing year, it is well to seek a return to reason and to rational processes. To quote a very wise man, the late Mr. Justice Frankfurter, "we . . . know how slender a reed is reason—how recent its emergence in men, how deep the countervailing instincts and passions, how treacherous the whole rational process."³ And when we contemplate "the opportunities for arousing passions, confusing judgment, and regimenting opinion, that are furnished by chain newspapers, cheap magazines, the movies, and radio"⁴ ("and," he would doubtless have added, had this been written a few decades later, "by that monstrous perversion for the dissemination of prejudice, cheap television"), it would be optimistic indeed to suppose that an invitation to calm reflection on the lessons of the past would stem the tide.

None the less, it seems not only appropriate but potentially worthwhile to undertake the effort. What, then, are the essential lessons of legal history?

The first, it is submitted, is the realization that the most difficult prob-

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1. J. SELDEN, *Preface to HISTORY OF TITHES* (1617), quoted in Hazeltine, *Selden as Legal Historian: A Comment in Criticism and Appreciation*, 24 HARV. L. REV. 105, 112 (1910).

2. O. W. HOLMES, *The Path of the Law*, in COLLECTED LEGAL PAPERS 167, 194-95 (1920).

3. F. FRANKFURTER, *THE PUBLIC AND ITS GOVERNMENT* 128 (1930).

4. *Id.* at 127-28.

lems of all, justice, crime, social regulation, centralization versus decentralization, are never truly solved in the sense that their answers can be summarily stated and then conveniently collected at the back of the book, needing only reference thereto as occasion arises.

By way of illustration, let us take a single rather narrow issue, the problem of alcohol. That is a question not nearly so burning today as it was years ago. In those days the country was groping through the nightmare of prohibition, when constitutional balance and moral standards fell victim to a drastic solution that had been imposed by doctrinaires and bigots, and that was being continued by pusillanimous public men who, hiding behind the sweet-scented formula of "an experiment noble in purpose," lacked courage to advocate an obviously necessary change.

Ultimately, as the country passed through the terrible inferno of long-continued depression, prohibition was swept aside, and communities everywhere have since been free to hammer out their own solutions. Some areas still foster an uneasy compromise that requires diners to bring bottles with them in paper bags lest their morals and those of the surrounding neighborhood be irretrievably corrupted by permitting the purchase in restaurants of liquor by the drink.

What is emphasized by this example is that there is no single solution to the problem of alcohol. Nor will there ever be. Alcohol will always be with us—because its production by fermentation is a process of nature. Drinking, likewise, will always be with us, because both grain and grape provide a potion that relaxes, that exhilarates, and that, when savored to the full, brings on nirvana. There will always be excesses, there will always be alcoholics, and therefore there must always be regulation. And so the best we can ever hope for in this area is ad hoc adjustment in the reconciliation of competing interests. The basic problem will abide, forever defying any single, simple solution.

A second lesson of legal history is that we cannot rely entirely on doctrine alone, however well matured, however reasonable such doctrine at times appears to be—and in making that assertion it is not meant to question the classic paradox posed by Roscoe Pound, that "[L]aw must be stable and yet it cannot stand still."⁶ What is assumed for the remarks that follow is a process of gradual change, slow enough and wise enough to win general community acceptance. That is, law must be a reflection of the prevailing culture if it is to endure and survive.

In the past, a rather easy optimism has assumed that, given a sensible,

5. R. POUND, *INTERPRETATIONS OF LEGAL HISTORY* 1 (1923).

self-contained body of law, one which embraced within itself capacity for growth, such a system was bound to flourish in any soil and need not fear rejection because it was a transplant. If one wishes to examine not only an articulated but a beautifully written example of such optimism, expressed with calm assurance, he cannot do better than to read a series of Sir Frederick Pollock's lectures, delivered in 1895 and 1903, which is entitled *The Expansion of the Common Law*.⁶

For this was an era when the most profound English-speaking lawyers everywhere saw the jurist's task primarily as one of ascertaining and finding that brooding omnipresence in the sky, "The Law"; when the Supreme Court of the United States still had a substantial common law jurisdiction arising out of diversity cases; when the British Empire had reached its maximum expansion (except for the mandates it received after the end of the First World War); and when controversy between Briton and Boer in South Africa, like that between United Empire Loyalist and *habitant* in Canada, had subsided, and was thought to have ceased.

Today, over two generations later, we see a completely transformed legal world. Our Supreme Court rarely deals with common law questions, even in the guise of general law, having realized at long last that law is a set of rules deriving from an identifiable sovereign. The author waives the opportunity afforded at this juncture of defending *Erie R.R. v. Tompkins*⁷ by recalling to its critics their studied oversight of the *Black & White Taxicab* case.⁸ The British Empire which, when Pollock spoke, seemed to have solved these problems of autonomy and of local self-government on which it notably foundered when Williamsburg was Seat of Empire in His Majesty's Royal Province of Virginia, has been falling apart before our very eyes. Nor did the inoculation of common law take hold; to the contrary, the common law of whose expansion Pollock so confidently spoke has perceptibly receded. Canada appears to be in an endemic state of imminent dissolution, an amazingly large portion of its people still unreconciled to its cession to Britain more than two centuries ago; South Africa is a republic outside the Commonwealth, with enacted laws that reflect the least admirable features of the grimmest of Old Testament tribal exclusiveness; while elsewhere in what was British Africa the barbarous Biafran war in the former Crown Colony of Nigeria joins with the Nkrumah regime in Ghana, where the rule of law was transformed

6. F. POLLOCK, *THE EXPANSION OF THE COMMON LAW* (1904).

7. 304 U.S. 64 (1938).

