

A Bibliographical Note

In one sense, there is so much written about American law in the twentieth century that nobody could possibly absorb it all, not in a hundred lifetimes. There are more than a million volumes in the Harvard Law Library, most of them about American law, most of them published in the twentieth century; almost all of these are, in a way, sources that could potentially be used by somebody writing this kind of book. There are hundreds of law reviews, and most of the material in their millions of pages concerns American law in the twentieth century; archives are chock full of court records, lawyers' papers, and the like; tons of this stuff lie around in county courthouses and historical societies; in recent years, you can add to what is in these books and articles and archives the almost limitless contents of legal cyberspace, a mysterious science-fiction world of electronic data, which grows and grows and is nowhere and everywhere at once.

Moreover, the line between secondary literature and primary sources, for a period this recent, is naturally rather indistinct. Older studies—crime surveys of the 1920s, like the *Illinois Crime Survey* (1929); classics like Kalven and Zeisel's *The American Jury* (1966)—are works of scholarship, and at the same time, by now, genuine historical documents. I will, for the most part, ignore these in this survey of the literature, and concentrate on books of the more recent past.

Despite the fact that there is way too much literature for any one human being to absorb, general narrative accounts of the history of law in this century are actually so scarce as to be almost nonexistent. My own book, *A History of American Law* (2d ed., 1985), despite its promising title, essentially peters out in 1900; there is a forty-page epilogue which deals with the twentieth century, but I cannot honestly call this more than a sketch of a few major themes. Kermit Hall's book *The Magic Mirror: Law in American History* (1989) does, in fact, include the twentieth century. Hall's book is 336 pages long; and the twentieth century gets about a third of this. There are many good qualities to Hall's treatment of the twentieth century, but it is, after all, quite short; it cannot

honestly be considered definitive. Gerald L. Fetner, *Ordered Liberty: Legal Reform in the Twentieth Century* (1983), has only 96 pages of text, along with some documents; and it leaves out criminal law and most private law topics. There are some efforts to sum up or describe American legal culture in the twentieth century. I made modest attempts in *Total Justice* (1985) and *The Republic of Choice: Law, Authority, and Culture* (1990). An important interpretation of the latter half of the century is Robert A. Kagan, *Adversarial Legalism: The American Way of Law* (forthcoming, 2001).

There are also some annotated collections of documents (casebooks, in a way), such as Stephen B. Presser and Jamil S. Zainaldin, *Law and Jurisprudence in American History: Cases and Materials* (3d edition, 1995); this devotes some 200 pages to the twentieth century, but most of this deals with schools of legal thought, and constitutional doctrine, with some bits about contract and tort law. Another collection is Kermit L. Hall, William M. Wiecek, and Paul Finkelman, *American Legal History: Cases and Materials* (2d edition, 1996). It puts somewhat less weight on the twentieth century; the general themes of this collection, and the points of emphasis, are much the same as in Presser and Zainaldin. In other words, there is a crying need for some kind of synthesis. Whether *this* book fills the gap—or at least some part of the gap—I leave to the reader to judge.

I should also point out that law is so important a part of the American story in the twentieth century that almost every significant account of American history, politics, or culture is bound to have material about the law. You cannot write the history of the New Deal, for example, without talking about its massive legislative program. And indeed, there is a tremendous amount of legal history in David M. Kennedy, *Freedom from Fear: The American People in Depression and War, 1929–1945* (1999). A similar point could be made about any major twentieth-century study.

So far I have been talking about the general literature of legal history. Few books recount the legal history of any particular state. An exception is Joseph A. Ranney, *Trusting Nothing to Providence: A History of Wisconsin's Legal System* (1999). Histories of the bench and bar are, unfortunately, rarely of any real value—the authors would never get tenure at any respectable university—but they sometimes provide bits of useful information.

