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LAW AND HISTORY

C. J. FRIEDRICH*

Law is frozen history. In an elementary sense, everything we study when we study law is the report of an event in history, and all history consists of such records or reports. It therefore cannot be my task to develop a sermon on the importance of historical records for the understanding of the law; the tie is too intimate and too obvious to need laboring.

"The work of Professor Maine on 'Ancient Law,'" wrote Professor T. W. Dwight in his *Introduction* to that book in the sixties of the last century, "is almost the only one in the English language in which general jurisprudence is regarded from the historical point of view."¹ This is an astonishing statement, considering the strikingly historical pattern of the common law. It is possibly correct, if taken *very precisely*. But was not the work of Blackstone or the work of Coke general jurisprudence from the historical point of view? Was it not their preoccupation with history, with the past, which aroused Jeremy Bentham against the jurisprudence of Blackstone and his predecessors? Law cannot of course be identified with "general jurisprudence" in any case; but leaving that issue aside, English and American law appear in fact to be "frozen history"; the institutions by which they are constituted are the outgrowth of that process which in Burke's memorable phrase links the dead of the past with the generations yet unborn.

But what of history? Is history conceivable without law? Certainly not the history of our western world, though there are civilizations, such as the Chinese during most of its existence, which have not placed law into such a central position. It is patent that neither medieval nor modern history can be written or understood without careful attention to legal institutions. From feudalism to capitalism, from Magna Carta to the constitutions of contemporary Europe, the historian encounters law at every turn as a decisive factor.

It would seem, then, that any re-consideration of "law and history"

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1. Dwight, *Introduction* to MAINE, *ANCIENT LAW* at ix (3d Am. ed. 1864).

is apt to be a string of common-places or the beating of a dead horse. Names such as Maine and Savigny, Maitland and Gierke, McIlwain and Olivier-Martin—not to mention Holmes as the last in a succession of historically minded judges—clearly seem to settle the question of history's importance for law; it would not be difficult to match them with others signaling the importance of law for history.

Such encounter between history and law is especially frequent in the history of political thought. One has only to open one of the books on the subject in order to discover that such a history is at least half a history of jurisprudence. From the Sophists and Plato to Hegel and Marx, the philosophy of law in historical perspective is inseparably intertwined with the history of political ideas. "The prevalent moral and political theories" were fully recognized by Oliver Wendell Holmes to be the key to the understanding of the law. It is equally true that the living law is one of the focal points of all political theory; in it is crystallized what men in their time consider just, and there can be no understanding of the political order without a grasp of the common coin of such values, interests and beliefs as the idea of justice embodies at various stages of historical development. Political thought and legal thought are two sides of the same common coin.

The history of political thought and theory is itself not free from formidable difficulties, however. Unless we are to assume that words mean the same at all times or at least over long periods, virtually all the positions which it deals with are highly controversial. Plato and Aristotle, Cicero and St. Augustine, St. Thomas Aquinas and Machiavelli, Hobbes and Locke, Montesquieu, Rousseau and Kant—each and all have been the subject of extended learned controversy over what they *really* said. It may be true, and probably is, that "to know someone else's activity of thinking is possible only on the assumption that this same activity can be re-enacted in one's own mind."² But it cannot be "proven" that this condition can be fulfilled, that such re-enactment is possible. Similarly, it may well be that the task of "discovering 'what Plato thought' without inquiring 'whether it is true'" is "self-contradictory,"³ but it is equally likely that the question whether what Plato thought be true is meaningless, unless we first know what it was that he thought. This implies that "an act of thought, in addition to actually happening, is capable of sustaining itself and being revived and repeated without loss of its identity."⁴

2. COLLINGWOOD, *THE IDEA OF HISTORY* pt. V, ¶ 4 (1946). I do not share Collingwood's "idealist" premises, but I do find many of his formulations on history good. Cf. SWABEY, *THE JUDGMENT OF HISTORY* (1954) for a sounder position.