8. *Black & White Taxicab Co. v. Brown & Yellow Taxicab Co.*, 276 U.S. 518 (1928).

into the unpredictable whim of one man's paranoid will, in evidencing the frightening thinness of such legal veneer as was left behind when colonialism ended.

Can we in this country therefore assume as axiomatic that the law we inherited from England and that we now have developed independently for well nigh two centuries will be unquestionably accepted by all of those it governs, regardless of individual cultural background?

In the light of the instances just enumerated, it is suggested that much of the doctrinaire egalitarianism now current would be more realistic, more effective, and necessarily different, if its sponsors were only prepared to open their minds to those cultural factors whose very existence they so resolutely and so passionately deny.

A third lesson of legal history, indeed of all history, is that we stand to waste a great deal of energy, with the loss of much valuable time, if we fail to examine how matters were carried on in the past. It is only the fool who needs to learn by experience; the wise man learns from the experience of others. To quote John Dickinson of Delaware in the Constitutional Convention of 1787: "Experience must be our only guide. Reason may mislead us."⁹

A fourth and much more fully documented lesson of legal history is that reform is impossible without knowledge of the past. Holdsworth is our great teacher in that respect. He states in his *History*:

In an age which was inclined to despise the past, and to apply to the solution of its problems its own transient political theories and ideas, Burke was almost the only other thinker, besides Montesquieu and Blackstone, who saw that the present age was the outcome of the past, that the merits and defects of its institutions and its laws could not be appreciated without some reference to their history and that therefore present problems could not be understood except in the light of their history. This historical sense, coupled with a wide historical reading, made him acutely conscious of the difficulty of creating a civilized and ordered society, and impressed upon him a deep and almost mystic reverence for any set of institutions and laws which showed themselves able to master those anarchical forces which are ever threatening the existence of such a society.

. . . .

It followed that Burke distrusted all the abstract formulae, constructed by lawyers or political philosophers, and all their metaphysical discussions of rights. To his mind the history and the

9. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 278 (M. Farrand ed. 1911).

present circumstances of any given question were the matters first to be considered; and, since the history and circumstances of any given question were infinitely various, principles must be modified in their application to them, if a just solution was to be reached. Those who reasoned from abstract principles, without giving due weight to history and present circumstances, were, in his opinion, "metaphysically mad."¹⁰

Specifically, Lord Mansfield's reforms failed because, although "Lord Mansfield was perhaps the greatest legal genius of the eighteenth century," Holdsworth's own characterization,¹¹ he ignored history, thinking that——

the age in which he lived was the most enlightened age in the history of England; and that, since a great many of the binding precedents of the common law came from a barbarous, or, as the phrase then was, a "Gothic" age, they ought, if possible, to be moulded to meet the ideas of this age of enlightenment.¹²

So Mansfield's decisions were overruled by his successors, and it was not until the 1830's, when lawyers trained in the historical tradition took over the task, that the antiquated and worn-out procedural machinery of the law was swept away by legislation that effected few substantive changes.¹³

It is true that Holdsworth's *History of English Law* looks forbidding and formidable since there are sixteen volumes packed with solid learning. And it is also true that much of it is dated to the point of obsolescence; his revised volume 1, when last reissued in 1956, required an introductory essay of over seventy-five pages by way of supplementation; and his volume 2 badly needs a similar supplement to inform readers of all that has been newly discovered since 1922. The author realizes also that Holdsworth's volumes 3 and 7, which concern the fantastically complicated English land law, and his volume 9, which deals with common law and equity procedure, are, all of them, very heavy reading indeed.

But for those who heretofore have been frightened by the mere

10. W. S. HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 93-94 (1398) [hereinafter cited as *HOLDSWORTH HISTORY*].

11. W. S. HOLDSWORTH, *THE HISTORIANS OF ANGLO-AMERICAN LAW* 18 (1928).

12. *Id.* at 19.

13. *Id.* at 20-25; see also 7 *HOLDSWORTH HISTORY* 19-20; 8 *HOLDSWORTH HISTORY* 29-30; 12 *HOLDSWORTH HISTORY* 542-47, 555-56, 579-83, 595-601.

mention of Holdsworth, it is suggested that they start with volume 10, dealing with the eighteenth century, which according to an English historian still living is "the best brief survey" of that period, "a masterpiece in miniature."¹⁴ In volume 11 one finds as objective a discussion of the legal aspects of the American Revolution in terms of English public law as could be found anywhere.¹⁵ Volume 12 covers the professional organization, the legal personalities, and the legal literature of the eighteenth century; volume 13 deals with the period 1793 to 1832; while the last few short volumes recite legal developments from the Reform Bill of 1832 to the Judicature Act of 1875. Except for isolated passages, one will find all of this very interesting, a good deal to the point of fascination.