The situation, of course, is quite different in some more specific areas. There is, for example, an enormous literature on constitutional history and the

work of the Supreme Court in the twentieth century; indeed, this is a bottomless pit. I can mention only a few of these multitudes—those which I found especially useful or compelling for one reason or another. Melvin I. Urofsky, *A March of Liberty: A Constitutional History of the United States* (1988), devotes several hundred pages to the twentieth century, and often goes far beyond constitutional history; this is a valuable book. William F. Swindler wrote a three-volume history, covering the first two-thirds of the century, under the general title *Court and Constitution in the 20th Century*. The three volumes are: *The Old Legality, 1889–1932* (1969); *The New Legality, 1932–1968* (1970); and *The Modern Interpretation* (1974). On the Fuller Court, see James W. Ely, Jr., *The Chief Justiceship of Melville W. Fuller, 1888–1910* (1995); see also, on the Fuller and White Courts, John E. Semonche, *Charting the Future: The Supreme Court Responds to a Changing Society, 1890–1910* (1978); a recent and innovative addition to the literature is Maxwell Bloomfield, *Peaceful Revolution: Constitutional Change and American Culture from Progressivism to the New Deal* (2000). On the Stone and Vinson Courts, see Melvin I. Urofsky, *Division and Discord: The Supreme Court Under Stone and Vinson, 1941–1953* (1997); on the Warren Court, there is a large literature, including Lucas A. Powe, Jr., *The Warren Court and American Politics* (2000), and Morton J. Horowitz, *The Warren Court and the Pursuit of Justice* (1998). On more specific topics: Howard Gillman, *The Constitution Besieged: The Rise and Demise of Lochner Era Police Powers Jurisprudence* (1993); on Roosevelt's court-packing plan, William E. Leuchtenburg, *The Supreme Court Reborn: The Constitutional Revolution in the Age of Roosevelt* (1995); and on the New Deal developments on the Court, and what led up to them, Barry Cushman, *Rethinking the New Deal Court: The Structure of a Constitutional Revolution* (1998). On the Burger Court, there is a useful, if uneven, collection of essays: Bernard Schwartz, ed., *The Burger Court: Counter-Revolution or Confirmation?* (1998). A vivid picture of the Court at work, from the worm's-eye view of a Court clerk, is Edward Lazarus, *Closed Chambers* (1998), which he subtitles *The First Eyewitness Account of the Epic Struggles Inside the Supreme Court*. On the selection of federal judges, there is a fine and exhaustive monograph, Sheldon Goldman, *Picking Federal Judges: Lower Court Selection from Roosevelt Through Reagan* (1997). On the work of the Courts of Appeals, see Donald R. Songer, Reginald S. Sheehan, and Susan B. Haire, *Continuity and Change on the United States Courts of Appeals* (2000). Alexander Keyssar, *The Right to Vote: The Contested*

History of Democracy in the United States (2000), sheds new light on the history of suffrage.

There are also innumerable biographies of Supreme Court justices. The literature on Oliver Wendell Holmes, Jr., is especially voluminous; a well-written overview is G. Edward White, *Justice Oliver Wendell Holmes: Law and the Inner Self* (1993). Richard Polenberg, *The World of Benjamin Cardozo: Personal Values and the Judicial Process* (1997) is a fine study of this judge; another recent biography of Cardozo is Andrew L. Kaufman, *Cardozo* (1998). Alpheus Thomas Mason's classic biography, *Brandeis: A Free Man's Life* (1946) is still worth reading. On Felix Frankfurter's career before the Court, see Michael E. Parrish, *Felix Frankfurter and His Times: The Reform Years* (1982). Not surprisingly, there are many biographies of Earl Warren; one noteworthy example is G. Edward White, *Earl Warren: A Public Life* (1982). The biography of Thurgood Marshall by Howard Ball, *A Defiant Life: Thurgood Marshall and the Persistence of Racism in America* (1998), is also rich in details about the civil rights movement, and Marshall's part in the movement before he was appointed to the Supreme Court. Other good biographies of Supreme Court justices include Dennis J. Hutchinson, *The Man Who Once Was Whizzer White: A Portrait of Justice Byron R. White* (1998), and Laura Kalman, *Abe Fortas: A Biography* (1990). Lower federal judges, naturally enough, get much less play. Here one must mention Gerald Gunther, *Learned Hand: The Man and the Judge* (1994), and Robert Jerome Glennon, *The Iconoclast as Reformer: Jerome Frank's Impact on American Law* (1985). State-court judges are even more neglected; but biographies of Cardozo, for example, are a partial exception, because his most notable work was done in New York, not in Washington.

