THE COMMON LAW IN THE UNITED STATES *

IN undertaking to speak to the topic, " The Common Law in the United States ", I fear that I may have been overmuch encouraged by that sense of irresponsibility which beguiles one who is under no necessity of choosing the subject of his discourse. The illusion is enhanced by the comforting thought that no one will expect me, in the time at my command, either to exhaust my subject or transcend its limits. For one of the striking phenomena of the development of the common law since it was transplanted to these shores is the ever accelerated speed with which its boundaries have been extended, and its content multiplied and refined.

Coke's *Institutes* and the *Commentaries* of Blackstone and Kent, though comprehensive in their time, were not formidable in their scope. When Mr. Justice Holmes, some sixty years ago, expounded his theory of the common law, eleven chapters of a single volume sufficed to serve his purpose. One essaying the task today could not follow so closely the contours of the ancient rules of property, contract, tort and succession, as constituting the warp and woof of the common law, upon which the more modern doctrines of sixty years ago were only a light embroidery conforming to the ancient pattern. Now the writer would encounter strange intruders within the sacred precincts of the law, beyond the ken of Blackstone and Kent and Story, and only vaguely hinted at now and then in the judicial opinions of a generation ago. He would find new types of procedure, and an administrative system, growing by leaps and bounds, in which nonjudicial officers determine rights by methods quasi-judicial, and enforce them often without resort to the courts. He would observe a vast system of statutory rights and liabilities in large measure founded upon the idea, new to English law, that the basis of liability is not the fault of a wrongdoer, but such method of distributing the burden of loss as accepted social policy dictates. He would have to take account

* An address delivered before the Conference on the Future of the Common Law, held at the Harvard Law School, August 19–21, 1936, as part of the Harvard Tercentenary Celebration. — ED.

of a novel, complex and ever changing system of taxation, reaching out to touch directly or indirectly every individual, of new devices for the public control of business enterprise, and of others for arranging its management under a system where ownership and management have tended to become more and more distinct.

In speaking of these innovations as a part of the common law in the United States, you will observe that I use the phrase in none of its common narrower meanings, but in its broadest sense, as indicating the manifestation in this country of one of the two systems of law which have gained sway over the Western World, and that one which has either prevailed generally or is steadily winning its way in English speaking countries, as distinguished from the civil law, with its Roman law foundation.

Whether we describe the common law shortly, in Lord Justice Bowen's words, as an "arsenal of sound common-sense principles",[1] or broadly, as the expression, in legal forms, of the genius of the race, or merely as the habit of mind with which for some centuries now we have approached the adjudication of rights between man and man, the description, like any other we might choose, will suffice only as we are able to envisage the past from which the system has come and the methods by which it has arrived at its present estate. These are revealed to us by the study of its history, but their true significance for us now and for the future is the indication they give of the capacity of the common-law system to perform its appointed task of affording suitable protection and control of the varying interests which a dynamic society creates.

Distinguishing characteristics are its development of law by a system of judicial precedent, its use of the jury to decide issues of fact, and its all-pervading doctrine of the supremacy of law — that the agencies of government are no more free than the private individual to act according to their own arbitrary will or whim, but must conform to legal rules developed and applied by courts. Any attempt to appraise the progress of the common law in the United States or to predict its future must be concerned with at least some of these features of the system.

It is a commonplace that both the jury system and the doctrine

[1] Mogul Steamship Co. v. McGregor Gow & Co., 23 Q. B. D. 598, 620 (1889).

of supremacy of law have persisted and have been extended here more than in other common-law countries. Due mainly perhaps to the influence of constitutional restrictions, we continue to try before juries even the most complicated issues of fact characteristic of our twentieth-century business and scientific world, to an extent unknown in other countries; and the doctrine of supremacy of law has found here a new and elaborated expression under the impetus of constitutional restraints upon government action, which are interpreted and applied by the courts as the supreme law of the land. Of that I shall have more to say presently. There is much to be said of the use we have made of the jury system as compared with England and Canada, but that must be left to others, or to another time and occasion. And so I turn to what is perhaps the most significant feature of the common law, past and present, and the essential element in its historic growth, the fact that it is preëminently a system built up by gradual accretion of special instances.

With the common law, unlike the civil law and its Roman law precursor, the formulation of general principles has not preceded decision. In its origin it is the law of the practitioner rather than the philosopher. Decision has drawn its inspiration and its strength from the very facts which frame the issues for decision. Once made, the decision controls the future judgments of courts in like or analogous cases. General rules, underlying principles, and finally legal doctrine, have successively emerged only as the precedents, accumulated through the centuries, have been seen to follow a pattern, characteristically not without distortion and occasional broken threads, and seldom conforming consistently to principle.

