

MEMORIAL RESOLUTION
JOSEPH W. BINGHAM
(1878 – 1973)

Joseph Walter Bingham died on December 15, 1973, at the age of 95. He joined the Stanford Law School faculty in 1907 at the age of 29. Obviously any thoughtful description of his accomplishments as a legal scholar ought to consider them in historical perspective against their early 20th century background. And when thus considered, they seem almost incredible.

At the age of 34, this young Stanford professor successfully challenged some of the basic assumptions and beliefs of the leading American and English legal scholars of his day concerning the lawmaking powers of judges and the proper functions of academic commentators. He was the acknowledged pioneer of the realist movement which in subsequent decades came to dominate legal research, writing, and teaching in American law schools and, consequently, to mold the philosophical outlook of many of our judges and advocates. These early jurisprudential writings along with his later substantial published contributions to the solution of difficult problems of international law place him securely among the greatest legal scholars of the 20th century.

Walter Bingham was born in 1878 and grew up in Chicago; he attended the then newly founded University of Chicago where he obtained his A.B. in 1902, his J.D. in 1904. For a sensitive young man in his twenties, those were exciting years. The automobile was on the scene; the flying machine was coming over the horizon. The electric energy revolution was well under way with new uses appearing every year. In schools of medicine and engineering, in departments of the natural and behavioral sciences, an atmosphere of excited expectancy prevailed. Walter Bingham must surely have been aware of a contrast between this outlook and the curiously detached, abstraction-loving attitude prevailing in even the best law schools of the time. If he was aware of it, he was nevertheless not deterred from taking up the career of a legal scholar, after a brief experience in law practice.

During the first two years of his teaching career, Professor Bingham tackled the refractory problem of competing claims to fixtures. Using what were then regarded as innovative methods of analysis and research, he succeeded in laying bare the basic social policies that seemed to be influencing judicial decisions. Two years later, he achieved a similar triumph of analysis by disentangling the cluster of problems to which the mystifying term "proximate cause" had been applied. Having thus tested, in two different and difficult areas of the law, his premises concerning judicial behavior and the most fruitful techniques of legal research, he decided to explain and defend them. His celebrated article, What is the Law?, was published in the Michigan Law Review in 1912. Inevitably, this article constituted an attack upon some of the basic assumptions and beliefs of prominent English and American legal scholars and a criticism of their commentarial writings.

What were these widely-held assumptions and beliefs that Walter Bingham undertook to challenge in the year 1912? The primary and basic assumption was that the most scientific and rational way to pass on from one generation to another the accumulated case law of a state or nation was to have it summarized or restated in general principles, logically arranged and classified. The collection and arrangement of such rules was the all-important task of academic

scholars. The inspiration for this idea obviously came from the codification movements in France and Germany during the 19th century. Codification had made little headway in the United States and even less in England but it was still thought in some high academic circles to represent the wave of the future. Such famous English scholars as Jenks, Dicey, and Sir Frederick Pollock had all undertaken to codify parts of the common law of England.

The statement of the law in general principles was assumed to be so important that judges were also expected to participate in the process of casting the law in this form. The most admired judges were those who based their decisions upon one or more general principles. These judicially-formulated principles were virtually regarded as having the authority of a statute. A third major assumption of the establishment of 1912 was that what a judge wrote in his opinion could be accepted as a reliable, accurate and complete statement of all the significant factors that had influenced the decision of the case.

The principal target of Professor Bingham's attack was the notion that when a judicial decision was based upon a general rule, that rule must be accorded some kind of binding force in future cases. The traditions of the common law were, he argued, entirely opposed to such a notion and for very good reasons. The proper function of a court was to decide the actual dispute before it, not hypothetical future cases; for this reason courts had refused to decide moot cases. Though judges frequently professed to be following general rules quoted from prior opinions, this was merely the result of their modest desire to conceal the extent of their power. Statutes, of course, inevitably had to take the form of general directions to the judiciary. But Professor Bingham vigorously objected to an attribution of authority to judge-made rules that would shackle other judges in future cases.

Professor Bingham also rejected the notion that all factors affecting a judge's decision could be found in his opinion. Since common-law rules had no constraining authority and precedents could usually be distinguished, other forces must be at work: the judge's sense of justice in the particular case and his notions of sound social policy. No reflective advocate or commentator could afford to assume that judicial opinions were self-explanatory. The process of a judge coming to a conclusion was a psychological phenomenon in which the judge necessarily made policy choices that he might be unwilling or unable to articulate.

As for the academic commentator, he should try to predict the course of future decisions just as the natural scientist tries to make reliable predictions about the forces of nature. To succeed in this he should brush aside the obscuring veils of judicial generalizations and study most carefully the facts of decided cases, compare and extrapolate them. Then he should consider what social policies were being advanced by the judges and what social policies were being subverted. Critical writing of this type would be extremely useful to judges, practitioners and others. On the other hand, the academic commentator who confined his activity to collecting and arranging judicial generalizations was performing a mechanical and pointless task.

