

ON LEGAL SCHOLARSHIP

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THERE is a sense in which the law is not merely a learned profession, but *the* learned profession. If you say of a physician or an engineer that he is ignorant, you do not quite imply that he is unskilful in the things he sets out to do. But if you deny learning to a lawyer, you touch him — say the old books — in the essence of his calling. If untrue, your statement is a slander and he will get thumping damages; at least, he would get them from a right-thinking jury.

Although lawyers still refer to each other as “my learned brother,” and Supreme Courts designate as “learned” the courts whose judgments they reverse, it is an open secret that lawyers have taken their duties lightly in the matter. Their learning is apt to be quite specific and definite. If they are talking of bigamy, they perforce must know that in the reign of James II it was generally reckoned as a very serious crime to have two wives at a time, but they need know nothing of the history of marriage, of the sociological or psychological or economic functions of marriage, of its religious and theological aspects. They need not estimate whether bigamy is better than monogamy or worse. They can cling to their precious piece of accurate information about James II and if they can convince the court that it has a relevance to their case, they will be entitled to the salutation of “Oh man of learning!” even though they have no clear notion who James II was or why he is not king still.

To be sure, they often must have a large number of such bits of precise information at hand, but each one may be just as definite, just as unrelated to a background or a system, just as void of significance for anything or anybody except the issue before the court. It is their task to show this special significance and that is a matter of dialectic skill and not of learning.

This situation has come about because the total possible sum of all the bits of information on which this dialectic skill is to be used is far beyond the powers of any human being to grasp or to keep in mind, and because it is collected in tens of myriads of books on thousands of shelves, and the contents of these books can be discovered only by Digests, Cyclopedias, Finders, Citators, Indices and the like. The technique of snuffing up the appropriate fragment of learning is one in which a group of younger and inferior lawyers can be trained to perfection — case-hounds or statute-hawks, who like other useful animals learn how to dig up the truffles which they cannot eat.

There was a time, of course, when the learning of a lawyer was less vicarious. It was also more intensive. But it was likewise extremely

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limited. In Thomas Fuller's time it was still enough that a lawyer should know his *Littleton* and if a little later he knew *Littleton* plus my Lord Coke's commentary on that absolute and perfect treatise, more would not be asked of him.

But in the seventeenth and eighteenth centuries the common law made a desperate and none too successful effort to become rational. The permanently irrational element was turned over to a special class of technicians called conveyancers, and, outside of that field, learning was not permitted to be justified by itself alone. It had to vouch reason or equity or public policy to warranty. Then, in the nineteenth century, especially in the United States, the newer technique gave legal learning a vast extension and a thinner and thinner surface till it broke into minute fragments only to be reassembled in some such way as that already indicated.

Likewise, in the nineteenth century two elements of learning, scientific analysis and history made a tentative effort to enter or reenter the law and up to the date of this writing are still more or less knocking at the door. Perhaps it may be declared that they are admitted into the outer court of the gentiles. In the inner sanctuary they are still looked on askance or, better, are ignored.

This is the more surprising because the common law has insisted on two things: first, that it is the perfection of reason, which, one should suppose, had definite connection with scientific method; and secondly, that it was the custom of England, and customs are normally investigated as historical data. Both statements are in Coke, although, of course, not exclusively in Coke. Just what is meant by saying that the common law is the perfection of reason, common lawyers have rarely stopped to inquire. But they have been acutely conscious that a system of precedents has imposed on them the duty of examining the history of a doctrine as it is presented in cases, each one of which could be placed in space and time, if precisely dated by day and year. The situation became particularly serious when courts in the United States were constitutionally required to apply the common law. What was the common law in any special situation? Or better, where was the common law? In previous decisions, to be sure; but what decisions?

Once more, lawyers made things a little easy for themselves. After all, one could begin with Coke, both the *Institutes* and the *Reports*. It has been stated as a more or less good humored bit of cynicism that it is useless to prove Coke to be mistaken on any given point. Coke's mistakes, we are told, are the common law.

For practical purposes this might work very well, just as the Valentinian law of citations of 423 A. D. served most of the purposes of Roman courts and jurists till the publication of the *Digest*. But no one asserted that the Valentinian law contained the Roman law. It was

assumed that it was a device to save the trouble of a really thorough-going investigation of the Roman law. Here were five collections of books by known authors and you took what you could find there. Similarly, if the epigram about Coke were frankly taken to be a decision to forego any knowledge of the historic common law and to apply as far as possible the law declared by Edward Coke, we should at least be honest in the matter. But it will be noticed, we do not admit so much. We are prone to assert that it really is common law that we discover there. Since we have deliberately limited our research by stopping at Coke, we rationalize our act by assuming or believing as an act of faith that Coke knew and correctly stated the common law.

I may say at once that no one really supposes this to be the case as a matter of history, as indeed the epigram itself shows, but the figure of Coke is an example of the qualities for good or ill of legal scholarship and will do admirably for a basis of discussion.