Lord Macmillan, in a recent address at Cambridge University on " Two Ways of Thinking ",[2] classifies civilized peoples of the Western World, as the two great systems of law have substantially divided them, into those who think inductively and those who think deductively, a difference which, he holds, has pervaded the history of all human thought and activity. We will not be inclined to challenge his conclusion that the habit of mind which is content to make a workable decision suitable to the case in hand, without

[2] The Rede Lecture delivered at Cambridge University, May 9, 1934.

bothering too much about principle, or pressing matters to a logical extreme, has exercised a profound influence on law, politics and government in the common-law countries, and has given to these institutions a certain stability and continuity, not without adaptability, of great practical worth. But there are some, even among those trained in the common law, who may share the doubts, which he suggests, whether a rigid adherence to the doctrine of *stare decisis* is needful in order to attain these ends, and, in any case, whether continuity of legal doctrine is worth the price which, in some periods of our legal history, we have paid for it.[3] The Continental lawyer, when told that a judicial decision reported in the Year Books is not only sufficient for the purpose, but actually controls decision upon like events in the present year of our Lord, is openly sceptical of a system by which the living are thus ruled by the dead, and he is ready to echo the pungent remark of Mr. Justice Holmes that " It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV." [4]

I do not propose to enter the lists in the never-ending debate on the merits of a system which, to some extent, places precedent above principle, as compared with another in which formulated principle is the controlling guide to decision. It is enough, for present purposes, if we recognize that its strength is derived from the manner in which it has been forged from actual experience by the hammer and anvil of litigation, and that the source of its weakness lies in the fact that law guided by precedent which has grown out of one type of experience can only slowly and with difficulty be adapted to new types which the changing scene may bring. Whatever its defects, the system, deep rooted in our tradition and habit of mind, after serving us for some six centuries, will not be discarded. In the rôle of critics and prophets we will do well to accept that as the probable verdict of history. But as lawyers and judges called upon to administer the system, we will perhaps find it profitable if we endeavor to take advantage of its strength and to discern in the manner of its growth the generative principle for the correction of its faults.

Sir William Holdsworth, who has recently proved himself a

[3] See Goodhart, *Precedent in English and Continental Law* (1934) 50 L. Q. REV. 40.

[4] *The Path of the Law* in COLLECTED LEGAL PAPERS (1920) 187.

vigorous champion in its defense,[5] finds this vital force in the fact that the common-law rule of precedent is not an unyielding one, and in the eighteenth-century philosophy, which, fortunately perhaps notwithstanding its artificiality, we have not wholly outgrown, that judicial decisions are but evidence of the law, which is sometimes misrepresented by a bad precedent. Blackstone,[6] and as conservative a judge as Mr. Justice Parke,[7] admitted that the judge in the common-law system may rightly refuse to follow a precedent which is absurd, contrary to reason, or plainly inconvenient. And two centuries earlier Coke, who thought, or at any rate said, that even Parliament could not overturn the principles of the common law,[8] had declared that inconvenience in the results of a rule established by precedent is strong argument to prove that the precedent itself is contrary to the law.[9] This conception of the common law as a "brooding omnipresence in the sky",[10] something apart from the expression of it found in judicial decisions, may serve as well as another to advance the idea that the law itself is something better than its bad precedents, and to open the way for recognition that the bad precedent must on occasion yield to the better reason. It is this qualification of the rule of *stare decisis* in which Holdsworth finds the touchstone which will enable us to reach the golden mean between the extreme of flexibility and the extreme of rigidity, and ultimately to achieve a system which, though adaptable to the changing needs of a changing society, is not without symmetry and continuity.

I suppose we would all agree that the success of the remedy must depend in large measure upon the willingness of the judges to make use of it, and, even more, upon the manner in which they treat the precedents which they do not overrule. That these are variable factors in the law is evident to one who compares the expressed attitude of the English judges with that of judges in this country. I discern in the reports slight evidence of recognition by English judges that they have any considerable latitude for departing from precedent either in the like or analogous cases. That

[5] Holdsworth, *Case Law* (1934) 50 L. Q. REV. 180.

[6] 1 BL. COMM. *69–70.

[7] Mirehouse v. Rennell, 1 Cl. & Fin. 527, 546 (1833).

[8] Dr. Bonham's Case, 8 Co. Rep. 107a, 114a, 118a (C. P. 1610).

[9] Co. LITT. *379a; *cf. id.* *66a, *152b, *178a, *258b, *279a.

[10] Holmes, J., in Southern Pacific Co. v. Jensen, 244 U. S. 205, 222 (1917).

they are " bound " to follow the decisions of their own courts and those of superior jurisdiction is a declaration frequently made and one that appears rarely to have been consciously departed from by the English courts.[11] While obedience to precedent is the rule, one finds in this country less emphasis upon its compulsion and rather more readiness to restrict precedent regarded as dubious than to adhere to it by the application of rigid logic. Examples are not wanting in the reports of our appellate courts of a flat refusal to extend an undesirable precedent and even on occasion of a readiness frankly to overrule it.[12]

