

BOOK REVIEW

THE LAW IN AMERICA. By Bernard Schwartz.¹ New York: McGraw-Hill Book Co., 1974. Pp. xiii, 382. \$12.50.

In a recent speech, the distinguished scholar Robert M. Hutchins stated: "To understand the law is to understand the stage of civilization mankind has reached and to have some faint notion about how it might advance to a higher stage."² Reminiscing about the days he spent teaching law in the late 1920's and contrasting the law then with the law as it exists in the 1970's, Dr. Hutchins observed:

[I]n the law, as in everything else, change is the order of the day. I'm sorry to have to tell you that it is only a slight exaggeration to say that everything I studied in law school, and what is worse, everything I taught there, has now been overruled or repealed.³

If someone with Dr. Hutchins' experience, depth of perception, and innovative capacity were writing in 1784, when Judge Tapping Reeve established the first American law school, or in 1870, when Christopher Columbus Langdell, the originator of the "case method" for studying law, became Dean of the Harvard Law School, would he have arrived at essentially the same conclusions as Dr. Hutchins? Probably not.

Both Reeve and Langdell, and in general their contemporaries, perceived law as cast in a jurisprudential model quite distinct from that perceived by Hutchins. To Judge Reeve, law should be taught "as a science, and not merely nor principally as a mechanical business; nor as a collection of loose independent fragments, but as a regular well-compacted system."⁴ Dean Langdell, in the preface to the first edition of his *Selection of Cases on the Law of Contracts*, observed:

"Law, considered as a science, consists of certain principles or doctrines. . . . Moreover the number of fundamental legal doctrines is

1. Edwin D. Webb Professor of Law, New York University.

2. Hutchins, *All Our Institutions Are in Disarray*, CENTER REPORT, Dec. 1974, at 19, 20.

3. *Id.*

4. A. SUTHERLAND, *THE LAW AT HARVARD* 28 (1967), quoting 4 T. DWIGHT, *TRAVELS IN NEW-ENGLAND AND NEW-YORK* 296 (1823).

much less than is commonly supposed"⁵

In a speech delivered in 1886, Langdell further elaborated on his approach to the study of law:

"[It] was indispensable to establish at least two things; first that law is a science; secondly, that all the available materials of that science are contained in printed books. If law be not a science, a university will best consult its own dignity in declining to teach it."⁶

"Science," as the term was used by Langdell, was not intended to denote that the law was simply an organized body of knowledge, which was Judge Reeve's view of "science." Rather, Langdell saw law as but one branch of the natural sciences, analogous to chemistry or biology.⁷

Neither Reeve nor Langdell focused on the ephemeral nature of law, nor did they stress cognizance of the myriad factors that molded the then-prevailing state of the law. On the other hand, Dr. Hutchins perceives law as a social, rather than a natural, science. He considers its existing content to be shaped by diverse and compelling human considerations and events. For him, law is a means to promote that which the lawmaker seeks to attain. Law can promote good and damn evil; it can also do the converse. When Reeve and Langdell spoke of law, they were thinking essentially of the common law. The plethora of legislation and agency regulations, which now play a critical role in our legal system, were of little significance in 18th or 19th century American law or jurisprudential thought. Dr. Hutchins, however, must necessarily include these present features of our legal system in his formulations on the nature of law.

When Reeve and Langdell classified law as a science, they saw the law as a concoction of precedents, critical analysis of judicial pronouncements, adherence to the dictates of *stare decisis*, and logical application of announced legal principles. The calculus of law permitted one to determine just what was, and what was not, demanded of an individual, enterprise, or government. One needed little prescience to predict, with reasonable accuracy, the outcome of a lawsuit once the perti-

5. A. SUTHERLAND, *supra* note 4, at 174, quoting C. LANGDELL, A SELECTION OF CASES ON THE LAW OF CONTRACTS at vi (1871).

6. A. SUTHERLAND, *supra* note 4, at 175, quoting Address by C. Langdell, Harvard Law School Association, in RECORD OF THE COMMEMORATION, NOVEMBER FIFTH TO EIGHTH, 1886, ON THE TWO HUNDRED AND FIFTIETH ANNIVERSARY OF THE FOUNDING OF HARVARD COLLEGE 97 (1887).