One of the elements contained in the idea of scholarship is undoubtedly erudition — learning in the ordinary sense. Whatever else a scholar is, he is a man who knows and remembers a great many things. Usually, unless he is a "broad" scholar, these things are in a limited field, but it is important that there shall be a great many matters about that field in his mind. He manifests his scholarship by continually referring to them, by showing an easy familiarity with them. The most effective, if quite modern, method is by a sort of casual allusion that suggests that there is much left unmentioned. But the older and more direct method was to pour out everything that had any bearing on the point, and thus to earn a reputation for erudition by the sheer process of enumeration of facts.

Not only is scholarship in this sense a process of exhibiting knowledge of facts, but these facts are for the most part facts found in books. A man who knows merely facts of experience may be an expert, but he is not called a learned man. A master mariner of Coke's day who knew every minute detail about his ship or about navigation would as little be called learned as a modern engineer would be so called — at any rate an engineer whose knowledge is a knowledge of the concrete data of experience. It must be something in books or it is not scholarship.

Coke was certainly in this sense a most undoubted scholar. He knew a portentous deal about the cases that had been decided in the King's Bench, in the Common Pleas and in the Exchequer. He knew much, but after all, a great deal less than all, about the cases that had been decided in the Chancery. And as one left the courts of Westminster and went to the Admiral's court, the mercantile courts, and the church courts, Coke's erudition, although considerably greater than that of most men, grew less and less, even professedly.

All this material about the royal courts, their decisions and other customs, the names and functions of their judges and officials Coke knew from books: the actual reports that had been in circulation for nearly a century before him, the Year Books that preceded these reports, and the Abridgements in which these Reports had been epitomized. And then he knew the "old books;" first and foremost, he knew Littleton's *Tenures*, but also the *Old Tenures* of the century before Littleton. And likewise the older books, Glanvil, Bracton, Britton, the *Mirroure*, Fleta, Hengham, Staunforde and a great many smaller manuals. He knew the books which collected statutes and precedents arranged by subject matter and by action. Evidently he did not profess to know all these books by heart except, perhaps, Master Littieton. But he had doubtless read them all, knew much of the substance of what was in them and had them ready at hand to quote orally and in writing whenever necessary.

Of the other branches of learning available to men of his time Coke doubtless knew the *Institutes* of Justinian — as any educated man did. He read at least one manual of the Civil Law, and perhaps of the Canon Law. The commonest brocards of both systems were at any rate familiar to him. Then he had had the usual classical training. He had read Cicero, Virgil and Horace, doubtless also Homer, the *Ethics* of Aristotle and some of Plato. His quotations of these authors indicate no especially thorough familiarity. They were not among his bedside books, if he had bedside books. Finally, he knew the Bible in the Vulgate version.

The impression made by Coke's learning on his own and subsequent generations was terrific. He was a prodigy. The term "rabbin of the law" seemed to describe him. If learning or scholarship is to be judged by the capacity to refer to many books about the Common Law in order to prove a point, Coke had it.

The scholarship that consisted in the exhibition of a great deal of information of what was in books was highly characteristic of the Renaissance. In this respect the Renaissance continued the tradition of the medieval schoolmen, at any rate since the Thomistic period. An important difference was that the schoolmen of the thirteenth and fourteenth centuries quoted the fathers, Gregory, Augustinus, Jerome, and doubtless others, and also the commentators and the expositors; and the scholars of the fifteenth and sixteenth centuries quoted Cicero and Livy. In both cases the more recondite and rare the citation was, the more eminent and demonstrable the learning became.

What was completely unessayed in the learning of this time was any exercise of critical judgment. An authority was an authority. And any book was an authority, if it was an old book or, in any case, somewhat older than the person who cited it. It was unnecessary to evaluate the authorities, although the normal tendency was, of course, to ascribe a high importance to every one of them. It was inevitable that

a book should be praised if it was about to be cited. But the essence of authority was that it was quantitative and cumulative. "Weight of authority," an expression which was to become so fateful in the later common law, was to be taken almost in the sense of *avoirdu pois*.

Not only did Coke possess the same sort of learning as the medieval schoolmen and the Renaissance humanists, but he used it as the schoolmen and a few humanists did. Their learning, it must be remembered, was an intellectual instrument. For the schoolmen, Augustine was not quoted to demonstrate that the doctor knew his saint. That was taken more or less for granted. The issue was always a specific argument — a question of casuistry: "Is a given act good or bad under given circumstances?" Or one of theology or philosophy: "How are we to understand this passage, or conceive this attribute of God?" The citations of Jerome, of Augustine, of Gregory, of Latin translations of Eusebius and Origen, were brought in to bolster up the argument. The ancients were vouched to warranty. And the most characteristic way of quoting them was to offer them in a form that itself needed interpretation. It was a particular triumph when only by an ingenious exposition could a *prima facie* irrelevant text be made to offer support to an argument.