But in these days of facile legislation it must be admitted that mere refusal to overrule a bad precedent is not an insurmountable obstacle to law improvement, unless it be in the field of constitutional law, where rectification must come by the slow and uncertain process of amendment. When the evil is defined and generally recognized, legislatures have not been slow to effect reforms which courts have been unwilling or have not felt free to make. A far more pervasive influence on the orderly development of the law, and one less amenable to any form of legislative correction than are the shackles of specific precedents, is the habit of mind with which judges and lawyers approach the decision which no precedent necessarily controls. If we search the precedents so intent upon the past that we have no eye for what is going on in the world about us, it is easy to find analogies and resemblances which will serve as a superficial justification for the extension of a precedent to sets of facts whose social implications may be quite different from any which the precedents have considered. We may regard a shipbroker and a stockbroker and an employment agency as identical for all purposes, or we may conclude that, according to their different relationships, they are alike for some purposes but not for others. We may think that they are the same for ascertaining whether any of them has entered into a contract with his patrons, but very different for determining whether the contract is fraudulent or illegal. If, with discerning eye, we see differ-

[11] For a discussion of this question and a collection of the cases, see POLLOCK, A FIRST BOOK OF JURISPRUDENCE (5th ed. 1923) 319 *et seq.*

[12] See Burnet v. Coronado Oil & Gas Co., 285 U. S. 393, 405 *et seq.* (1932); Gray, *Judicial Precedents — A Short Study in Comparative Jurisprudence* (1895) 9 HARV. L. REV. 27.

ences as well as resemblances in the facts and experiences of the present when compared with those recorded in the precedents, we take the decisive step toward the achievement of a progressive science of law. If our appraisals are mechanical and superficial, the law which they generate will likewise be mechanical and superficial, to become at last but a dry and sterile formalism.

It is just here, within the limited area where the judge has freedom of choice of the rule which he is to adopt, and in his comparison of the experiences of the past with those of the present, that occurs the most critical and delicate operation in the process of judicial lawmaking. Strictly speaking, he is often engaged not so much in extracting a rule of law from the precedents, as we were once accustomed to believe, as in making an appraisal and comparison of social values, the result of which may be of decisive weight in determining what rule he is to apply. The law itself is on trial, quite as much as the cause which is to be decided, for the product of the decision of the common-law judge is always law, as well as the particular judgment which he gives for the plaintiff or defendant. The skill, resourcefulness and insight with which judges and lawyers weigh competing demands of social advantage, not unmindful that continuity and symmetry of the law are themselves such advantages, and with which they make choice among them in determining whether precedents shall be extended or restricted, chiefly give the measure of the vitality of the common-law system and its capacity for growth.

It is unavoidable, and not necessarily an evil, I think, that the continuous practice of searching the past to find, in what has been done, a guide for what is to be done, should develop a certain conservatism. Cultivated sedulously for some centuries by the common law, this conservative habit of mind is a by-product, by no means negligible, of the system of building law by precedent. In its narrowest manifestation it is the mental attitude which finds the precedent good because some judge in the past has decided it, and the system altogether good because it is built on precedent. Cherishing the doctrine which time has sanctified, it places reliance on history rather than on science. Unless we are on our guard, it encourages us to accept uncritically the system and all its fruits, and to regard with suspicion and distrust innovations in the law which come from nonjudicial sources. One gets the

savor of it from Coke and Blackstone who found in the common-law system the perfection of reason, and in such intrusive matters as statutes and equity but evil devices to mar its symmetry. Theirs, it is true, is a waning influence, but it plays no small part in much of our legal thinking today. We cannot examine critically the course of the common law in this country without acknowledging the varying, but at times far-reaching, effect upon it of a legal philosophy which looks to the past as the means, not only of securing a needful continuity of legal doctrine, but as affording the measure of experience which is to guide the next step in the development of the law. One may choose his field of investigation at random, but the part which statutes have played in modern law is perhaps as interesting and fruitful an example as another, and for a few moments I propose to recall the part which statutes have played in the development of the common law of this country.

If one were to attempt to write a history of the law in the United States, it would be largely an account of the means by which the common-law system has been able to make progress through a period of exceptionally rapid social and economic change. Law performs its function adequately only when it is suited to the way of life of a people. With social change comes the imperative demand that law shall satisfy the needs which change has created, and so the problem, above all others, of jurisprudence in the modern world is the reconciliation of the demands, paradoxical and to some extent conflicting, that law shall at once have continuity with the past and adaptability to the present and the future. Science, invention and industrial expansion have done more than all else to change the habits of life of the people of this continent, and the striking development in those fields has taken place since the Civil War. In the brief space of about seventy years our law has been called upon to accommodate itself to changes of conditions, social and economic, more marked and extensive in their creation of new interests requiring legal protection and control, than occurred in the three centuries which followed the discovery of America. Rapid social change, more than all else, puts to the test a legal system which seeks its inspiration and its guidance in a past which could make no adequate prophecy of the future.

To have kept pace with the rapid developments in the American commonwealth since the Civil War, any type of judge-made law

must have possessed the qualities of flexibility and adaptability to a unique degree, and certainly to a far greater extent than had in fact been exhibited by the common law as it had developed in the United States, largely under the tutelage of the Blackstonian conceptions. His was the notion prevailing during most of the nineteenth century that the common law was a complete and perfect system, in the administration of which it was only needful for the judge to "find the law" by diligent search of the precedents. There was little scope in such a system so administered for the creative task of framing legal doctrine adequate to the needs of a new and rapidly changing experience.