7. See A. SUTHERLAND, *supra* note 4, at 175.

nent facts were dissected, the appropriate precedents were gathered, and logic was exactly applied. Assumedly, permanency and predictability permeated the law just as they presumably marked the natural sciences. As administrators of a body of rules that could be precisely analyzed, judges, like chemists or biologists, could hypothesize and synergize in order to discern the inescapable outcome of a legal proceeding. The scientist, whether judge, chemist, or biologist, would be obliged to report and act on the conclusions his or her research and logic compelled. It was what the scientist found, not what he or she aspired to, that determined how he or she should proceed. Express judicial rejection of precedent or refusal to abide by the dictates of logic would render the judge a lawmaker, rather than a discoverer of the law, and judicial legislation was anathema in the 18th and 19th centuries. In the 20th century, with the denigration of precedent and stare decisis, the demise of the fear of judicial legislation, the sprouting of judicial activism, and the incessant generation of new rules of law and abandonment of others by legislatures and agencies, Robert Hutchins can easily and comfortably write that in law, as elsewhere, change is "the order of the day."

The Law in America dispels the notion of Reeve and Langdell that American law possesses the common indicia of a science. If one were to enumerate the characteristics of a science, one would include the following: (1) the presence of a highly ordered body of objectively tested principles, which often evolve from a hypothesis later sustained by fact and judicious extrapolation; (2) the impersonal application of pertinent principles to the matters at hand; and (3) a high degree of predictability of outcome in the presence of the same givens. Were law a science, each of the mentioned characteristics would describe the formulation and administration of the principles of our legal system. Because a semblance of the features ascribable to a science does characterize law, Reeve and Langdell could have reasonably arrived at their conclusions. They may have been encouraged to do so by the fact that at that time a discipline regarded as a science attracted singular approbation and awe. In his forcefully presented and lucid historical study of American law, Professor Schwartz makes the case for those who do not see law as a science but rather as a dynamic and potentially serviceable tool of social control.

Brilliantly, Professor Schwartz spins an enticing web as he develops his thesis. At its best, law gently, but not precisely, intermeshes with the

contemporary attitudes, values, and goals of the community it serves; it is part and parcel of a people's thought and behavior. For the most part, law interlaces delicately with man's foibles and achievements; it enhances the likelihood that a people will attain its needs, takes into account man's selfishness, nurtures man's nobility, and restrains his ignobility. When effective, law drains from society that which is bad and infuses that which is good. Timeless contemporaneity, in the strictest sense, is not the *sine qua non* of an ideal legal system. At times, law must be in the forefront of change. At times, it should prudently lag behind, serving as a critical brake on unwise, later to be popularly rejected, adventures. On occasion, law must direct a people to places they would prefer not to go. But fundamentally, the philosophical base upon which law is built must be linked to what is transpiring during the era within which it is operating. Kant's concern with a priori dictates, proper for one age, would be debilitating in another in which Holmes' pragmatism and insistence on judicial self-restraint, or Warren's activism and egalitarianism, or perhaps Professor Schwartz' own humanistic jurisprudential model, would alone be suitable.

To persuade the reader of the correctness of his thesis, Professor Schwartz has structured his presentation around soundly selected time segments. When dealing with each segment, he focuses on chosen aspects of public law, private law, and those actors most closely involved with the law: judges, lawyers, and law professors. Each category of actors is evaluated from an individual and collective perspective. A word of caution: this work examines the grand sweep of American law rather than the evolution of particular legal principles. If a reader wishes to discover the intricacies of common law or equity pleading in the late 1700's or the state of the parole evidence rule in the latter 1800's, he or she must look elsewhere. But if one is interested in exploring with a master guide the evolution of the thought processes underlying the appearance, modification, and disappearance of the basic features of American law, he or she will find *The Law in America* an enlightening and delectable work and will be left with an insatiable urge to ponder further Professor Schwartz' suggested philosophical criteria for this and immediate future generations.

