

INTRODUCTION: THE LAW THEN AND NOW

BY PHIL SCHATZ

Continuity and change are the two major tensions in the development of the law.

Continuity is essential to maintaining respect for any legal system; our respect for precedent and the principle of *stare decisis*—what Karl Llewellyn described in *The Bramble Bush* as doing over and over again under similar circumstances substantially what has been done before—are mandated by community expectations and respect for the accumulated experience of our forebears, as much as by inertia and convenience. Judges and lawyers are, by training and inclination, generally conservative, in the nonpolitical sense of the word. As Benjamin Cardozo recognized in *The Common Law*, even if judges legislate from the bench, they usually do so only interstitially, at the molecular level, and to the slightest degree possible.

But change is also a constant. In his oft-quoted essay, “The Path of the Law,” Oliver Wendell Holmes soundly trashed the unthinking application of creaky doctrines whose rationale had long since vanished: “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.” As society changes, law must change along with it. And sometimes law is the agent of change. So change does come—sometimes fitfully, sometimes sweepingly. (And sometimes, it must be said, only superficially. The typical response to our unscientific survey of senior lawyers was that the practice of law was vaguely better 50 years ago, the same response we would have gotten then and are likely get 50 years hence. *Plus ça change, plus c’est la meme chose.*)

The set of articles in this issue all focus, to one degree or another, on the conflicting tensions of continuity and change in the law.

In “Legal Lexiconography: A View from the Front Lines,” Bryan Garner, legal writer and lexiconographer par excellence, describes the history of legal lexiconography and the evolution of *Black’s Law Dictionary*, now in its ninth edition—which you should buy immediately, if you don’t already own it.

In “Habeas Corpus Past and Present,” Professor Eric Freedman, an expert on habeas corpus—the most ancient and, in many ways, the most essential of the legal procedures upon which our freedoms are based—describes the sometimes illustrious, sometimes ignoble application of the writ as well as the tensions arising as a result of modern terrorism.



In “28 U.S.C. § 1782 and the Evolution of International Judicial Assistance in United States Courts,” Michael Campion Miller, Alejandro Rosenberg, and Michael Stoll describe the increasing willingness of American courts to assist discovery by foreign litigants for use in foreign proceedings.

In “From Conformity to Uniformity: The Rules Enabling Act of 1934 and the Rise of Federal Judicial Authority,” David Holt, a historian at the Federal Judicial Center, describes the long road to the establishment of a uniform federal procedure and the resulting increase in the influence of the federal courts.

And then we have Abraham Lincoln, the patron saint of both legal continuity and legal change, whose “Notes on the Practice of Law” remain as true today as they were in 1850. This issue includes two fine articles about Lincoln the practicing lawyer. In “Abraham Lincoln at the Bar,” Judge Henry Cohn describes how Lincoln came to be a lawyer and the nature and scope of his legal practice. In “Law Practice from Abraham Lincoln to Now,” David Hirsch and Dan Van Haften, authors of *Abraham Lincoln and the Structure of Reason*, describe the multifold changes in the law since the age of Lincoln.

I will close with a reference to Lincoln, whose legal training informed his political thought. Lincoln consistently sought to ground his political positions on the principles established by the founding generation of Americans. But he also recognized that law and government—as well as his own views—must evolve with the times. As he told the publisher Horace Greeley, “I shall try to correct errors when shown to be errors; and I shall adopt new views so fast as they shall appear to be true views.” That’s a good motto for us all. **TFL**

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