The situation changes somewhat with the humanists. Learning is much more of an end in itself — quantitative learning, that is, acquired for love and displayed for show. There is perhaps a certain differentiation. The classical writers are better than the later ones as ornamental devices, and they are so almost in bulk. All Cicero, all Virgil, all Horace, are perfection in styles. History is good history if it is like Livy or Tacitus or Thucydides. And whatever a humanist writes about his classical models or, better, the classical writers whose sentences stuff his mind, will be mentioned as often as possible, not to prove his points but to decorate them. The finest example of this sort of humanistic scholarship is Montaigne, whose insight and skeptical suavity use learning as illustrations or half mocking cadences. The worst example is perhaps the noisy pedantry of such a man as Filelfo, who merely let his learning ooze out on all conceivable occasions and connected it with his discourse by the merest verbal tags.

Coke, it will be seen, derives from both types of learning. Like the scholastic learning, his learning is instrumental. It is cited to prove a point. Coke asserts a rule or a distinction and quotes his authority to prove it. The matter is here or there in "the books." But he quotes more than is necessary to prove it if his theory that the cases are themselves evidence of the law is to be taken seriously. He quotes like the humanistic scholars, for ornament and for display, not so much to bolster up his argument as to make good his claim to vast learning.

But neither the schoolmen nor the humanists nor Coke, who was the descendant of both, had any real sense of criticism. Coke needed merely to make sure or profess to make sure that he had an "authoritative" text before him, to justify its use. The existence of contrary authorities was admitted. In such a case, while you may have a preference, it cannot be denied that conflicting doctrines may also be supported. But how authoritative your warrant is or why it should be taken as authority at all, that is practically never examined. The situation is very much that of expert testimony in American courts. The witness "qualifies as an expert." That is often easily enough done. Then his testimony goes to the jury to be believed or disbelieved, but under the circumstances not to be weighed or tested. The only difference is that the jury has no means or capacity to test or weigh it, but Coke had, if he had wished to use it.

For it must be remembered that Coke was not merely acting by the lights of an uncritical period. A century before Coke, Francis Baudouin had given excellent examples of critical examination applied to just such historical data as that with which Coke dealt. Baudouin had questioned the authenticity of documents, the claims of pseudepigrapha and generally accepted theses. And not only Baudouin but Coke's contemporary, Spelman, and his younger contemporary Selden, are eminent examples of a scholarship which makes the torch of learning that Coke literally brandished look like a pitifully brief candle. Spelman and Selden possessed a judicial acumen and objectivity that Coke never had or at least never exhibited. If the learning of Coke is a medieval and Renaissance learning, it was because Coke was that sort of a person, not because a new and different type of learning had not as yet been developed.

Coke doubtless could and did read some of his Year-book sources in manuscript. But he did not do so habitually, nor is there any reason to believe that he had the patience to solve the problems of paleography that these manuscripts present, or that he saw any need for doing so. There was enough printed material to serve nearly all his purposes, which were, we must remember, polemic and dialectic always, never expository or scientific. He dug into his books to find material to prove his points, and he did so frankly and unabashedly.

Coke's notions of history, whether about law or about England generally, were ludicrous. He believed firmly that England was settled by Brut, the great grandson of Aeneas, about 1000 B. C.; that the common law, much as it was in his own time, was then established; that Edward the Confessor two thousand years later had restated the common law and that this was again done in Magna Carta; that the invasion of Saxons, Danes and Normans had only temporarily disturbed and perverted the grand sweep of this magnificent continuity. The Brut story is, of course, the theme of the excellent thirteenth century Saxon poem of Layamon,

who translated the Norman-French of Wace, who had versified material derived from the Latin chronicle of Geoffrey of Monmouth. In this manner, Coke's proof of English antiquity and perfection finds its first source in the work of a Welshman who despised everything English.

But Coke knew nothing of the history of the Brut story and cared less. Nor did there seem anything improbable or incongruous to him in the notion that a complete system of land tenures and a government by kings, lords and commons had existed in England centuries before the foundation of Rome. He took these stories as he found them because they helped prove his point, first against civilian innovation, based on the superior antiquity of the Roman law, and secondly, against the royal prerogative, based on the theory that the Norman William had conquered England and imposed his feudal and Norman system on the conquered. He did not invent these stories, though he would not have scrupled to do so if it had been necessary. He accepted the preposterous forgeries of the *Mirrou* as pious Churchmen accepted the pseudo-Isidorian *Decretals* and the *Donation* of Constantine. The *Mirrou* gave him statements he could use. He would have regarded a suggestion that its authenticity be scientifically investigated as Jesuit propaganda or Royalist malice.