Professor Schwartz' format permits him cogently to present and test his thesis. The reader is easily able to come to grips with the author's hypotheses, to cogitate about them, and then to appraise them personally. The author perceives four workable time periods and assigns each an

appropriately descriptive title: (1) "The Law in the New Nation," (2) "Formative Era," (3) "Reconstruction and Gilded Age," and (4) "Welfare State." Because Professor Schwartz correctly sees the evolution of American law as a continuous flow rather than a matter of stop-and-go development, he does not assign specific beginning and ending dates for the periods. Cited dates may be helpful guideposts, but no more. Many of the prime principles and precepts that marked the Reconstruction and Gilded Age, for instance, had their origin in the Formative Era; the Welfare State did not suddenly appear on a specific day or during a certain month in 1930, 1940, or 1950.

For analytical purposes, each of the last three legal eras are divided into two sections, one entitled Public Law and the other, Private Law and Institutions. Under Public Law, the author considers the powers of government within our constitutional framework. Under Private Law and Institutions, he examines the general nature of the law of contracts, torts, property, and enterprise as well as the conduct of judges and lawyers. Attention is also paid to areas of special significance to a particular period, such as the codification movement, labor law, and the nature and impact on private law of legislative, executive, and administrative action. The last several pages of each Private Law section contain a discussion of what Professor Schwartz labels "Ends of Law." Here he presents what he believes to be the overriding considerations and tenets that determined the fundamental makeup of private law for that time block.

If one is to appreciate fully Professor Schwartz' personal summons to our legal system to heed what he regards as a necessary jurisprudential model, one must note the author's perceptions of the key factors shaping American law. It would be fair to classify Professor Schwartz as a happy, positive-thinking philosopher. He is not a skeptic. His is not a dismal analysis of what has transpired, nor should his candor be mistaken for cynicism. His writing clearly conveys a basic approval of the overall working of our legal system. Although he finds cankers, they are psoriatic rather than malignant. He approves the curative potions that have appeared, but would have favored their earlier arrival. His challenge to what he discerns as a contemporary malaise is cure-directed. The author is not engaged in a search and destroy mission but in a quest to correct by broadening one's horizon of acceptability. While he recognizes the danger of a failure to respond, he does not harp needlessly on the heinous consequences that may follow rejection of his thinking—but he does

mention them.

During the first three time periods, the author perceives law as overwhelmingly concerned with the liberty of self-assertion and property rights. These concerns were limited, however, by a recognition of the police power, government's inherent power to control property in the public interest. The result was a balancing of individual self-interest and property rights against community well-being, the point of balance varying according to the era. During the Formative Era and the Reconstruction and Gilded Age, the former two interests weighed more heavily on the scales of justice than public health, safety, and welfare. Why this balancing technique? Because, Professor Schwartz believes, these were times when the urgency to facilitate economic expansion was regarded as of paramount importance. Law had a job to do; it had to respond. But what is correct in one age may be wrong in another. By the end of the Reconstruction and Gilded Age, individual self-assertion and property rights, inadequately restrained, were triggering oppression and a corps of horrors. These debilitating byproducts had to be dealt with. The law was compelled to respond. Egalitarianism for one age may be defined in terms of equality of opportunity and the protection of one's acquired interests. In another age, however, egalitarianism must assume a welfare dimension, equality of distribution. Sadly, Professor Schwartz reports that judicial response was too slow in coming. The law's self-confidence and almost Hegelian arrogance were no longer realistic. But shibboleths are slow to die.

In time, the excessive stagnation dissipated. As Social Darwinism lost its hold and as the clamor for change grew louder, the law shifted its focus from a fixation with the freedom to behave as one wished to a concern for the horrors and grimness which unrestrained individual liberty and property rights could cause. At the beginning of the 20th century, the judiciary was weighted toward deductive reasoning, preconceived notions, and reliance on precedent. Gradually, this orientation was replaced by one of inductive reasoning, judicial digging into the facts at hand, and appraisal of what was desirable. Professor Schwartz notes that property rights reached their "apogee" soon after the turn of the century. Slowly, the broad outlines of the Welfare State began to take shape, while the importance of property rights declined. As concern shifted away from isolated individuals and rights to relationships and duties, the significance of the liberty to contract diminished. Now the balance of individual self-assertion and property rights

against community interest was recalibrated. Emphasis on a beneficently organized society replaced efforts to shield individual economic liberties from encroachment.