3. COLLINGWOOD, *op. cit. supra* note 2, at 300.

4. *Ibid.*

Such an implication is surely a self-evident proposition. If every thought, like all other acts, happens in context, is "an organic part of the thinker's life," then as the context changes the thought will necessarily also change. If then there is to be any continuity of thought it must be possible to relate degree of stability in context to degree of self-identity in thought. Hence the more abstract the thought, in the sense of being abstracted from specific detail in the context within and to which it applies, the more stable it presumably will be.⁵ Here is the key dilemma of all historical effort at dealing with products of the mind which constitute creative responses to concrete problematic situations. Legal history shares it, as does political theory. By referring one to the other, we are possibly inviting the blind to lead the blind. Neither a reference to the pre-supposed identity of experience, nor to the constancy in the environment so experienced resolves it.

In our age of doubt and scepticism, the problem cannot be so easily disposed of. "The life of the law" may not be "logic, but experience," as Holmes is ever again quoted as saying (though this view has a hoary ancestry). The wonderful passage which follows that famous generalization provides in a sense the theme for any discussion of law and history which is undertaken in light of the common law.

The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed. The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics. In order to know what it is, we must know what it has been, and what it tends to become.⁶

The experience, then, is historical experience. This means that without history there cannot be, there would not be any law or jurisprudence. History is here simply conceived as the record of human experience. Yet, both "What is law?" and "What is history?" are questions which have not ceased to trouble the reflective student of both fields. It is not my intention to enter upon the task of seeking definitive answers to either of these never-ending queries, though I

5. Collingwood observes in this connection that "the mere fact that someone has expressed his thoughts in writing, and that we possess his works, does not enable us to understand his thoughts. In order that we may do so, we must come to the reading of them prepared with an *experience* sufficiently like his own to make those thoughts organic to it." Is it really probable that any man today will be able to share the experience of a fifth century Athenian sufficiently to think Plato's thoughts on politics? I should say that, at best, only the most general features of such thought may be comprehended.

6. HOLMES, *THE COMMON LAW* 1 (1881).

will deal with both again later; rather, I intend to point out that neither question can be answered except within the context of a philosophical appraisal of law or history. And that means inexcapably that he who would discourse upon "law and history" would have to state first of all the philosophical context within which he is prepared to discuss either "in general." Such an undertaking might be of some interest, especially if the philosophy were novel. For if we stayed with established philosophical positions, such as those of Hegel or Dewey or Jaspers, all we would need to do would be to report what these eminent thinkers have had to say about our two fields and to match their positions as best we may. Thus Hegel concludes his remarkable but much misunderstood and misquoted *Philosophy of Right and Law* with a brief summary of his philosophy of history. This summary states with admirable succinctness his view of their relationship: law is the embodiment of the ethical idea emanating from the state; as such it is embedded in history which consists in the unfolding of the world spirit's idea of freedom by way of the states which progressively realize it.⁷ And if it were objected that such a view is hardly relevant today, we might reply that its Marxian variant in *Diamat* is still very much with us and indeed perhaps our major plague. But I am not a Hegelian and hence am merely giving his notions as an illustration of a thinker who clearly and explicitly argued the philosophical relation of law and history *in his terms*.⁸

The philosophy of history has moved a long way from Hegel. But it is very much alive. In our day, the sceptical view of Becker for whom every man was his own historian, the biological view of Spengler for whom history was embodied in cultural or civilizational wholes each of which was a law unto itself, its variant in Toynbee who believes in an ascent⁹—these and many lesser (though not less interesting) conceptions testify to the fascination which a view of the whole of man's existence on this globe exerts at present. Indeed, the extension of this view beyond the confines of written records to

7. HEGEL, *GRUNDLINIEN DER PHILOSOPHIE DES RECHTS* (THE PHILOSOPHY OF RIGHT) §§ 341-60 (Hoffmeister ed. 1955). This most recent critical edition omits the additions (*Zusätze*) which Hegel's editors had inserted on the basis of lecture notes, as well as the subtitle *NATURRECHT UND STAATSWISSENSCHAFT* (NATURAL RIGHT AND POLITICAL SCIENCE IN OUTLINE). The latter omission is regrettable, since the subtitle better describes the content of the book.

8. For a brief sketch of Hegel's philosophy of law see my *THE PHILOSOPHY OF LAW IN HISTORICAL PERSPECTIVE* ch. XV (1958). See the more detailed discussion in *CAIRNS, LEGAL PHILOSOPHY FROM PLATO TO HEGEL* ch. XIV (1949).