True, much of the Tory is found in Holdsworth, some passages well-nigh incredible.¹⁶ But he wrote what others simply said and many

14. J. H. PLUMB, *ENGLAND IN THE EIGHTEENTH CENTURY* 215 (7 Pelican History of England, 1950).

15. 11 *HOLDSWORTH HISTORY* 107-39.

16. It is the greatest of the blots upon the system introduced in 1832 that it substituted uniformity for variety, and threw away the greatest of the safeguards against the gradual introduction of a democratic representation which, in effect, disfranchises the most enlightened classes, and thus introduces a vulgarity of tone into the discussion of public business, which tends to lower the political ability of the nation.

10 *HOLDSWORTH HISTORY* 565-66.

It is true that, even in these democratic days, distinguished descent and noble connections confer advantages. The son, or even the grandson, of a great statesman or a distinguished peer, starts political life with many advantages over a man of equal or even greater abilities and undistinguished descent. And it is probably good for the state that this should be so; for to the advantage of ability is added the advantage of education in an environment which, by reason of its contact with affairs, can convey, almost insensibly, an education in the art of their practical conduct.

Id. at 613.

The attempt which all democracies make to attain socialistic ideals necessarily makes the machinery of government far more complex; and at the same time the decline in the abilities of many of those whom democracy accepts as its leaders makes them less competent to control it. For these reasons the trained bureaucracy, who alone know how to work it, tend to gain more power. In fact, unless they took this power and kept it the realization of the socialistic ideals of a democracy would be impossible.

14 *HOLDSWORTH HISTORY* 138.

Nor has elementary education proved to be a remedy; for it has produced an electorate which is sufficiently literate to be deluded by specious argument; and is not, as a rule, sufficiently literate to discriminate between arguments which are specious and those which are sound.

Id. at 159. See also *Id.* at 152; 10 *HOLDSWORTH HISTORY* 602-03; 13 *HOLDSWORTH HISTORY* 257-59.

others only felt, and today, when we are witnessing such a frightening number of instances of disintegration from within, his emphases are not nearly as far-fetched as one might have thought in earlier—and in calmer—days.

Finally, there is the fifth lesson of legal history, perhaps best expressed by Mr. Justice Frankfurter in 1930: "If we focus attention on the human origin of all government, we shall have a more scientific temper for dealing with its frailties."¹⁷

What the wild youth of today utterly ignore, when they scream with the supreme self-confidence vouchsafed only to the ignorant that our society is rotten, are two all-pervasive fundamentals. These are, first and foremost, that the fallibility of social structure simply reflects the fallibility of the human beings who compose it, and, secondly, that one cannot evaluate any period except by comparison with others. And what is true of society generally is equally true of law and of the legal structure. Therefore, it will be shown that lawyers' complaints today differ not at all in substance and very little, if any, in form from the complaints uttered by lawyers far in the past—because, and necessarily and inescapably because, legal personalities remain precisely the same, and laymen react precisely the same, as in times long since gone by. It follows that the problems of today not only parallel, but in uncanny fashion repeat the same problems, precisely the same problems, that faced earlier ages.

To illustrate this thesis a number of examples will be taken from the past, starting with three illustrations of the psychology of judges. True, psychology is a fairly recent word and psychological analysis a thoroughly modern approach; but, as will be demonstrated, judges trained in the common law have reacted much the same over the years.

The judicial trilogy will begin with a personal anecdote, even at the risk of being deemed to have descended into anecdotage. A number of years ago, I was about to appear before a judge whom I had known very intimately for a long, long time without ever having had a matter in his court. Inasmuch as stories about his strong-mindedness in the courtroom were circulating freely, I made it a point to inquire of acquaintances with frequent litigating appearances before him how I could best deal with his undoubted idiosyncrasies. Here was the most helpful answer: "Just be sure to compress all of your case into your first sentence, because that's when he makes up his mind."

There is, of course, no novelty in instant justice. Sir George Jessel,

17. F. FRANKFURTER, *supra* note 3, at 129.

Master of the Rolls in England from 1873 to 1883, was frequently quoted as saying that "This court may be wrong but it is never in doubt." And, long before Jessel's time, another English Judge, successively Chief Justice of both Benches, Sir Hervey de Stanton, was known to the bar of his day as "Hervey the Hasty." [a]¹⁸

A second judicial example concerns the judge who does his utmost to force the parties into settlement. One is certain to encounter such jurists once he embarks on litigation, particularly in courts where pre-trial is the order of the day. But judicial readiness to urge settlement because of judicial reluctance to decide difficult cases is far earlier than the effective date of Rule 16 of the Federal Rules of Civil Procedure in 1938; witness this admonition from many years before:

It is for us to judge; and because this is a new case we will take it under advisement. I counsel you that you discuss a settlement between you meanwhile. [b]

The third judicial example presents a basic jurisprudential problem. Counsel argued his point, concluding confidently with the words, "and I think you will do as others have done in the same case, or else we do not know what the law is."