I am not concerned with Coke's technique in legal argument nor with the accuracy or the inaccuracy of his citations. What is of moment here is merely the illustration he furnishes of a definite type of learning; and the dominating role that Coke played in the imagination of later generations of lawyers and publicists has given that type of learning a permanent footing in our tradition. Its characteristic is that authorities prove themselves, that they are not subject to critical examination, that their cumulation logically adds nothing to their weight, but redounds to the glory of the persons who cite them. To this is to be added the fact that the purpose to be served by learning is a practical purpose. A conclusion is to be established and if it is established by a chain of authorities, it is solidly based, even though its contradictory might also be established by authorities. The choice between the two conclusions is to be made on the basis of the dialectic skill of their proponents, not on the quality of the authorities or the merit of the conclusion.

We can see here the firm foundation of the cock-pit theory of legal discussion and the reason why it is so hard to eradicate in the common law. What is generally absent is any interest either in historic truth or in philosophic validity. The scholarship that had its inception in the scientific impulse of the seventeenth century, however, is concerned almost wholly with these matters, and it is this new type of scholarship that we must now turn to in relation to the law.

The learning of the scholastic and humanistic scholarship represented so fully by Coke had in it a great deal that was fortuitous: "I remember

a case in my Lord Thorpe's time," "There is an example in the *Liber Assisarum*." A great deal was amassed, and while a certain amount of order and arrangement was a psychological necessity, arrangement and order were not of the essence. But the scholarship that began with criticism of sources found itself obliged to deal with irrational authorities. If it could not fit the authorities into a system it denied their force — which was generally a matter of historical investigation; or it emphasized their irrational character and described them as vestiges or survivals or anomalies which should perhaps be destroyed unless they continued to have a function in society.

But there was an obvious demand for systematization. Modern scholarship takes a mass of material and orders it, segregates what will not fit and marks it so. The purpose of this systematization is partly mnemonic, partly as a means of exposition, but at least equally as a satisfaction of a psychologic impulse that is as real as any other.

The word "scholar" long meant a person who knew Latin and Greek — not with any special thoroughness — but who knew it at all. It designated, therefore, merely a man who had gone to school, since nothing else was taught in schools. But when intensified study of Latin and Greek was the pride of a cultured society, a scholar was one who knew the languages well. Hebrew was added in the Reformed countries and soon Oriental languages generally. Finally it became applied particularly to those persons who employed the methods of research and of science to the study of any language, especially if it was a dead or a remote language.

The term philology as we know it, did not become current till the seventeenth century. It seemed to cover the field of which scholarship could be predicated. But history was very soon included specifically, because history was in a sense a branch of philology, since it was something which could be studied only by persons who knew other languages. In most cases, any history was impossible without a knowledge of Latin. An historian was, therefore, of necessity a scholar, since he had to be a good deal of a philologist, but this specific dependence was soon abandoned. History became in a sense the particular connotation of scholarship. A man was a scholar in any subject, even in a lowly and concrete subject, if he knew its history. It is thus that a man may have a scholarly acquaintance with bathtubs and toothpicks as well as Homeric criticism and the Decline and Fall of the Roman Empire.

And it is through history and philology that scholarship can be applied to law. It is characteristic that Coke was regarded in his own and subsequent generations as a learned lawyer, but Spelman and Madox were styled "legal antiquarians." On the older theories of scholarship, both would be well enough entitled to be so called. But if the modern tests are applied, Coke was a mediocre scholar since he was only moder-

ately interested in truth and very much interested in overcoming his real or imaginary opponents; while Spelman and Madox were excellent scholars simply because they were far more interested in truth than in establishing their point.

While scholarship has been deepened by science and broadened by philosophy it has never freed itself in the estimation of lawyers and other practical gentlemen from the suspicion of being concerned with trifles. Obviously there is a great difference between one fact and another, even if both are perfectly true by the correspondence test. But the evaluation of facts must depend on the purpose for which the fact is ascertained. Is December 25th the birthday of Christ? It is of no importance unless inferences are drawn from the fact that this is the correct date, in which case the ascertainment by modern scholarship that the date is wrong is of first rate importance so far as those inferences are concerned. And the point is that we can never be quite sure that inferences will not be drawn from a wrong statement, and consequently if doubts are aroused we may not refuse to investigate them.

Similarly it may be of no importance whether *per legem terre* in Magna Carta implied trial by jury, provided our only interest in trial by jury is connected with a pending indictment. But when attention is for any reason directed to the assertion that this is the meaning of the phrase *per legem terre*, it is highly desirable to discover whether it really is. The fantasy about tenancy by cornage is as old as Littleton and is continued into the nineteenth century. In interpreting a California deed, it is irrelevant, but if Northumbrian land titles are the subject of discussion, it is well to know that such lands were held not by the service of giving notice of invasion by means of blowing a horn, but for a payment based on heads of cattle.