9. SPENGLER, *THE DECLINE OF THE WEST* (1926); TOYNBEE, *A STUDY OF HISTORY* (1934-54). Among the many critical evaluations I especially found myself in accord with HUGHES, *OSWALD SPENGLER—A CRITICAL ESTIMATE* (1952), and with GEYL, *DEBATES WITH HISTORIANS* ch. VIII (1955) ("*Toynbee the Prophet*").

prehistory and the "endless journey"¹⁰ which precedes it has added both poignancy and a certain weariness to the task, as ever more "cultures" have knocked at the gate to be admitted to "history" as well as to the United Nations. All such endeavors are somehow bound up with the convictions that history is something more than "making sense out of nonsense."¹¹ To the unsophisticated, history is "of course" that which happened, the concrete actions and events in all their specificity and effervescence. Indeed, many historians continue their arduous labors with something of this sort in mind. They are "looking" for history as it really happened—"wie es wirklich gewesen." This memorable and simple phrase belongs of course to the great Ranke, himself a striking illustration of how far the great historian's achievement is from merely recounting how it really happened.¹² But the perplexing paradox of all historical work is that what actually happened can never be recaptured, although historical research would lose its point without a belief that more of it can be recaptured than is presently known. It is certainly true that each generation re-writes history in terms of its own values, interests and beliefs, up to a point at least; it is also certainly true that discoveries of new material may from time to time alter important images of past events and personalities. But the quest is never complete, except in regard to such elementary data as the names and dates of particular tidbits. The happenings of history as contrasted with the reports about these happenings, the *Geschehen* in contrast to the *Geschichte*,¹³ are devoured by time as soon as they happen. As we go through our days, they vanish into oblivion.

If, then, all history is a gloss upon the happenings, in the form of reports and interpretations of reports—such interpretations relating them to other reports and to thoughts upon them—the intellectual standing of such a gloss becomes a problem. And here the real issue of the relation of law to history is joined. As I see it, the reports of

10. EISELY, *THE IMMENSE JOURNEY* (1946). Cf. TEILHARD DE CHARDIN, *THE PHENOMENON OF MAN* (1959); CLARK, *THE ANTECEDENTS OF MAN* (1959).

11. LESSING, *GESCHICHTE ALS SINNGEBUNG DES SINNLOSEN* (1915); BECKER, *EVERY MAN HIS OWN HISTORIAN* (1935) (contains the essay by that name). For contrast, see NIEBUHR, *FAITH AND HISTORY* (1949).

12. See WAGNER, *GESCHICHTSWISSENSCHAFT* ch. II (1951), which gives many pertinent citations. The entire work is a most useful compendium of the "theories" of history from the beginning to Max Weber; it is, of course, written from the German perspective. The implicit idealism of Ranke which contradicts his oft- and above-quoted saying can be seen in such statements as "*Alles Leben traegt sein Ideal in sich: der innerste Trieb des geistigen Lebens ist die Bewegung nach der Idee, nach einer groesseren Vortrefflichkeit . . .*" *Id.* at 194.

13. The nicety of this contrast is not quite caught by the English words "happenings" and "history"; "Geschehen" carries the connotation of "by-gones"—what *has* happened and is now accomplished fact. "Occurrences" suffers from the same defect.

cases which occurred and are made part of the body of the law are related to other such reports in terms of the particular legal concept or rule which they demonstrate as an occurrence in time. Anyone opening a case book in any of the fields of law can see this clearly enough. And a good case book of the older type sought to illuminate the evolution of a concept and the rules it gave rise to by a succession of such cases. Well-known case books, such as Bigelow's or Wigmore's on torts, or Williston's on contracts, are essentially histories of the particular legal institution with which they deal. Open any of them and an instance of the proposition just stated suggest itself. Thus in Scott and Simpson's *Judicial Remedies*¹⁴ the first case is *Slade's*.¹⁵ It is a case from the Court of Queen's Bench, and the report begins as follows:

Be it remembered that heretofore, that is to say, in the term of St. Michael last past, before the lady the Queen at Westminster, came John Slade, by Nich. Weare his attorney, and brought here into the Court of the said lady the Queen, then there, his certain bill against Humphrey Morley, in custody of the Marshal, etc. of a plea of trespass upon the case