One of the judges instantly replied, "It is the will of the justices." But another disagreed openly, saying, "No, law is reason, it is justice, it is that which is right." [c]

The Supreme Court of the United States has, in the last ten years, overruled no less than thirty of its former decisions, and over two-thirds of these overrulings date from the last three years.¹⁹ This cir-

18. For reasons that will become apparent, citations to the source of all the quoted passages that follow, provisionally identified by bracketed letters, are postponed to footnote 25.

19. (1, 2) *United States v. Raines*, 362 U.S. 17 (1960), *overruling* *United States v. Reese*, 92 U.S. 214 (1876), and *Barney v. City of New York*, 193 U.S. 430 (1904); (3) *James v. United States*, 366 U.S. 213 (1961), *overruling* *Commissioner v. Wilcox*, 327 U.S. 404 (1946); (4) *Mapp v. Ohio*, 367 U.S. 643 (1961) *overruling* *Wolf v. Colorado*, 338 U.S. 25 (1949); (5) *Local 438, AFL-CIO v. Curry*, 371 U.S. 542 (1963), *overruling* *Montgomery Bldg. & Construction Trades Council v. Ledbetter Co.*, 344 U.S. 178 (1952); (6) *Gideon v. Wainwright*, 372 U.S. 335 (1963), *overruling* *Betts v. Brady*, 316 U.S. 455 (1942); (7) *Fay v. Noia*, 372 U.S. 391 (1963), *overruling* *Darr v. Burford*, 339 U.S. 200 (1950); (8) *Murphy v. Waterfront Comm.*, 378 U.S. 52 (1964), *overruling* *Feldman v. United States*, 322 U.S. 487 (1944); (9) *Jackson v. Denno*, 378 U.S. 368 (1964), *overruling* *Stein v. New York*, 346 U.S. 156 (1953); (10, 11) *Escobedo v. Illinois*, 378 U.S. 478 (1964), *overruling* *Crooker v. California*, 357 U.S. 433 (1958), and *Cicenia v. Lagay*, 357 U.S. 504 (1958); (12) *Swift & Co. v. Wickham*, 382 U.S. 111 (1965), *overruling* *Kesler v. Department of Public Safety*, 369 U.S. 153 (1962); (13) *Harris v. United States*, 382 U.S. 162 (1965), *overruling* *Brown v. United States*, 359

cumstance assuredly adds weight to the view that law is the will of the justices. Now whether these overrulings reflected reason, or justice, or that which is right, raises a more much difficult problem, because only 7 of the 30 were unanimous.²⁰

Having dealt with the lawgivers, we turn to the lawyers. Their foibles, like their sources of strength, also go back many years. Ever since common law litigation first started, there has been continuous recognition of the powerful impact of facts and the concomitant need for candor on the part of the bar. Mr. Justice Brandeis always preached the primacy of facts.²¹ And the observation that "The great power at the bar is the power of clear statement" is a remark attributed, depending on the speaker's background—or on the locale of his audience—either to Rufus Choate of Massachusetts or to Judah P. Benjamin of Louisiana. But the precepts involved long antedate all three who have been mentioned, as the following judicial formulations from an earlier age clearly show:

In this case there is no way of pleading except to disclose the truth... [d]

[Y]ou are pleading very covertly. Tell us what the real facts

U.S. 41 (1959); (14) *Spevack v. Klein*, 385 U.S. 511 (1967), *overruling* *Cohen v. Hurley*, 366 U.S. 117 (1961); (15) *Afroyim v. Rusk*, 387 U.S. 253 (1967), *overruling* *Perez v. Brownell*, 356 U.S. 44 (1958); (16) *Camara v. Municipal Court*, 387 U.S. 523 (1967), *overruling* *Frank v. Maryland*, 359 U.S. 360 (1959); (17, 18) *Katz v. United States*, 389 U.S. 347 (1967), *overruling* *Olmstead v. United States*, 277 U.S. 438 (1928), and *Goldman v. United States*, 316 U.S. 129 (1942); (19, 20) *Marchetti v. United States*, 390 U.S. 39 (1968), *overruling* *United States v. Kahriger*, 345 U.S. 22 (1953), and *Lewis v. United States*, 348 U.S. 419 (1955); (21) *Peyton v. Rowe*, 391 U.S. 54 (1968), *overruling* *McNally v. Hill*, 293 U.S. 131 (1934); (22) *Bruton v. United States*, 391 U.S. 123 (1968), *overruling* *Delli Paoli v. United States*, 352 U.S. 232 (1957); (23) *Carafas v. La Vallee*, 391 U.S. 234 (1968), *overruling* *Parker v. Ellis*, 362 U.S. 574 (1960); (24) *Lee v. Florida*, 392 U.S. 378 (1968), *overruling* *Schwartz v. Texas*, 344 U.S. 199 (1952); (25) *Jones v. Mayer Co.*, 392 U.S. 409 (1968), *overruling* *Hodges v. United States*, 203 U.S. 1 (1906); (26) *Moore v. Ogilvie*, 394 U.S. 814 (1969), *overruling* *MacDougall v. Green*, 335 U.S. 281 (1948); (27) *Bandenburg v. Ohio*, 395 U.S. 444 (1969), *overruling* *Whitney v. California*, 274 U.S. 357 (1927); (28) *Lear v. Adkins*, 395 U.S. 653 (1969), *overruling* *Automatic Radio Mfg. Co. v. Hazeltine*, 339 U.S. 827 (1950); (29, 30) *Chimel v. California*, 395 U.S. 752 (1969), *overruling* *United States v. Rabinowitz*, 339 U.S. 56 (1950), and *Harris v. United States*, 331 U.S. 145 (1950). Compare *Baldwin v. Missouri*, 281 U.S. 586, 596 (1930) (Holmes, J., dissenting): "I suppose that these cases and many others now join *Blackstone v. Miller* on the Index Expurgatorius—but we need an authoritative list."