All such valuation of sources is based on knowing the purpose for which the statement was made. But as a matter of fact, if the statement is made at all, there must have been some purpose in making it, so that at once the accuracy of the statement is in issue to some extent. Nothing is more exasperating in legal discussion than to find a lengthy statement about the development of a doctrine and then to meet, when the historical truth is challenged, the lofty retort that it makes no difference whether it is true or not. If it makes no difference, the statement should not be there at all. No history is better than bad history, and if we were to keep all bad history out of all legal and judicial discussions, the discussions would be better for the omission.

But it would be better still if the history were correctly stated as far as modern scholarship can state it. And here we meet what is the concealed grievance of practical gentlemen against scholarship. It is not really the triviality or the irrelevance of the facts that scholarship ascertains. It is the fact that when scholarship is applied to any body

of facts, especially historical facts, the result is generally a verdict of not proven, a statement that several conjectures have varying degrees of plausibility, an emphasis on the fact that we cannot get nearer to truth than an approximation.

Practical gentlemen hate uncertainty, balancing of probabilities, skepticism or approximation. They have a number of bitterly satirical comments on persons whose minds are so open that their brains fall out. They are bent on getting to a conclusion. In fact, their favorite conclusion is already at hand, and they know they will reach it by Barbara and Celarent but never by Darii or Ferio. That is to say, if the premises contain "perhaps" or "on the whole" or "in many cases," these limitations must appear in the conclusion; and while lawyers use these phrases, they do not honestly mean them. It satisfies a real psychological demand, therefore, to repeat a traditional statement which is four-square or neatly circular without subjecting it to a scholarly research which will almost surely destroy its outlines and render it useless for an emphatic and unqualified conclusion. Traditional statements, again, however bad, if sufficiently multiplied, still justify themselves as learning, and if one can be learned, it seems doubly unnecessary to be scholarly.

There is still another consideration for which the illustration may be drawn not only from Coke, who was only partially capable of understanding what scholarship meant, but from Maitland, who was probably the finest and most complete legal scholar that England has produced. In his essay on *The Seisin of Chattels*,¹ Maitland quotes a definition of seisin Mansfield took from Craig's *Feudal Law*, a Scottish book of the sixteenth century, and from the *Libri Feudorum*, a Lombard compilation of the twelfth century. Maitland goes on to say: "But it will have occurred to many readers as a little strange that Lord Mansfield, instead of vouching some English writer, Glanvil or Bracton, Littleton or Coke, to warrant what he thus said about a word which, for many centuries, had been constantly in the mouths of English lawyers, should have appealed to certain ancient Lombards and a modern Scotchman."

Maitland was quite right. Many would have wondered, and would have doubtless been much better satisfied if Mansfield had quoted Coke, who would really be entitled to extremely little weight in such matters, except where he named his source. The question, however, should be not whether we need to go to Scotland or Lombardy for our source, but why an English authority is better. It is better, of course, if there is greater likelihood that this geographically nearer source was used than the more remote ones. But that cannot be determined until we have carefully examined the question of whether the *Libri Feudorum* either

1. (1885) 1 L. Q. REV. 324; 1 MAITLAND, COLLECTED PAPERS (1911) 329.

in their original or in their British setting were available to the men who used the word *seisin*.

There is a touch in all this that a local and home-grown source is somehow better than a foreign one. That is due partly to an unavoidable prejudice for what we know better, but also in part to the line of least resistance. We shall not really have applied scholarship to law, however, until we remember that while we must often use inadequate sources, we must never pretend even to ourselves that they are adequate.

It is doubtless the Anglo-American lawyer's absorption in his practical tasks that has left us with the unenviable reputation of being the least scholarly of learned professions. But it is partly our capacity for self-deception that has kept us so. It is not enough that our legal history is still insufficient and our legal philology not much beyond the etymologies of the *Termes de la Ley*. Our difficulty lies in the fact that we are Malignants in the sense of the seventeenth century. We refuse to reform. We are capable of defending our insufficiencies on the theory that the least admission against interest will be used against us. We find it hard to be sure of a good historical theory, and we take any that comes to hand. And there is nothing so seductive as having to make a case for a bad historical theory.

We have less excuse at the present day because we have been furnished in recent times with the notable examples of Maitland and Holdsworth, to instance only the most famous of at least a dozen names, men in whose works scholarly methods are exemplified as in few books on any subject. And lawyers have recognized the character and importance of their accomplishment. But they have not freed legal history entirely from the suspicion of being antiquarian and, therefore, irrelevant to what the lawyer really wishes to know. In one sense, matters have become a little worse because of them. If to be a legal scholar one must be a man of the vast grasp and varied equipment of Maitland or Holdsworth, most of us would perforce be compelled to forego any claim to that designation. But all these men have labored in vain if they have not freed us from the belief that something in books is authoritative merely because it is in a book, and that, if lawyers have neither the time nor the training to apply the methods of scholarship, they may compromise by pretending to do so, by piling authority on authority, by using the externals of scholarship — which is the accurate verification of citations — and by disregarding the important part of scholarship — which is criticism of the sources cited.