Judge-made law, which at its best must normally lag somewhat behind experience, was unable to keep pace with the rapid change, and it could find in the law books no adequate pattern into which the new experience could be readily fitted. It was inevitable that the attempt should be made to supply the unsatisfied need by recourse to legislation. So it has become increasingly our habit to look for the formulation of legal doctrine suited to new situations, not to the courts, as through most of the life of the common law, but to the legislatures, and the primary record of the most important changes in the law in our own time is to be found in the statute books.

It is the fashion in our profession to lament both the quantity and quality of our statute-making, not, it is true, without some justification. But our rôle has been almost exclusively that of destructive critics, usually after the event, of the inadequacies of legislatures. There has been little disposition to look to our own shortcomings in failing, through adaptation of old skills and the development of new ones, to realize more nearly than we have the ideal of a unified system of judge-made and statute law woven into a seamless whole by the processes of adjudication.

The reception which the courts have accorded to statutes presents a curiously illogical chapter in the history of the common law. Notwithstanding their genius for the generation of new law from that already established, the common-law courts have given little recognition to statutes as starting points for judicial lawmaking comparable to judicial decisions. They have long recognized the supremacy of statutes over judge-made law, but it has been the supremacy of a command to be obeyed according to its

letter, to be treated as otherwise of little consequence. The fact that the command involves recognition of a policy by the supreme lawmaking body has seldom been regarded by courts as significant, either as a social datum or as a point of departure for the process of judicial reasoning by which the common law has been expanded.

The attitude of our courts toward statute law presents a contrast to that of the civilians who have been more ready to regard statutes in the light of the thesis of the civil law that its precepts are statements of general principles, to be used as guides to decision. Under that system a new statute may be viewed as an exemplification of a general principle which is to take its place beside other precepts, whether found in codes or accepted expositions of the jurists, as an integral part of the system, there to be extended to analogous situations not within its precise terms.[13] With the modern practice of drawing a statute as a statement of a general rule, I can perceive no obstacle which need have precluded our adoption of a similar attitude except our unfamiliarity with the civilian habit of thought. The Scottish law, with its Roman law foundation, took this position, and the House of Lords, common-law learning and background notwithstanding, found no difficulty in approving it as applied to local statutes, in passing on appeals from the Scottish courts.[14]

But quite apart from such a possibility, I can find in the history and principles of the common law no adequate reason for our failure to treat a statute much more as we treat a judicial precedent, as both a declaration and a source of law, and as a premise for legal reasoning. We have done practically that with our ancient statutes, such as the statutes of limitations, frauds and wills, readily molding them to fit new conditions within their spirit, though not their letter, possibly because their antiquity tends to make us forget or minimize their legislative origin. Professor Landis of this Law School has recently pointed out in a valuable discussion of "Statutes and the Sources of Law",[15] numerous examples in the Year Books of the application of the doctrine of the "equity of the statute" by which statutes were treated, in

[13] See Pound, *Common Law and Legislation* (1908) 21 HARV. L. REV. 383, 388; Freund, *Interpretation of Statutes* (1917) 65 U. OF PA. L. REV. 207, 229.

[14] Hay v. The Lord Provost, 4 Macq. H. L. Cas. 535 (1863).

[15] HARVARD LEGAL ESSAYS (1934) 213 *et seq.*

effect, as sources of law which by judicial decision could be extended to apply to situations analogous to those embraced within their terms. Apart from its command, the social policy and judgment, expressed in legislation by the lawmaking agency which is supreme, would seem to merit that judicial recognition which is freely accorded to the like expression in judicial precedent. But only to a limited extent do modern courts feel free, by resort to standards of conduct set up by legislation, to impose liability or attach consequences for the failure to maintain those or similar standards in similar but not identical situations, or to make the statutory recognition of a new type of right the basis for the judicial creation of rights in circumstances not dissimilar. Professor Landis and others have developed the subject with a detail unnecessary to consider now.[16] It is enough for my purpose that they show that the legislative function has been reduced to mere rule making by the process of narrow judicial interpretation of statutes, and in consequence of the renunciation by the courts, where statutes are concerned, of some of their own lawmaking powers.

That such has been the course of the common law in the United States seems to be attributable to the fact that, long before its important legislative expansion, the theories of Coke and Blackstone of the self-sufficiency and ideal perfection of the common law, and the notion of the separation of powers and of judicial independence, had come to dominate our juristic thinking. The statute was looked upon as in the law but not of it, a formal rule to be obeyed, it is true, since it is the command of the sovereign, but to be obeyed grudgingly, by construing it narrowly and treating it as though it did not exist for any purpose other than that embraced within the strict construction of its words. It is difficult to appraise the consequences of the perpetuation of incongruities and injustices in the law by this habit of narrow construction of statutes and by the failure to recognize that, as recognitions of social policy, they are as significant and rightly as much a part of the law, as the rules declared by judges. A generation ago no feature of our law administration tended quite so much to discredit law and lawyers in the lay mind. A narrow literalism too often defeated the purpose of remedial legislation, while a seeming contest

[16] See Pound, *Common Law and Legislation* (1908) 21 HARV. L. REV. 383.

went on with the apparent purpose of ascertaining whether the legislatures would ultimately secure a desired reform or the courts would succeed in resisting it.