20. Cases numbered (1), (2), (5), (6), (21), (23), and (27) in the preceding footnote. In case numbered (8), the Court was unanimous in result but not as to the overruling.

21. P. A. FREUND, ON UNDERSTANDING THE SUPREME COURT 50-52 (1951).

are. [e] "A fact trips up the cleverest men," . . . so if you wish to be freed you must disclose the fact. [f]

Most attorneys are bound on occasion to experience, particularly when they first appear in court, a certain patronizing attitude on the part of some of their more senior opponents. Alas, this also is a recurring facet of legal life. All one can usefully do, it is submitted, is to amuse himself—inwardly of course—by application of the litmus paper test for ascertaining whether a member of the senior bar has reached the stage when his forensic arteries have begun to harden, when, realistically if cruelly, he has become an indubitable old fud. That point is marked whenever a lawyer tells the court that, in all his x years at the bar—and x in this connection is any number over 19—that in all his x years he has never heard a more untenable set of contentions than those just now made by his young opponent. Here again, this manifestation is not new; examine, for instance, the following recorded comment by one of the worthies of old: "Never all these thirty years . . . have I seen such a voucher." [g]

The same individual was quite prepared to raise the ante, just as the oldsters of today occasionally are: "I have been forty years in court and never heard I such a voucher received." [h]

Having paid attention to lawgivers and to lawyers, we turn to the manifestations of litigants. Here again, one must be warned that little if any novelty will be found, because many of the underlying situations giving rise to litigation are strikingly similar to what we in our day regularly encounter. Consider the following three examples.

First, long before there was a firm or settled law of contracts, there were dishonest contractors:

William de Prene, carpenter, was . . . accused of this, that whereas he had been the king's master of works as Roscommon, the same man stole some of the . . . king's iron wherewith he bound a cart, and afterwards he filled and loaded the . . . cart with iron nails, that is to say, "spikings," and caused them to be furtively carried to Dublin and sold them to his own personal advantage. And over and above that, whilst he was the . . . king's master of works and master-carpenter throughout all Ireland, he often accounted for more workmen than he had, thus embezzling and concealing the money of the . . . king and queen, to their loss of three hundred pounds. And again, when . . . William should have been at Glencree and

Newcastle supervising the queen's workmen, he was attending to his own works, and he hired other workmen in his place at eight-pence a day at the . . . king's expense, in this way deceitfully charging against the . . . king a sum estimated at ten pounds. [i]

Next, fools were being mass-produced long before the late Phineas T. Barnum ever uttered his perceptive and hence immortal dictum. In consequence the confidence game flourished successfully many years prior to the time when side-wheelers first navigated the Mississippi River.

Gervase Worthy and others came to the house of Roland Smalecombe of Barnstable and said to Roland's wife that they had once been pagans and were afterwards converted to the faith. And they said that they knew how to tell any man or woman which and what kind of fortune would befall them and all whatsoever things they would do to the end of their life and for as long as they lived, with the result that they induced and worked upon the . . . wife so much that she brought before them all the gold and silver as well as all the precious things she had in her keeping. And when the wife had brought her precious belongings, that is to say, pieces of silver, mazer cups, belts, rings and brooches of gold and silver, Gervase took all those goods and put them in a certain linen bag and asked for a box in which to put the . . . precious things. And to the woman's belief the . . . precious things were placed in the . . . box. And Gervase closed the box with a key. And he took that key away and told the . . . woman that she was to go every day for nine days to church to have three masses celebrated and that she was in no wise to open the box until the nine days were fully ended. And Gervase promised the woman that he would come back on the tenth day after the . . . nine days with the key, and on that day the woman would find all her precious belongings in the box intact and get them back doubled. And Gervase and the others went away with the key and they did not come back. And afterwards the woman broke the box but she found none of the . . . precious things within it, as . . . Gervase promised her, but only a linen bag full of pieces of lead and stones [j]

Finally, it is commonplace in law practice today that the bulk of civil litigation involves personal injuries. The defense bar, those who represent the insurance companies that everyone knows to be involved

but who can never, never, never be mentioned by name, sometimes suppose that imaginary injuries are simply an emanation of that age of invention which has so completely transformed modern life. And they adhere to this belief even in the face of that aged chestnut, the classic question to the plaintiff on cross-examination: "And now show the jury how high you could lift your arm before the accident." In actual fact, however, it is very easy to prove that there were ambulance-chasers long before there were any ambulances.