It then proceeds to tell how Morley defrauded John Slade by not paying him for some wheat that he had harvested and promised to pay for, the wheat growing on land which belonged to John Slade. But what matters to the writers of this text is the form of pleadings in appellate review in an instance of actions at law. Alongside is placed a case from the Court of Appeals of the State of New York.¹⁶ The vast differences between the England of Queen Elizabeth I and twentieth century America are of no significance to the point at issue which is stated by the text writers as follows: "After final judgment is rendered, the losing party can ordinarily carry the case to a higher court."¹⁷ This statement presents a general principle of the law, deeply involved in the tradition of the "rule of law," a concept which has characterized adjudication over the centuries which have elapsed between the reign of Elizabeth and our time. The stress is on what is and has remained the same rather than on what has changed and evolved. The view is dogmatic rather than historical.

This instance illustrates, as would thousands of others, that the

14. SCOTT & SIMPSON, *CASES ON JUDICIAL REMEDIES* 23 (1938).

15. 4 Co. Rep. 91a, 76 Eng. Rep. 1072 (K.B. 1602).

16. *Palsgraf v. Long Island R.R.*, 248 N.Y. 339, 162 N.E. 99 (1928).

17. Interesting further points could be made regarding the fact that a "record" of a particular kind, defined at law, goes to the appeals court, embodying a "report" of what happened which excludes many events. In the days of Queen Elizabeth the record usually contained only the pleadings, the verdict and the judgment; nowadays it also contains some of the proceedings at the trial.

jurist is not concerned with the same dimension of interpretation as is the historian. For to the historian, the key question about the case would be: What does it tell us about the time of Queen Elizabeth? Is there anything here which sheds new light on Elizabeth, or on the economic or social relations or any other of a number of possible individual historical features including the law, of *her time*. And since the case as reported does not seem to do anything of the sort, it might well be considered irrelevant and trifling to the historian of Queen Elizabeth I's reign. Needless to say, the books on her reign, and on the economic and social history of her reign do not make mention of this case. Nor do the legal histories, in fact. If we look up some of the leading texts on English legal history, such as Holdsworth or Pound, we do not find this case;¹⁸ instead we find the rise of the Court of Chancery, from which this case is *not* taken, to be the key feature of the history of English law in this period. By the way, the rise of this court and of its equity jurisdiction has been described by a great legal historian as "an exceedingly curious episode." He added that "the whole nation seems to enter into one large conspiracy to evade its own laws, to evade laws which it has not the courage to reform."¹⁹ The rise of this equity jurisdiction, in modification of the common law, was a matter of "stumbling into a scheme for the reconciliation of permanence with progress." Such a statement suggests that there is no effort made here to relate a decisive development in the history of the law of England with any of the other changing elements in the pattern of English life and politics. I am not going to indicate here what might be some of the correlations that suggest themselves, but will merely remark that a deeper probing of the historical setting might well reveal connections which a strictly doctrinal approach tends to overlook.

But I wish to go a step further now and to advance the argument that the specific task of the student of law, of the jurist, is antithetical to that of the historian. By the very nature of his enterprise he is drawn into an a-historical position.

In a challenging inaugural lecture, Frederic W. Maitland in 1888 discussed the question: why the history of English law is not written.²⁰ He asserted at the outset that "English legal memory" went back to the year 1189 and no further, indeed to Sept. 3, 1189.

Glanvill had just finished the first text-book that would become a permanent classic for English lawyers; some clerk was just going to write the earliest plea-roll that would come to our hands; in a superb

18. The case is actually cited by Holdsworth several times, but in connection with another matter.

19. MAITLAND & MONTAGUE, *A SKETCH OF ENGLISH LEGAL HISTORY* 123 (1915).

20. 1 MAITLAND, *COLLECTED PAPERS* 480-97 (Fisher ed. 1911).

series of such rolls law was beginning to have a continuous written memory, a memory that we can still take in our hands and handle.²¹