Happily the abrasive effect of the never-ending judicial labor of making a workable system of our law, so largely composed of statutes, is bringing about a more liberal attitude on the part of the courts. Fortunately, too, law schools have begun to study and investigate the problem involved in an adequate union of judge-made with statute law. They are developing the underlying principles for its solution, which rest basically on a more adequate recognition that a statute is not an alien intruder in the house of the common law, but a guest to be welcomed and made at home there as a new and powerful aid in the accomplishment of its appointed task of accommodating the law to social needs. But there still remains much to be done. The better organization of judge-made and statute law into a coördinated system is one of the major problems of the common law in the United States. I would invite those who doubt to survey almost any new field of legislation and particularly to consider the published studies of the Law Revision Commission of the State of New York, disclosing the results of its five years' search of the laws of New York for inequitable and anachronistic rules.

Unfortunately we cannot revise *ab initio* our philosophy of interpretation of statutes, but we can still give them a more hospitable reception as an aid and not a detriment to the system of judge-made law, and we can turn to better account than we have our theory that statutes are commands, and the illusion that in interpreting them our only task is to discover the legislative will. We can at least let the statute reveal more fully the reasons for its enactment, and we can let its command prescribe the treatment which courts are to accord to it. I observe in recent statutes a revival of the ancient practice of stating in them the reasons for their enactment. The reasons were addressed, it is true, to the removal of constitutional doubts, but the practice can similarly be made an aid to construction. As the force of judicial decision is enhanced by the reasons given in support of it, so the union of statute with judge-made law may be aided by the statement of legislative reasons for its enactment, or by a more adequate preservation of the record of them in its legislative history. On occa-

sion legislatures have made so bold as to direct that a statute shall be extended to cases plainly within its reason and spirit, though not within the strict letter,[17] a practice which, if skillfully employed, may yet restore to courts a privilege which they renounced only because they have mistakenly regarded statutory enactments as in some degree less a part of the law than their own decisions.

Perhaps the most striking change in the common law of this country, certainly in recent times, has been the rise of a system of administrative law, dispensed in the first instance through authority delegated to boards and commissions composed of non-judicial officers. The reception by the profession and the courts of these new administrative agencies has exhibited an interesting parallel to their attitude toward other forms of external change. These agencies soon became a matter of concern, not alone because of their novelty and statutory origin, but because they were brought into the law as a means of law enforcement and as the instruments for providing, to a limited extent, remedies for its violation, of which the courts had possessed a virtual monopoly.

Under the civil law the rise of a system of administrative law, independently of the courts, came as a welcome formulation of principles for the guidance of official action, where no control had existed before. To the common law the use of these administrative agencies came as an encroachment upon the established doctrine of the supremacy of the courts over official action. It was the substitution of new methods of control, often crude and imperfect in their beginnings, for the controls traditionally exercised by courts — a substitution made necessary, not by want of an applicable law, but because the ever expanding activities of government in dealing with the complexities of modern life had made indispensable the adoption of procedures more expeditious and better guided by specialized experience than any which the courts had provided.

Looking back over the fifty years which have passed since the establishment of the Interstate Commerce Commission, no one can now seriously doubt the possibility of establishing an administrative system which can be made to satisfy and harmonize the requirements of due process and the common-law ideal of supremacy of law, on the one hand, and the demand, on the other, that gov-

[17] See Landis, *supra* note 15.

ernment be afforded a needed means to function, freed from the necessity of strict conformity to the traditional procedure of the courts.

Rarely in the history of the law has such an opportunity come to our profession to carry forward a creative work which would enable the law to satisfy the pressing needs of a changing order without the loss of essential values. The ultimate establishment of equity, after a period of resistance, as a coördinate branch of the law, ameliorating the rigors of the common-law system and translating in some measure moral into juristic obligations, is a comparable transition in the law. The profession of our day, like its predecessors who saw in the pretensions of the chancellor but a new danger to the common law, has given little evidence that it sees in this new method of administrative control any opportunity except for resistance to a strange and therefore unwelcome innovation.

Addresses before bar associations twenty years ago, discussing the rise of new administrative agencies, are reminiscent of the distrust of equity displayed by the common-law judges led by Coke, and of their resistance to its expansion. We still get the reverberations of these early fulminations in renewed alarms at our growing administrative bureaucracy and the new despotism of boards and commissions. So far as these nostalgic yearnings for an era that has passed would encourage us to stay the tide of a needed reform, they are destined to share the fate of the obstacles which Coke and his colleagues sought to place in the way of the extension of the beneficent sway of equity. These warnings should be turned to account, not in futile resistance to the inevitable, or in efforts to restrict to needlessly narrow limits activities which administrative officers can perform better than the courts, but as inspiration to the performance of the creative service which the bar and courts are privileged to render in bringing into our law the undoubted advantages of the new agencies as efficient working implements of government, surrounded, at the same time, with every needful guarantee against abuse.