Jerome Frank was more famous as a legal thinker than as a judge. Legal thought and legal thinkers have had their share of literature. On Karl Llewellyn, see William Twining, *Karl Llewellyn and the Realist Movement* (1973); since Twining wrote, the Llewellyn literature has grown substantially; see, for example, N. E. H. Hull, *Roscoe Pound and Karl Llewellyn: Searching for an American Jurisprudence* (1997). On the legal realist movement, see Laura Kalman, *Legal Realism at Yale, 1927-1960* (1986); Kalman deals with later developments in *The Strange Career of Legal Liberalism* (1996); see also John Henry Schlegel, *American Legal Realism and Empirical Social Science* (1995). Morton Horwitz, *The Transformation of American Law, 1870-1960: The Crisis of Legal Ortho-*

doxy (1992), is a general treatment of the intellectual history of the American legal system.

On individual decisions of the Supreme Court, and individual areas of decision, there is also an inexhaustible literature. The books and articles about *Brown v. Board of Education*, and what came before and after, could fill a sizable room. One has to mention, however, Richard Kluger, *Simple Justice* (1976), a richly detailed account of the background of this case. Also useful is Mary L. Dudziak, *Cold War Civil Rights: Race and the Image of American Democracy* (2000). On the reaction to *Brown*, and the impact of the case, there are many studies. Jack Bass, *Unlikely Heroes* (1981), deals with the southern federal judges who bore the brunt of the legal struggle to integrate; see also Michal Belknap, *Federal Law and Southern Order: Racial Violence and Constitutional Conflict in the Post-Brown South* (1995). Peter Irons, *Justice at War* (1983), tells the story of the Japanese internment cases in World War II; and in *The Courage of Their Convictions* (1988), Irons provides first-person accounts by the men and women who figured in sixteen notable Supreme Court cases—a most interesting and enlightening book. The *Oxford Guide to United States Supreme Court Decisions* (1999), edited by Kermit Hall, has brief sketches of the most prominent Supreme Court cases. It is an exceedingly useful reference book.

A wonderful account of the early freedom of speech cases is Richard Polenberg, *Fighting Faiths: The Abrams Case, the Supreme Court, and Free Speech* (1987); indeed, this book goes far beyond the case itself, dealing with the whole period of the red scare. David J. Garrow has written a rich and interesting study of the abortion cases and their precursors in *Liberty and Sexuality: The Right to Privacy and the Making of Roe v. Wade* (1994); there is a fairly big literature on this subject, including Barbara Hinkson Craig and David M. O'Brien, *Abortion and American Politics* (1993). Among other noteworthy accounts of individual cases are Melvin I. Urofsky, *Affirmative Action on Trial: Sex Discrimination in Johnson v. Santa Clara* (1997); Christopher P. Manfredi, *The Supreme Court and Juvenile Justice* (1998); Maeva Marcus, *Truman and the Steel Seizure Case: The Limits of Presidential Power* (1994). A lucid and useful summary of many of the changes in constitutional law (and in society) can be found in Samuel Walker's book, *The Rights Revolution: Rights and Community in Modern America* (1998).