Soon these records were to swell to a mighty chorus and "the practical limit set to our knowledge is not set by any lack of evidence, it is the limit of our leisure, our strength, our studiousness, our curiosity."²² It was obvious to Maitland that no one man could possibly hope to read the records even of one such reign as that of Edward I; how could the history of English law ever be written. "Seven hundred years of judicial records, six hundred years of law reports; think how long a time seven centuries would be in the history of Roman Law."²³ Centralization and the good fortune of England's insular position gave her "a series of records which for continuity, catholicity, minute detail and authoritative value has . . . no equal, no rival, in the world."²⁴ But it is the very fullness of this record which has been a major obstacle to legal history. Yet there are others, the most important being the isolation of English law and the conceit common to the guild that English law is something unique. "History," Maitland observed, "involves comparison and the English lawyer who knew nothing and cared nothing for any system but his own hardly came in sight of legal history."²⁵ And again: "[A]n isolated system cannot explain itself, still less explain its history."²⁶ Blackstone could write his remarkable volumes because he had an image of the feudal system, full of holes, in our modern perspective, but still an image that enabled him "to paint his great picture . . . the first picture ever painted"²⁷ of the history of English land law. So much for Maitland. There can be little doubt that the pursuit of legal history on the Continent was greatly stimulated by the confrontation of the local with the Roman law. The conflict between the two had profound political importance in the bargain; while the Roman law served ecclesiastical authorities at first, the "discovery" of its "true meaning" was a powerful weapon in the hands of the partisans of emperor and king. And eventually both were buried by the ivory tower learning of the great humanist jurists who insisted upon the historical record, Cujas, Doneau and the rest. The work of these remarkable scholars serves at the same time to bring to light another aspect of the conflict between law and history, namely that historical learning can kill the value of the legal doctrine, because it removes

21. *Id.* at 481.

22. *Ibid.*

23. *Ibid.*

24. *Id.* at 482.

25. *Id.* at 488.

26. *Id.* at 489.

27. *Ibid.*

it from its contemporary application back to its original setting and thereby deprives it of authority and validity. The Roman law, which had been a live source of legal thought in the hands of the great glossators and post-glossators who used it for solving the problems of their changing society, was in danger of becoming dead and lifeless once the humanists had fully established its meaning in terms of a society long gone, the pagan world of ancient Rome.²⁸ However, the much argued "reception" of the Roman law into the German law in the course of the sixteenth and seventeenth century, though much lamented by the Romantics and "Germanists" such as Eichhorn and Gierke, gave it a new lease on life; it also continued in considerable vigor in the South of France until the great codification (see below). This can be vividly seen in Savigny's famous study on possession which makes a startling companion to Holmes' chapter in his *Common Law*. After reviewing the positions of Hegel and Kant which he thinks are related to the positions of the Roman law, Holmes remarks that Savigny did not follow them and quotes him as thinking that "every act of violence is unlawful" and considering "protection of possession a branch of protection to the person."²⁹ He puts the matter as if this were a similarly philosophical opinion of Savigny's. But a reading of the adduced paragraph six shows that Savigny was arguing from the Roman law itself, was therefore insisting that the right of possession was part of the law of obligations rather than of the law of "things" (*Sachenrecht*). He sees the reason in the *historical* fact that the Romans classified according to the procedural considerations, exploring the distinction between *jus in rem* and *jus ad rem*. He noted that *possessio* had always been a thorn in the side of systematic jurists. All attempts to interpret possession not as a distinct right, but as "provisional ownership" are in error, Savigny thinks; he adduces for authority a general principle of the Roman code: "*nihil commune habet proprietas cum possessione*." Having thus pointed out the basic *historical* position, Savigny proceeds to explore the linguistic usage of the Roman jurists to fortify his position, distinguishing between *possessio civilis* and *possessio naturalis*.³⁰ But I have already lingered too long over this fascinating issue. Suffice it to add that Savigny was well aware of the fact that the pristine Roman notions had undergone a basic development in the course of history. The modifications which occurred are clearly seen as the result of *historical* forces.

28. GILMORE, ARGUMENT FROM ROMAN LAW IN POLITICAL THOUGHT 1200-1600 (1941).

29. Holmes, *op. cit. supra* note 6, at 207.

30. SAVIGNY, DAS RECHT DES BESITZES (1st ed. 1803). The paragraphs relevant here and referred to by Holmes are 6 & 7. To these should be added paragraph 48 where the concept is discussed.