When I speak of this type of scholarship as something which began in the seventeenth century, the statement is to be taken with a great deal of qualification. Admirable examples are to be found in the heart of the Middle Ages. Nor did it reach its full development as early as 1700, although besides Spelman and Selden, Thomas Madox — who

has not been able to make the pages of any edition of the Britannica — represents a stage in scholarly research in law that was not attained in England till the period of Palgrave and Maitland.

But scholarship proper, as we generally understand it, which usually suggests philology and history, is a work of the nineteenth century, and the most complete examples are to be found in England, France and Germany. In Germany, particularly, the newer methods were shown to require not merely systematization carried to a degree unknown before, but also another principle, that of an exhaustive or nearly exhaustive gathering of materials, as complete an inductive basis as was feasible.

This is quite different from the older learning, in which authority was unquestioned and any authoritatively supported assertion was sufficiently well sponsored to be the foundation of a whole edifice of reasoning. The concern is now not for a truth sanctioned by something better than human or, at any rate, better than contemporary judgment, but for a truth of determinable past fact, which must be derived from examination of books and documents. And a great importance is laid on having the facts complete. The statement that certain facts are essential and others not essential is no longer accepted. It is not past opinion that is examined but the material on which the opinion is based. A properly qualified scholar will establish his own basis for his opinion.

This doubtless is the origin of the cult of exhaustive enumeration which has had so many excessive manifestations in modern times and has furnished so much occasion for ridicule. Certainly there were ridiculous enough instances, but as a matter of fact the ridicule was just as likely to be directed to a study that was of real significance and value as to the mere pedantry of knowing that every instance of a usage or a type heartily unimportant in itself has been tabulated.

The need for an exhaustive account is grounded in the method of the exact sciences. Any one of a number of theories of light will give a plausible account of the ordinary phenomena, but only a very few of them will fit such phenomena as diffraction and interference. Unless we have them all, we cannot be sure that the touchstone of one theory will work. Scholarship cannot make with confidence any system whatever unless it is in possession of all the data. It can make a tentative one and if scholars can promise themselves the strength of mind to resist the emotional transference to the system they have devised, there is no harm in making as many tentative orderings as they wish. But scholarship demands patience and patience is a difficult thing to learn.

To criticism of sources, to an exhaustive induction, to a systematization devised as a convenience of reference or of exposition, there is, of course, to be added that *epitheton ornans* of scholarship, the term "accurate." Evidently inaccurate scholarship is as much of a contradiction

as a "partial judge," but there are in fact more inaccurate scholars than there are partial judges, we hope. It is a question of degree, after all. Complete and absolute accuracy is practically impossible. How much inaccuracy may be tolerated and what kind of inaccuracy, will be differently stated by different men.

There are those persons who will not admit that the slightest error is anything less than a mortal sin. Eminent scholars have been heard to say that all details are equally important and that a mistake in the measurement of a manuscript page is as serious as a complete misunderstanding of the purposes of the text. Obviously, no one has as yet lived up fully to so hard a rule, any more than the ancient Stoics can be taken literally when they proved conclusively that all sins were equal and that there were no degrees of error. We may, therefore, take it that perfect accuracy in great matters as in small is desirable but attainable only with efforts slightly beyond human power. To be sure, reviewers and critics will continue to reserve their vested interest in all errors large and small and to determine sovereignly what constitutes, either in quantity or quality, the limits of the venial in such matters. There are many of us who must plead for a treatment better perhaps than our deserts, if we venture to be classed as scholars at all.

If all this is scholarship as it developed out of the critical rationalism of the modern age, its application to law is clear enough. In all modern countries the immediate ancestors of the legal profession are the canonists and theologians of the height of the Middle Ages. Like them, the lawyer has a problem to solve. It is not the ascertainment of truth but is the dialectic task of establishing the relevancy of an admittedly authoritative text to one of several possible adjustments of conflicting claims. Like the canonists and theologians, he needs a set of authoritative texts, an *album iudiciorum* instead of *iudicum*, and neither theologian, civilian, canonist nor common lawyer is likely to be very patient with persons who challenge the authority of their authorities. But all four of them are confronted with the problem of contradictions or antinomies and, as in the case of Gratian, their technique lies in part in providing a concord for the discordant canons. But, whereas Gratian had no purpose except the general intellectual one of finding such a concord, a truth we have been taught to call a logical truth, the purpose of lawyers in the presence of discordant canons is to make a concordance which will eliminate one of them, or at any rate create that particular harmony of which the test will be a limited sort of logical truth, the logical truth that will result in a pre-selected conclusion.

It is, therefore, very natural that, so long as the professional side of legal activity is uppermost in lawyers' minds, their scholarship will tend to be that of Coke at his best; their dealings with authority will be uncritical as far as the validity of the authority is concerned; and at its

highest their skill in using *distinguo* will be in direct ratio to the extent of discordance in their canons. If they wish to be learned lawyers as well as acute ones they will add authority to authority, even if it necessitates in each case the dialectic technique of removing discordant elements.