There is considerable material on the legal profession. Richard L. Abel's

book, *American Lawyers* (1989), contains a great deal of historical material. See also Jerold S. Auerbach, *Unequal Justice: Lawyers and Social Change in Modern America* (1976); Peter H. Irons, *The New Deal Lawyers* (1982), looks at New Deal legislation from the standpoint of the government lawyers who worked on the statutes and the cases; see also Ronen Shamir, *Managing Legal Uncertainty: Elite Lawyers in the New Deal* (1995). On public-interest lawyers, see Martha F. Davis, *Brutal Need: Lawyers and the Welfare Rights Movement, 1960–1973* (1993). On legal education in general, the standard work is Robert B. Stevens, *Law School: Legal Education in America from the 1850s to the 1980s* (1983); but this is a growing literature. There are quite a few histories of particular law schools, of variable quality. Histories of law firms also exist, but most of them are bland and self-congratulatory. One of the few written by a professional historian is Harold Hyman, *Craftsmanship and Character: A History of the Vinson and Elkins Law Firm of Houston, 1917–1997* (1998). There are also dozens and dozens of biographies of lawyers, and many autobiographies, most dedicated to the proposition that the author was a heroic figure; few of these are any good. But a handful have been written by real, honest-to-goodness historians; one of the best of these is William H. Harbaugh, *Lawyer's Lawyer: The Life of John W. Davis* (1973). Clarence Darrow was flamboyant enough to attract his share of biographers; see, especially, Kevin Tierney, *Darrow: A Biography* (1979). There is also David J. Langum's fascinating biography, *William M. Kunstler: The Most Hated Lawyer in America* (1999).

Rights and violations of rights have generated quite a literature. On free speech, see Polenberg, *Fighting Faiths*; and, for the earlier period, David Rabban, *Free Speech in Its Forgotten Years* (1997). There is also Samuel Walker, *In Defense of American Liberties: A History of the ACLU* (1990). Shawn Francis Peters, *Judging Jehovah's Witnesses: Religious Persecution and the Dawn of the Rights Revolution* (2000), deals with this important chapter in the history of civil liberties. On the civil rights cases of the 1920s, see William G. Ross, *Forging New Freedoms: Nativism, Education, and the Constitution, 1917–1927* (1994). On the travails of the McCarthy period, there are many books, and the controversy seems to be getting steamier. See David Cauter, *The Great Fear: The Anti-Communist Purge Under Truman and Eisenhower* (1978); Arthur L. Sabin, *Red Scare in Court: New York Versus the International Workers Order* (1993), and *In Calmer Times: The Supreme Court and Red Monday* (1999); Ellen Schrecker, *Many Are the Crimes: McCarthyism in America* (1998). On

immigration, see Elliott Robert Barkan, *And Still They Come: Immigrants and American Society, 1920 to the 1990s* (1996), a clear, well-written summary.

Americans are fascinated with trials (mostly criminal trials), and there are almost too many books to mention. I single out two that are particularly interesting and incisive: Edward J. Larson, *Summer for the Gods: The Scopes Trial and America's Continuing Debate over Science and Religion* (1997), and Dan Carter, *Scottsboro: A Tragedy of the American South* (1971).

The literature on specific fields varies from sparse to vast. On criminal justice, I will take the liberty of citing my own book, *Crime and Punishment in American History* (1993); also, Roger Lane, *Murder in America: A History* (1997). Both of these devote a good deal of space to the twentieth century; the same is true of Samuel Walker, *Popular Justice: A History of American Criminal Justice* (2d ed., 1998). There is a rather rich literature on prisons and prison life—for example, James B. Jacobs, *Stateville: The Penitentiary in Mass Society* (1977), and David M. Oshinsky, *"Worse Than Slavery": Parchman Farm and the Ordeal of Jim Crow Justice* (1996), about a mostly black penal institution in Mississippi. Some subareas have produced fine monographs—for example, Leslie J. Reagan's prize-winning study, *When Abortion Was a Crime: Women, Medicine and Law in the United States, 1867–1973* (1997), and David J. Langum's excellent study of the Mann Act, *Crossing Over the Line: Legislating Morality and the Mann Act* (1994); also, Mary Odem, *Delinquent Daughters: Protecting and Policing Adolescent Female Sexuality in the United States, 1885–1920* (1995); and Jonathan Simon, *Poor Discipline* (1993), which deals with the parole system in the century between 1890 and 1990. Philip Jenkins, *Moral Panic: Changing Concepts of the Child Molester in Modern America* (1998), is broader than its title suggests; it gives a good overview of laws against sexual psychopaths, child abuse, and child pornography in the twentieth century.