Carefully, Professor Schwartz distinguishes between liberty in terms of economics and liberty in terms of a plethora of civil rights. He speaks of the decline of economic liberties and the ascendancy of noneconomic liberties and is especially anxious about the protection of personal privacy in a mass society.

With the abandonment of the traditional respect accorded *stare decisis* and the disappearance of the fear of judicial legislation, the law, according to the author, has assumed a relativistic and behavioristic trait. No longer is law the master; it is society's servant. With this shift in outlook, certainty in the law has dissipated. The appearance of the Welfare State has meant a renunciation of commitment to legal justice and an espousal of social justice. Having once assumed this new nature, the law has been expressly shaped in terms of the suitability of its responses. It must be incessantly examined, evaluated, and, as required, changed. The criterion of prime importance is how well the individual fares in fact, not whether or not bare opportunities to prosper are present.

Professor Schwartz' own jurisprudential model is designed for what may be regarded as a postwelfare state. It carries one beyond the economic considerations which are usually regarded as the critical components of a welfare state. Refusing to frame his model in bare economic terms, the author enmeshes his standard of acceptability with humane values and with what is considered essential for civilized life. Professor Schwartz describes his brand of jurisprudence in the following manner:

The basic goal of the contemporary society may be taken as that of ensuring that each individual be able to live a human life therein—that, if all individual wants cannot be satisfied, they be satisfied at least insofar as is reasonably possible and to the extent of a human minimum. The interests the law vindicates must find their ultimate justification in the realization of this goal.⁸

He insists that when all interests are placed on the scales of justice, the balance must be struck in favor of "the ultimate social interest," which, he finds, "is that in the individual life."⁹ Law is good when it proceeds to

8. B. SCHWARTZ, *THE LAW IN AMERICA* 286 (1974) (footnote omitted).

9. *Id.* at 287.

satisfy human wants, bad when it fails to do so. He sees "[t]he task of the law . . . as that of adjusting or harmonizing conflicting human wants or expectations so as to achieve the values of civilization with a minimum of friction and waste."¹⁰ Patently, postwelfare state jurisprudence is to be predicated on cooperation and interdependence rather than competition and the protection of an individual's acquired interests. According to the author, society may compel the law to move away from a regulatory role to a distributive one. "[F]inancial burdens incident to life will increasingly be borne by the society and . . . the individual will be assured at least the minimum requirements of a standard human life."¹¹ If our court system fails to adopt this humanistic jurisprudence, Professor Schwartz warns that the system may be bypassed in favor of an institutional framework that does.

How sound is Professor Schwartz' jurisprudential model at a time when the nation, and much of the world, is undergoing a vast and shocking economic dislocation? Although unvoiced, the author's underlying assumption appears to be that there is an escalating level of human wants and that such level should be met. Concededly, he does speak of distribution, and this could simply mean redistribution of whatever is available, be it much or be it little. Yet, his model does seem to be most appropriate for an affluent society. As one discerns what appears to be, at best, a short period of economic distress or, at worst, a long period of grave economic disturbance, one wonders if Professor Schwartz would qualify some aspects of his model if he were writing at this moment. Would he add the variable of individual contribution to society in time of shortages? Is humanistic jurisprudence, unrestricted by limiting factors, consistent with a society which is obliged to combat the rigors inherent in a retreat from affluence? Should there not be a contributive factor linked to the distributive element? Is it necessarily in the best interests of a post-affluent, or momentarily nonaffluent, society to pay close heed to distributing that which is available rather than generating more to distribute? It is still too early, though, to make any meaningful suggestion as to how, if at all, the current state of national and world affairs will affect Professor Schwartz' model.

Professor Schwartz has indeed prepared a book worthy of close scrutiny by anyone interested in understanding the history of American law

10. *Id.* at 308 (footnote omitted).

11. *Id.*

and in appreciating the numerous difficulties now confronting our legal system. With deliberateness, the author makes his case: unless corrective action is forthcoming, the legitimacy of our judicial process may be successfully challenged, and our courts will be bypassed in favor of other institutions. Many of Professor Schwartz' valuable insights and proposals have been left unmentioned here, but they are certain to attract and retain the intense interest of whoever sets aside several hours to read this important contribution to American jurisprudential history by an author who has already made his mark as a legal scholar.

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