Robert of Norwich and Ives of Fulham . . . procured John Skinner to obtain a certain writ . . . against John of Norwich . . . and, by false covin and conspiracy made between Robert and Ives, they plotted to get the blood of a pig, and they put that blood on John Skinner's face and body and tied his arms and legs with splints and linen cloths and brought him in a cart to Westminster Hall and led the justices there and others to believe that John of Norwich had thus beaten and wounded him. Therefore John of Norwich was arrested and imprisoned and put to great loss on that account, whereas John Skinner was sound and well without any wound, as was discovered later, and afterwards, on the day when he left the . . . Hall, he unbound himself and got up and pushed his own cart on his own feet, several of his neighbors seeing him, as far as Fulham to his own home. [k]

Let us turn briefly to the endemic question of crime, which troubled many generations before our own. Today there are widespread lamentations that the courts have become too considerate of criminals, and it is urged that a more rigorous attitude is necessary. An older no-nonsense approach is admirably illustrated by an old text that preserves the colloquy between a judge and a man charged with larceny of a horse:

"Sir, God knows, I am an unlettered man and have scarcely ever made a plea: hence I feel scarcely able to defend myself, and for this reason, sir, I beg you to let me be advised by some learned person as to how I can best defend myself in this case."

"What, Hugh? That course would be clearly against the law of the land and against right, for who can tell us more about your doings than you yourself? Do as a wise man, and as a good and law-abiding man should do; keep God before your eyes and tell us the truth of this matter, and we shall be as merciful as we can, according to the law."

"Sir, in God's name I thank you. I took this horse by

temptation of the Devil, otherwise than I ought to have done. In truth I cannot deny that I took it as a thief."

"Sir, in peril of my soul, I tell you that I had no accomplice on this occasion or any other."

"Bailiff, let him have the priest."

So let him be hanged. [1]

Actually, this exchange contains an exceedingly well-reasoned argument in support of the probative value of confessions: "Who can tell us more about your doings than you yourself?" The Warren Court, on the other hand, as dissents from its determinations all too revealingly disclose, had "a deep-seated distrust of all confessions,"²² or, as one Justice put it, "decision has emanated from the Court's fuzzy ideology about confessions, an ideology which is difficult to relate to any provision of the Constitution and which excludes from the trial evidence of the highest relevance and probity."²³

It is suspected that, in the years ahead, the pendulum will swing the other way and that an impending criminal law counter-revolution will make it easier to live in safety than it is today. But to welcome such a change is certainly not to applaud the procedure reflected in the excerpt just quoted, which all too dramatically illustrates the wide gulf between swift justice and just swiftness.

Let us turn to more of today's grave problems, the increasing pollution of water and of air, and the dangers inherent in the adulteration of articles for human consumption. None of these pressing crises was first created in the last third of the twentieth century; each existed, each posed difficulties, in much earlier ages.

For example, pollution of water was a familiar manifestation long before the concept of industrial waste was ever formulated, or, for that matter, before industry as such really existed.

The bakers and brewers of the town of Oxford cause water, which they use in making bread and ale, to be taken in two places in the water of the Thames, . . . and these places are disgraceful and dirty on account of the filth thrown into the . . . water and frequently carried down into that water by the floods of waters coming from the . . . town and also by the outside ganntries constructed on the other side of the . . . water in those parts, and it is considered that this will be dangerous and noisome to

22. *Miranda v. Arizona*, 384 U.S. 436, 537 (1966) (White, J., dissenting).

23. *Harrison v. United States*, 392 U.S. 219, 228 (1968) (White, J., dissenting).

the community of the scholars of the . . . town and to all others inhabiting the . . . town [m]

Air pollution, likewise, long antedates today's frenzied campaigns against smoke, smog, and stench.

Many people, living in our town of Oxford and the suburb of the . . . town, keep certain animals in their houses there and from them and likewise elsewhere they gather dung which is put together and deposited in the streets of the . . . town and suburb and by it the air there is infected and corrupted to the serious damage and peril of loss of life not only of the clerks but also of the laymen inhabiting the . . . town and of others flocking to the same, we, wishing such to be prevented, command you that you should on our behalf firmly enjoin all those, . . . clerks as [well as] laymen, opposite whose houses or inns or on whose premises dung of this kind has been collected and brought together in the aforesaid town or suburb . . . that they cause all the aforesaid dung—that is to say, each of them the dung lying opposite his house or his inn or on his premises—to be removed without delay from the . . . streets and premises and [those] to to be cleaned up and henceforward kept clean for the safety and decency of all the clerks and people. [n]

Finally, unclean matter for human consumption was similarly not a problem first exposed by Upton Sinclair in *The Jungle*, nor was Dr. Harvey W. Wiley the pure food pioneer that some still credit him with being. Long years before any of these, a remedy for this evil was prescribed by royal command.