There is a real shortage of books on the history of family law in the twentieth century; see, however, Herbert Jacob, *Silent Revolution: The Transformation of Divorce Law in the United States* (1988); J. Herbie DiFonzo, *Beneath the Fault Line: The Popular and Legal Culture of Divorce in Twentieth-Century America* (1997); and E. Wayne Carp, *Family Matters: Secrecy and Disclosure in the History of Adoption* (1998). On the regulatory state, there are two important books by Morton Keller, *Regulating a New Economy: Public Policy and Economic Change in America, 1900–1933* (1990), and *Regulating a New Society: Public Policy and Social Change in America, 1900–1933* (1994). A

useful overview is Robert Harrison, *State and Society in Twentieth Century America* (1997). There is also a literature on particular government agencies—for example, Joel Seligman's *The Transformation of Wall Street: A History of the Securities and Exchange Commission and Modern Corporate Finance* (rev. ed., 1995). Legal histories of agriculture and the like are in short supply, but there are honorable exceptions, for example, Victoria Saker Woeste, *The Farmer's Benevolent Trust: Law and Agricultural Cooperation in Industrial America, 1865–1945* (1998), and Arthur McEvoy, *The Fisherman's Problem: Ecology and Law in the California Fisheries, 1850–1980* (1986).

There is quite a bit on welfare policy and its history—for example, Molly Ladd-Taylor, *Mother-Work: Women, Child Welfare, and the State, 1890–1930* (1994); Michael B. Katz, *In the Shadow of the Poorhouse: A Social History of Welfare in America* (revised ed., 1996), which has a great deal of material on the twentieth century; and James T. Patterson, *America's Struggle Against Poverty in the Twentieth Century* (2000), a good overview. Labor law has also produced an impressive number of thoughtful studies; see in particular William E. Forbath, *Law and the Shaping of the American Labor Movement* (1989); Melvyn Dubofsky, *The State and Labor in Modern America* (1994); and Daniel R. Ernst, *Lawyers Against Labor: From Individual Rights to Corporate Liberalism* (1995).

On an often neglected corner of legal history, military justice, there is now a substantial study, Jonathan Lurie, *Arming Military Justice*, vol. 1, *The Origins of the United States Court of Military Appeals, 1775–1950* (1992), and *Pursuing Military Justice*, vol. 2, *The History of the United States Court of Appeals for the Armed Forces, 1951–1980* (1998). Administrative law is another important but neglected field. A good overview is Robert L. Rabin's book-length article "Federal Regulation in Historical Perspective," *Stanford Law Review* 38:1189 (1986).

It should come as no surprise that there is a shortage of rigorous historical studies of such things as procedure, appellate process, federal jurisdiction and the like. One honorable exception is Edward A. Purcell, Jr., *Litigation and Inequality: Federal Diversity Jurisdiction in Industrial America, 1870–1958* (1992). Even more impressive is Purcell's more recent book, *Brandeis and the Progressive Constitution: Erie, the Judicial Power, and the Politics of the Federal Courts in Twentieth-Century America* (2000), which gives political and social meaning to shifts in the jurisprudence of federal jurisdiction. Stephen C.

Yeazell, *From Medieval Group Litigation to the Modern Class Action* (1987), deals mostly with the period before the twentieth century, but the sections on the past century are well worth consulting.

Fields like business law, property law, commercial law, antitrust law, land law, intellectual property, and the like produce mountains of practical and scholarly writing, but not much of it is overtly historical, and most of what is is both dull and formalistic. One exception is Paul Goldstein's sparkling book on copyright, *Copyright's Highway: The Law and Lore of Copyright from Gutenberg to the Celestial Jukebox* (1994); see also Joel Seligman's book on the SEC mentioned above, and Herbert Hovenkamp, *Enterprise and American Law, 1836–1937* (1991). Here there really is a lot more to be accomplished. But that is true of the whole business of interpreting the past. It is never signed, sealed, and delivered; it is always incomplete, always inchoate, always a work in progress, a work that is never done.