By the constitution of the Christian Church and of the European states rights have been created and have been linked to the possession and usufruct of the soil which the Romans partly did not know, and partly were far from recognizing as rights belonging to an individual. Thus the exercise of episcopal power depends upon the possession (*Besitz*) of the church and its possessions . . .³¹

But a close examination leads Savigny to the conclusion that the notion of possession in Roman law has "not been changed, but has been very consistently developed." Roman law, then, can be seen here as alive and still providing answers to concrete problems of the "living law," albeit at times rather formal ones. Holmes, in commenting upon Savigny's historically argued position (in terms of authority and precedent), allows himself to be too much influenced by the philosophical generalizations of Kant and his followers. It was not these generalizations but the dead hand of the past that persuaded Savigny to take the position which Holmes criticizes in terms of the common law's view of possession. But I am not sure that he states Savigny's position correctly. I do not read him the way Holmes does;³² it is clear in any case that he does not enter upon the *historical* argument, but treats the discussion dogmatically.

Maitland was fully aware of this conflict, but when considering the history of English law, he put it down as hindering the writing of English legal history, because of the dogmatic preoccupation of the English lawyer. English lawyers were dealing with medieval law materials as lawyers, not as historians. "What is really required of the practising lawyer is not, save in the rarest cases, a knowledge of medieval law as it was in the middle ages, but rather a knowledge of medieval law as interpreted by modern courts to suit modern facts."³³ Thus a case is the more valuable, the more recent it is; "what the lawyer wants is authority and the newer the better; what the historian wants is evidence and the older the better."³⁴ This point is of crucial importance for the right perspective on our problem. For the lawyer, Coke is better authority than Bracton, but for the historian seeking to interpret the law in the reign of Henry III "Bracton's lightest word is infinitely more valuable than all the tomes of Coke,"³⁵ not to mention more recent commentary. There is a basic conflict here which bedevils the task of legal history. We cannot say

31. *Id.* at 481.

32. HOLMES, *op. cit. supra* note 6, at 236. I find nothing in Savigny's careful historical analysis to support the sentence that Savigny "thinks that there must be always the same *animus* as at the moment of acquisition, and a constant power to reproduce at will the original physical relations to the object." See also *Id.* at 238.

33. 1 MAITLAND, *op. cit. supra* note 19, at 490.

34. *Id.* at 491.

35. *Ibid.*

that Maitland has fully escaped it. For he proceeds to expound the notion that "any one who aspires to study legal history should begin by studying modern law."³⁶ Is it not like saying that anyone aspiring to study the history of philosophy or of art had better first study the contemporary practice of these subjects? No one will deny that such knowledge might be helpful, but is it essential? What then of the study of legal history where it extends to systems of law which no longer are alive? Can they not be studied at all? Indeed, such practical contemporary knowledge might be harmful, if not very carefully controlled, because it might cause the kind of "anachronism" which is so typically a-historical in the work of, say, Sir Edward Coke. He knew the words and what use they could be made of in seventeenth century England; he often did not know the meaning these words possessed at the time they were uttered. A medieval historian, fully alert to the conditions of the particular period and region in which he had become an expert, would presumably be able to interpret more adequately the tenor of the phrases of the period. For law is not something separate and apart throughout the ages. It is part and parcel of the culture which it helps to organize and to define.

Thus legal history is seen as part of cultural history. Yet the term law does not even turn up in the index to Toynbee's magistral tomes—a scandal of sorts, if one remembers that Toynbee is an Englishman. How can culture, or at least Western culture, be imagined without laws? All of man's everyday activities, his government and his economy are regularized and given form by law. In innumerable ways the history of certain cultures, and more especially Greco-Roman and Western culture, is the history of the laws governing the communities which compose it. We need not go as far as Sir Henry Maine, who in one extraordinary passage attributed the difference between Roman (Western?) and Indian civilization to the fact that the Romans had their Twelve Tables. These he saw as "merely an enunciation in words of the existing customs of the Roman people."³⁷ But he also saw a law that "usage which is reasonable generates usage which is unreasonable."³⁸ Stressing the common Indogermanic ancestry, which the ethnology of his time thought it could show, and acknowledging a "substratum of forethought and sound judgment"³⁹ in the Hindoo jurisprudence, he yet imagined that the lack of an early code had thwarted the development of Hindoo society; their law had been drawn up "after the mischief had been done."⁴⁰ The civilization of

36. *Id.* at 494.