Fortunately, the theories, firmly established in this country, of due process and of the supremacy of law over official action, afford that protection of individual right and justice which is the ideal of the common law. The time has come for a more ready

recognition that the procedures worked out by administrative bodies have realized this ideal largely without the coercive intervention of courts, and that they have set up standards for the appraisal of the specialized experience with which they are concerned which courts could have formulated, if at all, only more tardily and with far greater difficulty. The reports of the Interstate Commerce Commission and of public utility and industrial commissions, and the admirable studies in this field under the auspices of the Commonwealth Fund, now afford a record of experience which are a guide for the future and an assurance that the development of administrative agencies, under the sympathetic guidance which courts and the bar can give, need not be a menace either to the courts or to the individual. It is a record which encourages us to believe that our concern for the future should be not so much to secure for the citizen the adequate protection which, under the Constitution, cannot be denied, as to secure a more unified system of administrative procedure and to make certain that court review, whether by constitutional or statutory requirement, shall not go beyond that need, and shall be made available at such time and in such manner as will not unnecessarily impair the efficiency of the administrative agency, or duplicate its work by courts.

We need to be reminded, too, that in the construction of statutes establishing administrative agencies and defining their powers there is little scope for the ancient shibboleth that a statute in derogation of the common law must be strictly construed, or for placing an emphasis on their particulars which will defeat their obvious purpose. Legislatures create administrative agencies with the desire and expectation that they will perform efficiently the tasks committed to them. That, at least, is one of the contemplated social advantages to be weighed in resolving doubtful construction. It is an aim so obvious as to make unavoidable the conclusion that the function which courts are called upon to perform, in carrying into operation such administrative schemes, is constructive, not destructive, to make administrative agencies, wherever reasonably possible, effective instruments for law enforcement, and not to destroy them.

If, as you may think, I have labored overmuch these instances in which the common law has failed to prove itself the ideal system which the eighteenth-century writers portrayed, let me hasten to

assure you, of what I hope I have already given some indication, that I do not regard them as necessary results of the system. They were the outgrowths of a legal philosophy which was too little concerned with realities, which thought of law more as an end than as a means to an end, and assigned to the judicial lawmaking function a superficial and mechanical rôle, very largely unrelated to the social data to which the law must be attuned if it is to fulfill its purpose. Pursued to its logical end, such a philosophy could lead only to sterility and decay. That it has not prevailed, and that in our own day the emphasis is shifting to the need of a more penetrating and truer insight into the processes by which a judge-made law is created and adapted to the world in which it is to function, are the facts of outstanding importance in the history of the common law in the United States.

We shall not understand that transformation or realize how great is its promise for the future unless we also understand the part played in it by the law schools of American universities. Originally little more than vocational schools, they began less than two generations ago the steady march of progress which has made them the most powerful agencies in the English speaking world for the organization of a true science of the common law. Recognizing that precedents have not always been the product of a philosophy of law, the law schools have nevertheless shown that they are material out of which a philosophy of law may be constructed. For a generation they concerned themselves with the history of the legal system which we had inherited from the mother country, and with the necessary preliminary work of classification and restatement of its legal doctrine. Gradually there has emerged from the mass of precedent and juridical writing the substance of a common law which, with the clarity and extended detail of its statement, has been subjected to thoroughgoing analysis. With this process of clarification there has gone forward a continuous search for those underlying causes which have made the common law what it is, and a critical survey of its content in comparison with the social and economic life of the times, in order to ascertain its shortcomings and the reasons for them. And, finally, there has been a fresh analysis of the judicial lawmaking function, making clear what artificial conceptions of law and of judicial lawmaking had made obscure, the nature of the process by which the

common law has been enabled to retain its vitality and through which it may still be made adequate to the needs of society.

All this has come about through the patient and persistent investigation of legal problems in the university law schools, with the leadership among others of the great school in whose honor we are here assembled. Highly competent instruction in their classrooms, the writings of their teachers and of others whom they have stimulated and inspired — I cannot omit to mention that remarkable little volume of Mr. Justice Cardozo, *The Nature of the Judicial Process* [18] — are gradually bringing to bench and bar a new and fruitful conception of law and the lawmaking process. It is not too much to say that this intensive reëxamination of law and legal doctrine is bringing us appreciably nearer the promised land — within view I think — where the common law may provide us with the essentials of a truly scientific jurisprudence.