The taverners of Oxford have mixed, putrid and corrupt wines in their taverns in the aforesaid town and sell them indiscriminately to whosoever asks for wines, whereby some who buy them incur serious maladies and often some of them sustain death, and this is not to be tolerated any longer, we, wishing a remedy to be devised for such a danger, as is proper, command you that in your own person you should go along to all the . . . taverns to inspect and taste all the . . . wines. And if it shall happen that wines of such a kind are found there, then you are to cause all the casks containing them to be taken out of the taverns or houses in which they shall be found and their heads broached and the wines contained in them poured away. [o]

The net result of all of the foregoing is that men have remained essentially unchanged over the centuries. In like manner, women have similarly remained womanly. Consider the contemporaneousness of this dictum uttered by a sage of old: "There is no man in England . . . who can surely say whether a woman is of full age or not, for there are women of thirty who try to make themselves look as though they were only eighteen." [p]

One of the psychological problems created by the presence of women was, years ago, solved in quite modern fashion:

And the . . . chancellor . . . on behalf of the . . . university . . . makes request to the king that the prison of Oxford which has been set aside for clerks and for laymen can be enlarged by one floor, so that some who are accused of more serious crime can stay at the bottom of the same prison, and the women on another floor by themselves for the avoidance of sin, and those who have been arrested for a petty trespass on the third floor by themselves.

Again to take a modern problem as a point of departure, nowadays we constantly, indeed virtually every day, read in the newspapers of the damage, the injury, and the inevitable loss of life occasioned by the careless habit of smoking in bed. If we substitute candles for cigarettes, we will learn that this form of dangerous foolishness long preceded Sir Walter Raleigh's introduction of tobacco into England.

The jurors . . . say on their oath that . . . Herbert and John his son together with a certain Thomas de la Weye . . . put up . . . in the manor of . . . Walter de Brainton and, while . . . Herbert was lying on his bed asleep in a certain grange of the . . . manor, . . . Thomas did not allow . . . John . . . to put out a certain candle which was fixed on a post of that grange, for which reason . . . John went to bed whilst that candle was burning and immediately went off to sleep. And . . . Thomas went away, and before he came back the . . . candle fell down and that grange was immediately set alight by it, and this at night, so that a certain part of the bed of . . . Herbert was burned before he woke up, and also the whole manor of . . . Walter, together with all his goods, was burnt by the . . . fire. [r]

Other unhappy examples of un wisdom likewise lack novelty. Today, for instance, one of the most widespread manifestations in every Amer-

ican community is the street demonstration by persons dissatisfied with particular policies and laws. Those who wring their hands over this particular flowering of the glorious right of dissent and over the asserted exercise of the right of free speech through non-verbal action should take heart; individualists demonstrating in the streets go back many, many years, as an old record clearly shows:

Robert Gerard, vicar of Aldbury church, and Richard of Fulman, hermit, . . . scorned and poured contempt day after day on the king's statute and ordinance of laborers, . . . made by the king and his council for the common utility of the realm of England, publicly preaching and proclaiming that there is no statute that would restrict laborers . . . from taking for their labors and services as much as they are pleased to take and from obtaining what they desire and that, if it was ordained or decreed otherwise, the said statute and ordinance were falsely and wickedly made, and they proclaimed that all who made the same, support or agree to them and execute or maintain them, or indict such laborers . . . or to punish those thus indicted or prevent them from being able to obtain wages, even abnormal wages, as they wish are excommunicate, and that the aforesaid ordinances and statutes are abolished . . . [s]

Those whom we call kooks have accordingly always been with us. And, similarly, we have had a full quota of those whom the kooks call squares, persons who find assurance and security in the conviction that the means for curing every current ill can always be found in deference and adherence to authority.

Moreover, . . . king Henry brought against . . . Gilbert a similar writ and in the same words, nothing being changed except the name "Edward" in place of "Henry," and this writ was framed by the advice of the magnates and those learned in law who were of the council of the king Henry. These men applied their wisdom and all their pains and framed that writ as that which could be quashed by no exception, wherefore, since there are not now in the kingdom any men of such outstanding diligence or wisdom as were those who framed that writ, it does not seem . . . that any exception put forward by . . . Gilbert ought to be admitted to quash the present writ. [t]

Other squares, holding forth in court, stressed precedent and regularity, in terms that still have current application.

Nor ought it to be any difficulty that there [are] found in the aforesaid records the words "with the consent of the parties," because, even though the parties sometimes want to plead before the justices contrary to the rules of law or the king's statute and the law and custom of the land, to this the justice ought not to admit the parties who mischievously litigate in this way, especially when it is a question of pure law, since there are a method and a standard and definite limits on either side of which nothing remains lawful. [u]

And, finally, there is the recurrent lament over novelty, which is repeated in all ages by those whose greatest unhappiness stems from changes in the scenes, the laws, or the institutions with which they grew up, with which they are familiar, and with which they therefore feel most comfortable. Any deflection, therefore, brings sadness, and evokes an anguished cry for the dear dead days when all was better. Here is a characteristic sigh, somewhat more forward-looking than most; it is drawn from an old law report: "Such writ did not use to be made of old time. . . . But all was once other than it is now, and will be other again. New King, new law, new Justices, new masters"—and, the original adds, "et cetera." [v]

While the reader has had a great many quotations inflicted upon him, there exists a greatly multiplied host of similar passages. The selection presented here amply suffices to show that the problems confronting mankind have not changed in essence over the years.