37. MAINE, *op. cit.* *supra* note 1, at 17.

38. *Id.* at 18.

39. *Id.* at 19.

40. *Ibid.*

these unfortunate Hindoos he saw as "feeble and perverted," while the Romans "with their code . . . were exempt from . . . so unhappy a destiny."⁴¹ The foolishness of these comments, in our perspective of comparative cultural history, ought not to be allowed to hide the greater truth dimly perceived by the great Henry Maine, namely that a culture may be shaped, and often has been shaped, by its law.

There is an extraordinary passage in a later chapter (IV) of his work which I now wish to quote *in extenso*, because it pushes this issue further in a direction which seems to me crucial.⁴² It ties in directly to what has just been discussed. And it raises a number of issues vital to our main theme. Among these the most crucial is that of the interaction between law and other aspects or components of culture. There are, Maine wrote,

Two special dangers to which law and society which is *held together by law*, appear to be liable in their infancy. One of them is that law may be too rapidly developed. This occurred with the codes of the more progressive Greek communities, which disembarrassed themselves with astonishing facility from cumbrous forms of procedure and needless terms of art . . . The Greek intellect, with all its nobility and elasticity, was quite unable to confine itself within the straight waistcoat of a legal formula; . . . the Greek tribunals exhibited the strongest tendency to confound law and fact. . . . No durable system of jurisprudence could be produced in this way. . . . Such jurisprudence would contain no framework to which the more advanced conceptions of subsequent ages could be fitted.⁴³

If I understand him correctly, Maine wishes here to say that a society which fails to develop a suitably firm skeleton of law is in danger of falling to pieces because there is nothing to hold it together. He did not think that this danger threatened many peoples. Actually one wonders whether the proposition can be maintained in this generality. Certainly the Chinese civilization was built upon a similar confounding of "law and fact"; but the *li* of the Confucian bureaucracy provided as firm a framework for that society as did law for the West. The legal solution to the problem of political and social order was explicitly rejected in the struggle over the so-called Legists.⁴⁴ But let us look for the other "danger," especially as Maine thought that "few national societies have had their jurisprudence menaced by this

41. *Ibid.*

42. This passage was especially drawn to my attention in a discussion by Lon Fuller.

43. MAINE, *op. cit. supra* note 1, at 72-73. (Emphasis added.)

44. See De Bary, *Chinese Despotism and the Confucian Ideal: A Seventeenth-Century View*, in CHINESE THOUGHT AND INSTITUTIONS 163-203 (Fairbank ed. 1957), for a recent re-appraisal. The "totalitarian" interpretation of Chinese despotism in WITFOGEL, *ORIENTAL DESPOTISM* (1957), does not convince me.

peculiar danger of precocious maturity and untimely disintegration."⁴⁵ For the other danger is much more common and it has "prevented or arrested the progress of far the greater part of mankind."⁴⁶ It is the danger that "the rigidity of primitive law, arising chiefly from its early association and identification with religion, has chained down the mass of the human race to those views of life and conduct which they entertained at the time when their usages were first consolidated into a systematic form."⁴⁷ And "over the larger part of the world, the perfection of law has always been considered as consisting in adherence to the ground plan supposed to have been marked out by the original legislator."⁴⁸ What allowed the Romans to escape from this other danger was their theory of Natural Law. Now in point of fact, modern scholarship has greatly reduced the importance of natural law in the development of Roman jurisprudence⁴⁹ and has correspondingly emphasized the traditional, especially the religious elements—in other words precisely those elements which Maine saw as the second "danger." But leaving aside the Romans and Maine's questionable interpretation of their theory of natural law as a parallel to Bentham's doctrine,⁵⁰ I wish to stress here that Maine insisted that law can seriously affect cultural development, either by giving it too much or too little of a skeleton, framework, stability, rigidity and so forth. This is, it seems to me, a major insight, and it is grounded in the paradox, the dialectic of the relation of jurisprudence and historical understanding. To put it hortatively: the dogmatic and conceptual foundation of the law needs the softening impact of an inquiry into the past in order to free itself for the future. But such historical "softening" must not be carried too far, or the legal fabric is dissolved and with it the society which it sustains. This two-fold danger is by no means restricted to the infancy of human society; it persists to the very present.