I shall state succinctly what I think is the resulting tendency of our legal thinking. We are coming to realize more completely that law is not an end, but a means to an end — the adequate control and protection of those interests, social and economic, which are the special concern of government and hence of law; that that end is to be attained through the reasonable accommodation of law to changing economic and social needs, weighing them against the need of continuity of our legal system and the earlier experience out of which its precedents have grown; that within the limits lying between the command of statutes on the one hand and the restraints of precedents and doctrines, by common consent regarded as binding, on the other, the judge has liberty of choice of the rule which he applies, and that his choice will rightly depend upon the relative weights of the social and economic advantages which will finally turn the scales of judgment in favor of one rule rather than another. Within this area he performs essentially the function of the legislator, and in a real sense makes law.

As we examine the periods when the common law has made its greatest progress, we realize that this is in fact nothing more than the method which, consciously or unconsciously, the great judges have employed. It is the judicial process which distinguished the work of Mansfield, Marshall, Kent and Holmes, and which has placed them among the outstanding judicial figures of the past two

[18] (1921).

hundred years. Its adequate recognition now by those most concerned with the science of the law, and its acceptance by the new generation of lawyers, are the strongest assurances that the performance of the judicial function will increasingly become a creative art by which legal doctrine, with due regard to its continuity, can be constantly molded to the social and economic needs of the times.

What I have said of the shift in emphasis in our legal thinking, and its possible effects on the future growth of the law, is not to be left out of account in considering the exceptional rôle which courts play in the administration of public law in the United States. The embodiment in a written constitution of the common-law ideal of supremacy of law, and its extension by the imposition of restraints upon the exercise of the powers of government itself, have brought to the judicial function a task of peculiar gravity and delicacy. But the idea of supremacy of law, pronounced by courts over official action, as I have said, was not unknown to the common law of England. The medieval notion that the king himself must keep within legal limits, that his agents and servants who transgress their authority or that of their royal master must suffer the penalties for their wrongdoing, like common mortals, contained the essential juridical material for the development of the law of a constitution imposing restrictions on governmental power. It anticipated the conception of the politically organized society of our own American polity, ruled by the ideal of a universal law lying back of all government action and exacting of it certain standards of conduct.

The common-law doctrine of the supremacy of law did not, it is true, preclude government action. It only required that such action should be in conformity to standards which experience had shown were essential to orderly administration and to the protection of the rights of the citizen. The Constitution set up those standards in the requirements of procedural due process. But it went further in laying substantive prohibitions, both specific and general, upon the exercise of the powers of government, regardless of the manner of their exercise. This novel design for the separation of sovereignty from government, and for the restriction and distribution of the powers of government, has made possible the government of a continent of forty-eight states, each making and

administering its own laws, together with a central government of limited powers, set over them for limited purposes, making and administering laws of its own within the same territory. What has made such an organization of our modern society practicable and tolerable are two main features of the constitutional scheme. One is the extraordinary prescience with which the instrument itself, by definition not embarrassingly meticulous, has succeeded for one hundred and forty years in distributing governmental power between national and state governments in substantial conformity to national and local interests. The other, of which the first is by no means independent, is the fact that its framework has admitted of the solution of the clashing demands of the interests which it has created by judicial decision in conformity to the methods of the common law.

It is true that in this field somewhat varying and larger considerations must enter into the judicial process than those with which it is occupied in the field of private law. Marshall's words, " it is *a constitution* we are expounding ", " intended to endure for ages to come, and, consequently, to be adapted to the various *crises* of human affairs ",[19] place emphasis on one social value which presses for judicial recognition whenever constitutional issues are at stake. The issue too, more often than in private law, is between the conflicting interests of the individual and of society as a whole. There is much in our history, which has found expression in the law and the Constitution, to inspire a passion for the protection of individual right against encroachment by the arbitrary exercise of power by government, much to justify our faith that the adequate protection of individual right and freedom is itself of incalculable social worth. But man does not live by himself and for himself alone. There comes a point in the organization of a complex society where individualism must yield to traffic regulations, where the right to do as one will with his own must bow to zoning ordinances, or even on occasion to price-fixing regulations. Just where the line is to be drawn which marks the boundary between the appropriate field of individual liberty and right and that of government action for the larger good, so as to insure the least sacrifice of both types of social advantage, is the perpetual question of constitutional law. It is necessarily a question of de-

[19] M'Culloch v. Maryland, 4 Wheat. 316, 407, 415 (U. S. 1819).

gree which may vary with time and place. While these are variations in the nature of the subject matter of judicial inquiry, they involve no necessary variation of the methods by which the common law has been accustomed to solve its problems. Its method of marking out, as cases arise, step by step, the line between the permitted and the forbidden, by the process of appraisal and comparison of the experiences of the past and of the present, is as applicable to the field of public law as of private. Courts called upon to rule on questions of constitutional power have thus found ready at hand a common-law technique suitable to the occasion.