But scholarship, properly speaking, begins where practical necessities end. In Gratian's hands the task of harmonizing discordances had the objective interest of determining truth, although a dialectic truth. Gratian, however, had no concern with the canons themselves. These were data. Modern scholarship has shifted the problem somewhat. Its chief task is that of critical examination of the canons.

The canons are in the main the same as those of Coke. They are in printed books and in manuscript. There are two other intellectual disciplines in which the critical examination of such texts is the basis of study. They are philology and history, and they are the disciplines in which all the elements of modern scholarship have been fully developed. But there is no abstract philology or history. It is always the study of a particular language or a particular epoch or a particular group or institution. There is no difference between philological scholarship as applied to Homer and as applied to Bracton, nor indeed to Littleton or to Coke, since Coke, the worst of all philologists, often in his own usage of words and expressions presents problems that would interest philologists. Again, history is investigation of a more or less limited field in past time. Its real characteristic is that history is an indivisible unit. Temporal limitations are unavoidable for purposes of exposition, and equally unavoidable are the limits presented by groups of persons whose interaction is to be described. Only one group can be presented at a time.

We can forget in deciding on *termini a quo* and *ad quem*, that the line is more or less arbitrary. But in discussing any single group, the demarcation is extremely precarious. Lawyers have dealt with legal history as though they were actually dealing with people whose sole function in life was to prosecute and defend lawsuits, who did not eat or sleep, marry or give in marriage, fight or love, except in so far as these actions might become the subject of testimony before a jury. And on the other hand, historians of various periods of English and other history have acted as though legal institutions were excrescences on the social body, regrettable, but ignored by the polite.

In this respect law has fared at the hands of historians somewhat as economics once fared. But the nineteenth century won the battle for the economists so well that historians are inclined, if anything, to give economic factors a little more than their share of attention—not to speak of the latest of historians who see no factor that is not economic. Law has had no such historical advocates. What is called public law

has been included from time immemorial as a branch of politics, which was long the sole rival of war as the subject of history. But public law, as it appeared to historians disdainful or innocent of law in general, was a marvelous thing — not quite law and sufficiently public. For just as lawyers forgot that their language and ideas were not wholly as artificial as Coke delighted to think them, and that words like “confidence” and “seisin” were human words before they became craft expressions, so historians seem never to have suspected that words borrowed from legal sources and used in non-legal or partly non-legal documents carried over their craft meaning. There is no better illustration than the havoc that American historians have caused by assuming that “body politic” in the *Mayflower Compact* and other documents meant “political body” merely because it sounds like that.

Philology and history, therefore, in which scholarly methods have been chiefly developed, have not helped law to be scholarly as much as should have been the case, and lawyers, when they found themselves confronted with the task of the philologist and the historian — and such occasions arise — quite excusably were at a loss and acted as they were accustomed to act when they had nothing else to do than persuade a jury or a judge that they had a better case than their opponents.

Scholarship, in this painful sense, in which a complete scientific technique of testing and examining is imposed on a preliminary induction, and in which the results are never more than a plausible conjecture, has to contend not only with the indifference of dialecticians who are concerned merely with a logical scheme, but also with the newest theories of law which profess to deal realistically with the present and future and which scorn dialectics. I profess the faith of realism and cannot imagine a legal theory that is not first of all concerned with a disposition of relations between man and man in an actual case. This takes us into the future at once, because a judgment is a decision to cause a future disposition to come about.

There is an undoubted tendency on the part of those who wish to discard conceptualism in law to assume that scholarship is implicit in conceptualism or vice versa. But as a matter of fact, the technique that assumes that fixed and solid principles are somehow given and that the task of the lawyer is to discover points of contact between these fixed principles and every situation that comes up for legal adjustment, is not the technique of scholars. It is a fascinating and stimulating process in which imagination and ingenuity play a large part, but it is as remote from the attitude of scholarship as anything can be.

Scholarship seeks to determine the truth and is fairly sure that it will not get nearer than an approximation, which it will hold tentatively and which it is willing to discard at the first well-founded critical attack. But the conceptualist attitude begins with a truth that is superior

to critical attack and is, therefore, removed from scholarly investigation. When scholarly methods are directed to these concepts, it must be on the side of philology and history. Since even principles must be expressed in words, the analysis of the words and their meanings can be conducted as philology, and since a principle was first stated in an historical setting, the investigation of that setting and of the circumstances in which the principle was restated is an obvious field for scholarship.