When these views first appeared in print, they caused commentarial criticism to which Professor Bingham assiduously replied in two subsequent articles. But this debate, which might have assumed international proportions, was cut short by the catastrophic impact of the first World War. Professor Bingham suspended his writing and teaching activities to serve on the staff of the War Trade Board in Washington. On returning to his academic career in 1919, he devoted himself almost entirely to research and writing on problems of international law. But

during the 1920's and 1930's, an increasing number of lawyers and law teachers in the United States expressed in writing their agreement with Professor Bingham's views. It would be wrong to say they were all his disciples; many of them arrived at similar conclusions through independent study and reflection. But they all recognized that he had been the pioneer, and they admired his persuasive and forceful writing. Today, the conceptions of the role of the judge and the progressive legal commentator, espoused by Professor Bingham and his fellow realists, have come to be widely accepted by judges and commentators alike. And their influence is growing from year to year.

Though Professor Bingham wrote on an unusually wide variety of subjects, it was during his time with the War Trade Board that he encountered problems of international law and international affairs and these subjects remained his subsequent life-long interest. After his return to Stanford for the spring quarter in 1919 he resumed his teaching duties and carried on intensive research in the field of international law, although at that time international law was not taught at Stanford. He became a member of the Harvard Law School Research Project in International Law and was the reporter of the Draft Convention on Piracy (1932). This work earned him international acclaim.

Thereafter his main interest was concentrated on problems of the Pacific coastal fisheries and the law of the continental shelf. He acted as adviser to the U.S. Department of State and the U.S. Department of the Interior, the Canadian-United States Commission on the treaties governing salmon and halibut fisheries, and the United States-Canadian and Japanese Commission on the tripartite treaty governing fishing rights. Professor Bingham testified on several occasions concerning these problems before committees of the U.S. Congress. He was also active in the American Bar Association (especially in its International Law Section) and in the American Society of International Law. For the International Law Association, he served as Chairman of its Committee on the Rights in the Seabed and Subsoil. Further, he served as the chairman of the Inter-American Bar Association's Committee of the Continental Shelf.

In international law, as in everything else, Professor Bingham was always in the vanguard, and his foresight was proved by subsequent events to have been correct. In 1959, when he was 81 years of age, he published his Comments concerning coastal and high sea fishery rights in the allocation of resources and contending systems. His activities constituted a splendid example of balance between philosophical consistency and political practicality; he spoke and wrote as a realistic commentator and consultant in the manner and style advocated in his earlier writings.

The impressive list of Walter Bingham's publications in the international law field combined with his famous jurisprudential essays and penetrating analysis of problems in such diverse fields as conflict of laws, property, water law and torts -- this remarkable bibliography might suggest to one who did not know him that he was a preoccupied scholar with little time for friends or family. On the contrary, he was a friendly and gregarious man who loved good company and good conversation. Years after his retirement he visited the Law School frequently, ostensibly to carry on his research, but also hoping that one or more of his younger colleagues would join him in an exchange of comments about the political issues of the moment. Such exchanges were always rewarding because Walter's views were refreshingly original and he drew upon a rich store of legal and political history. In his latest years, it became his custom to give intimate dinner parties for his colleagues with excellent food, wines and cocktails.

Sometimes the party was given to entertain a distinguished visiting friend of Walter's; sometimes it was simply the result of his yearning for collegial company and conversation.

In 1907 Walter married Florence Cornell who had been one of his students at the Cornell Law School. They are survived by a son, Rodman Bingham and his daughter, Patrice Louise Bingham.

Anyone who has studied Professor Bingham's writing and become familiar with the rich imagery of his several powerful literary styles has probably, at some time, thought, "What an exciting experience to have sat in this man's classes!" This inescapable impression is confirmed by those who had the privilege of being Professor Bingham's students. Most of them are now senior members of the bar and many have gone on the bench. But, in 1941, an event took place involving Professor Bingham and one of his students that must have brought to him as a teacher a tremendous sense of accomplishment and satisfaction. In that year the Northwestern University Law School published a handsome volume containing sixteen essays, each entitled, "My Philosophy of Law," written by sixteen outstanding American legal philosophers. It was inevitable that Professor Bingham would be asked to contribute an essay; what must have brought him profound and emotional satisfaction was that one of his former students was also chosen to be a contributor: Professor Lon L. Fuller of the Harvard Law School.

Professor Bingham's life work belongs to the whole world of legal scholarship but his memory belongs to the Stanford Law School. For it was here that he spent virtually his entire professional career. He was the kind of teacher that law schools perpetually search for: a productive, creative scholar whose ideas are innovative yet based on such sound premises that they withstand the blasts of adverse criticism and the onward march of time. Just as his dynamic personality inspired his students for more than three decades, the memory of his remarkable accomplishments should inspire all who teach and all who learn in this school for many years to come.

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