Let us turn once more to the abiding wisdom of a dear friend, whose teaching enriched not only this author's law school days but more than thirty years that followed.

"Government," said Justice Frankfurter, "is itself an art, one of the subtlest of the arts. It is neither business, nor technology, nor applied science. It is the art of making men live together in peace and with reasonable happiness."²⁴

Plainly, that basic quest neither changes nor becomes more easy of attainment with the passing years. Consequently, contemporaneous problems of legal administration and of law are identical in kind and very similar in degree to those that confronted and on occasion confused generations long since dead, whose wit was often insufficient to arrive at a workable solution.

The passages that have been quoted show all too clearly that the

24. F. FRANKFURTER, *supra* note 3, at 160.

search for justice is quite as difficult today, and fully as slow, as it ever was. The concept of "swift justice" is essentially a self-contradiction, as indeed all experience demonstrates, and the inability to find any universal answer to the ancient query, "What is justice?" is far from reflecting either mockery or indifference.

These are thoughts that lawyers should keep constantly in mind whenever any individual, or else some solemn commission, comes up with a facile formula for overnight reform in the law or in legal institutions. It makes no difference whether the novel solution is presented as an offhand remark, or as a pompous postprandial pronouncement, or whether it appears with the impressive panoply of a thick report printed on glossy paper and duly fortified with a proliferation of footnotes, graphs, charts, appendixes, annexes, and statistics (computerized or otherwise).

The aim of doing justice invokes an eternal quest—and presents what must realistically be viewed as a never completely soluble problem. So we conclude as we commenced, with the assertion that the really hard questions are never answered, that for those inquiries there is not and can never be any approved solution, and that it is the lot of humankind always to struggle in the hope of arriving at the only available substitute, namely, some reasonably acceptable adjustments.

And if any one deems this too pessimistic or cynical a closing note, if anyone is more hopeful that man is certain in due course to find definitive solutions for every human ill and every human trouble, it is asked that he ponder the fact that each of the examples that have been quoted goes back many, many years. Each of them antedates the settlement at Jamestown; indeed, each long preceded the first voyage of Christopher Columbus.

Hervey the Hasty was one of the King's Justices in the reign of the first two Edwards, from 1306 until 1326, while the quotations that have been called to your attention were taken from truly ancient legal records.

The earliest extract that was quoted came from the year 1274, while the most recent of the lot was dated A.D. 1377.²⁵

25. All but two of the references to the several passages quoted in the text are to volumes of *THE PUBLICATIONS OF THE SELDEN SOCIETY*. Y.B. is Year Book, K.B. is Select Cases in the Court of King's Bench, S.S. is Selden Society. The author has edited the published translations slightly, primarily to eliminate repetition.

[a] Y.B. 2 & 3 Edw. II (date uncertain), 19 S.S. 200. Stanton, a duly ordained cleric, was at various times a Justice of the Common Bench, Chief Justice of the

King's Bench, a Baron of the Exchequer, and Chancellor of the Exchequer; *see* index references to him in 1 K.B., 55 S.S. 205 and 4 K.B., 74 S.S. 180.

[b] Y.B. 4 Edw. II (1311), 42 S.S. 39, 41.

[c] Y.B. 18 & 19 Edw. III (1345), ROLLS SERIES 378-79; *see* the editor's comments on the translation of this case at xxxv.

[d] Y.B. 2 Edw. II (1308-09), 17 S.S. 119.

[e] Y.B. 3 Edw. II (1310), 19 S.S. 169.

[f] Y.B. 12 Edw. II (1318), 65 S.S. 137.

[g] Y.B. 7 Edw. II (1314), 39 S.S. 144.

[h] Y.B. 3 Edw. II (1310), 20 S.S. 23.

[i] 2 K.B. (1292), 57 S.S. 125, 127-28.

[j] 6 K.B. (1356), 82 S.S. 104-05.

[k] 6 K.B. (1356), 82 S.S. 109.

[l] PLACITA CORONE (S.S. Supp. vol. 4) 17. According to the editor, J. M. Kaye, Esq., the text appears to have been originally composed around A.D. 1274. *See Id.* at xiv-xx, The Date of the Treatise.

[m] 2 K.B. (1293), 57 S.S. 151.

[n] 2 K.B. (1293), 57 S.S. 151, 152-53.

[o] 2 K.B. (1293), 57 S.S. 151, 152.

[p] Y.B. 7 Edw. II, 39 S.S. xxxi, quoting from Y.B. 50 Edw. III f. 6, pl. 12 (1377) (Maynard ed.).

[q] 2 K.B. (1293), 57 S.S. 151, 153.

[r] 1 K.B. (1290), 55 S.S. 181, 182. *See* the commentary on the interesting substantive question of law involved in this case in Milsom, *Law and Fact in Legal Development*, 17 U. TORONTO L.J. 1, 10-13 (1967).

[s] 6 K.B. (1356), 82 S.S. 110.

[t] 1 K.B. (1279), 55 S.S. 52, 55.

[u] 2 K.B. (1291), 57 S.S. 45, 50.

[v] Y.B. 5 Edw. II (1311), 31 S.S. 87.