In its highest generalization the historic ideal of the common law is a reasoned application of authoritative standards of conduct for all actions, public and private. The common-law ideal of a universal law above the agencies of government never took form in a government held down at every turn by meticulous rules analogous to the rules of real property. There are, it is true, rules of this sort in both state and federal constitutions. The prohibitions in the Federal Constitution of bills of attainder, of any tax on exports, and of the exercise by a state of the power to make treaties and to coin money and the like, are framed in terms of specific and more or less detailed command, and they offer relatively narrow scope for treatment otherwise. But the great constitutional guarantees and immunities of personal liberty and of property, which give rise to the most perplexing questions of constitutional law and government, are but statements of standards to be applied by courts according to the circumstances and conditions which call for their application. The chief and ultimate standard which they exact is reasonableness of official action and its innocence of arbitrary and oppressive exactions. They are not statements of specific commands. They do not prescribe formulas to which governmental action must conform. There is little in the spirit and tradition of the common law to induce us to attempt to reduce the constitutional standard of reasonableness to a detailed formulation of definite propositions. There is neither scope nor historical support for the expansion of the constitutional exaction of reasonableness of official action implied in the use of the phrases " liberty ", " property ", " due process ", " unreasonable ", and the like, into a body of detailed rules attaching definite consequences to definite states of fact.

Whatever tendencies were exhibited in the last century toward an effort to reduce all law to such a system of rigid rules, it has at length been made plain that public law, where constitutions themselves do not impose explicit restraints, is not an aggregate of hard and fast precepts to be handed on and followed from generation to generation. It is rather an indication of starting points for legal reasoning and of a technique for developing it, expressing the ideal of a reasonable exercise of the powers of politically organized society, than the subjection of government to inexorable commands imposed upon it in another age. In such a system there is need of continuity such as the not too rigid adherence to precedent may attain, but it is the continuity not of rules but of aims and ideals which will enable government, in " all the various crises of human affairs ", to continue to function and to perform its appointed task within the bounds of reasonableness.

In ascertaining whether challenged action is reasonable, the traditional common-law technique does not rule out but requires some inquiry into the social and economic data to which it is to be applied. Whether action is reasonable or not must always depend upon the particular facts and circumstances in which it is taken. Action plainly unreasonable at one time and in one set of circumstances may not be so in other times and conditions. The judge, then, who must say whether official action has passed the limits of the reasonable, must open his eyes to all those conditions and circumstances within the range of judicial knowledge, in the light of which reasonableness is to be measured. In this he but follows historic precedent, even though he does less than did Lord Mansfield in learning the practices of merchants in order to adapt the rules of common law to the needs of a mercantile community.

He is aided, too, by the fact that the matter ultimately to be ruled upon is the reasonableness of official action, to which the common law has always attached the presumption of regularity where action is based on official ascertainment of facts and conditions. It is but the resort to a familiar technique of the common law which takes into account the nature of the official function and the circumstance that attending its performance are both the duty to ascertain the facts and special facilities for learning them which entitle it to deferential treatment by courts. And, finally, by a step typical of the methods by which the common law has grown

and accommodated itself to changing needs, courts have developed their own technique for safeguarding coördinate branches of the government from encroachments of the judicial power. By a self-denying ordinance of immeasurable importance to the balanced functioning of the constitutional system, the courts, under the leadership of Marshall, have declared that every law duly passed is presumed to be constitutional, and that the burden is on him who assails it to establish its unconstitutionality beyond the reasonable doubts of objective-minded men. There was thus adopted as a check upon any excess of judicial power a device familiar to the common law, in the presumptions of regularity of official action, and of the innocence of one accused of crime, by which the reasonable freedom of official action and the sanctity of life and liberty have traditionally been shielded from the zeal of courts, so that court action, ordinarily subordinate to that of legislatures, is similarly restricted in the constitutional field when called upon to set aside legislative action.

Whether the constitutional standard of reasonableness of official action is subjective, that of the judge who must decide, or objective in terms of a considered judgment of what the community may regard as within the limits of the reasonable, are questions which the cases have not specifically decided. Often these standards do not differ. When they do not, it is a happy augury for the development of law which is socially adequate. But the judge whose decision may control government action, as well as in deciding questions of private law, must ever be alert to discover whether they do differ and, differing, whether his own or the objective standard will represent the sober second thought of the community, which is the firm base on which all law must ultimately rest.

These somewhat discursive references to the more salient features of the common law in the United States will have failed of their purpose if they do not suggest to your minds some grounds for faith in the capacity of the common-law system to find adequate solutions of the problems of public and private law in a rapidly changing order. That faith must be inspired, not so much by the earlier history of the common law in America, as by its present, and by those unmistakable signs, which one may observe on every hand, of what its future is to be. The results of the

scientific reëxamination of the common law in our own time under the leadership of American university law schools, must convince us that there is nothing either in the spirit or the technique of the common-law method of expanding and applying judge-made law which need stand in the way of the creative development of doctrines and principles adequate to all the demands which may be made upon them and suitable to the judicial interpretation of the prohibitions of the Constitution which will enable that instrument to operate as a workable chart of government, responsive to social and economic conditions. That lesson will not be lost to the oncoming generation of lawyers whom those schools have trained as torch-bearers to illumine the pathway of the law. Despite the narrow and pedantic views which have at times retarded the progress of the common law and obscured our vision of its vital and essential qualities, at no stage of its history has it seemed to give such promise of carrying forward triumphantly the extraordinary task we have assigned to it.

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