Indeed, if realists are as hostile to abstract conceptions as they say, they will welcome the aid of scholarship to force the concepts to justify themselves. It may well be that when that is done, they have no further use for scholarly technique. Certainly, to reverse the phrase of Cujas, they may cry, "*quid edictum praetoris cum hoc?*" — "*hoc*" being, for the sake of argument, the sit-down strike. I will not undertake to convince them that there is a connection. But, after all, it is hard for the toughest minded legal engineer to be unswervingly realistic for twenty-four hours on end. In the intervals of relaxation, he may develop a curiosity about the steps that immediately preceded the situation he wishes to readjust. If he does so, he is in peril. The slightest glide into the past makes him an historian and if he would rather be a good historian than a bad one, he had better acquire a knowledge of scholarly methods.

There are times in all disciplines when scholarship verges on something larger than critical evaluation of source or extensive inductions or successful systematizations or meticulous accuracy. A discipline, after all, is an artificially segregated phase of a mental totality, and this totality is nothing less than the universe as reflected in a human mind. The legal scholar, like the historical scholar, will at some moments of his life be conscious of an obligation to make complete sense of his preoccupations by adjusting them fully to his intellectual world. He will have to be, ever so slightly and diffidently, something of a philosopher.

There is perhaps no necessary connection between philosophy and scholarship, but it is a fact that most philosophers are learned men and the more nearly their learning satisfies the demands of scholarship, as they have just been set forth, the better philosophers they are. That is due to the fact that, since a complete grasp of the universe in any one human mind is practically impossible — at any rate for the present — the successive attempts to arrive at such a grasp become a matter of record and no sensible persons wish to make the mistakes of their predecessors, if they can avoid them. Philosophic scholarship is, therefore, either purely history, as definitely history as is the investigation of any past epoch in a limited territory, studied for its own sake and without ulterior purpose; or else it is such history studied with the ulterior purpose of showing the defects of previous theories and the gaps that are left to be filled.

But if philosophy needs scholarly method as a means to effect its ends, a really serious scholarship in any subject can scarcely exist without a philosophic conscience. It is all very well to speak of a search for objective truth without any disposition to use it for any practical end, but in the last analysis this will not prove a satisfactory occupation for men of adult intelligence. The matter investigated — however minute a fraction of the experience of mankind — must be seen, or at least it must seem possible that at some time in the future it will be seen, *sub specie aeternitatis*. Otherwise the staleness and unprofitableness of determining with painful precision what can no longer be of moment to any conceivable conduct, will exercise an irresistible check to any lengthy meddling with it. And, as a matter of fact, in spite of repeated and emphatic assertions that scholars have no concern with implications and arrangements, the directly descried or directly suggested position of an ascertained fact in a scheme no smaller than the world, is of the essence of scholarship as it is of philosophy.

That must be peculiarly so with legal scholarship. Legal philology is merely the methods learned in preparing editions of Greek and Latin and Hebrew texts applied to Latin, Norman-French and English texts. But legal history is the history of all human activity, or nearly all of it, in a given period of time, generally a long period of time. An economic historian can and does glance only casually on family life, on art, on belles lettres, on intellectual development. A legal historian may have to go deeply into Peter the Lombard's sentences, into the political allusions of a poem, into the style of a Renaissance painter. Under all circumstances, these things are really no less grist to his mill than the chaffering of horse-dealers or the documentary evidences of a corporate merger. If either group of facts is involved in a law suit, it is equally important for that law suit.

Legal scholarship consequently must be prepared to follow its ascertained facts much further into the place each fact has with reference to the Pleiades or to the impact of protons on each other than other aspects of scholarship are required to do. That ought to keep legal scholars occupied and humble. And since there are limitations of time, the search for the truth obtainable by legal scholarship applied to law will be more frequently a distant prospect than the easier and less exhausting truth of other disciplines.

But distant as it is, we may not turn our face from it, so long as the ideals of scholarship continue to stir us. It is unfortunately true that we allow ourselves easily to be diverted. The most powerful of the ideals of scholarship is the love of truth, and it may be that in our innocence we have exaggerated the driving power of that impulse. A. E. Housman said quite correctly that the love of truth was the weakest of the pas-

sions. Perhaps a world satiated with power, wealth and sense-satisfactions will have more room for it.

The essence of scholarship in the modern sense is not learning but criticism. And the critical scholar who has fulfilled all the requirements of patient collection of material, of scientific investigation, of skeptical detachment, of philosophic synthesis, is a rare person, so rare indeed that we are not likely to meet many of them in law or in anything else. Indeed, the tendency to make things easy by accepting what is at hand as authoritative, the tendency to prefer home products to foreign ones, the tendency to grow desperately fond of one's own conjectures, are rarely absent in some degree from honest scholars.

But the standards of scholarly method are known even to some who do not quite follow them, and if we keep rigidly to the distinction between scholarship and learning on the one hand, which is a difference between a general method and a means of pursuing it, and between scholarship and dialectic on the other, which is a difference between seeking the approximate truth of scientific correspondence and the logical truth of consistency, we shall not fail to understand the function of scholarship in law. And if we add to that the self-discipline of skepticism, we shall get less satisfaction out of our intellectual pursuits, but we shall be less likely to go astray.