45. MAINE, *op. cit. supra* note 1, at 73.

46. *Id.* at 74.

47. *Ibid.*

48. *Id.* at 74-75.

49. SCHULZ, *HISTORY OF ROMAN LEGAL SCIENCE* (1946); BRUCK, *UEBER ROEMISCHES RECHT IM RAHMEN DER KULTURGESCHICHTE* (1954). In the latter, the natural law is not treated at all, and Cicero's position is correspondingly reduced to the point where Professor Bruck even says: "*Jurist war er schwerlich.*"

50. Maine is, of course, aware of the fact that philosophically the two doctrines are far apart; natural law is not "an anticipation of Bentham's principles." Still he considers it "not an altogether fanciful comparison if we call the assumptions [of natural law] the ancient counterpart of Benthamism." The reason is that they both gave the nation and the profession "a distinct object to aim at in the pursuit of improvement." Bentham gave England a "clear rule of reform." In short "law of nature" and "the general good of the community" fulfilled the same *function* in the reshaping of the law. For a sketch of the natural law doctrine see my *THE PHILOSOPHY OF LAW IN HISTORICAL PERSPECTIVE* ch. IV (1958).

In order to illuminate this aspect of the relation of law and history further, the mooted question of codification deserves treatment here. For the issue of codification has helped to precipitate the argument about jurisprudence and history, the argument over whether history and more especially the history of law matters to jurisprudence at all. Savigny's famous essay on behalf of the historical school of jurisprudence⁵¹ was written in response to the proposal made at the time, and in a spirit of patriotism, that the Germans codify their law. Savigny cited Bacon for the opinion that the age in which a code is brought into being must excel the preceding ages in legal understanding, and he drew the inference that therefore some ages which might be highly cultured in other respects do not possess the requisite "calling" for making a code.⁵² He insisted that Germany was in that position. He built his argument upon a general proposition in line with our analysis here that "a two-fold understanding is indispensable to a jurist: the historical, in order that he may grasp the peculiar [nature] of each age and of each legal form, and the systematic one, in order that he perceive each concept and each rule [principle] in living connection and interaction with the whole [of the law]"⁵³ Savigny felt that the German jurists of the eighteenth century did not possess this equipment, that they were shallow rationalists, and that the new beginning which had been made had not yet progressed far enough, though there was hope. To fix the law at such a point he felt was not only useless, it was dangerous, because it clothed with authority an unsatisfactory state of the law, and he reminded his readers of the Code of Theodoric in this connection. He also urged that the German language had not yet developed an adequate legal vocabulary. He then proceeded to analyze the codes that had come into being, more especially the Code Civil or Code Napoleon.⁵⁴ His

51. SAVIGNY, *VOM BERUF UNSERER ZEIT FUER GESETZGEBUNG UND RECHTSWISSENSCHAFT* (1814). I used the third edition which contains two appendices concerned with the matter. Savigny's views have been re-studied in the past generation; there is the detailed scholarly biography of STOLL, *FRIEDRICH KARL VON SAVIGNY* (1927), in three vols.; the brilliant essay of WOLF, *GROSSE RECHTSDENKER, DER DEUTSCHEN GEISTESGESCHICHTE* ch. XII (1939); and the penetrating analytical essay by ZWIGLMAYER, *DIE RECHTSLEHRE SAVIGNY'S* (1929). All three agree that behind Savigny's historicism there is to be found a dogmatic judgment in favor of the Roman law as the standard of what constitutes high achievement. This non-relative aspect of Savigny is crucial for an understanding of his position on the question of codification.

52. Bacon's well-known proposals were made to King James and are entitled "A Proposition to His Majesty . . . Touching the Compiling and Amendment of the Laws of England" and "An Offer to King James of a Digest To Be Made of the Laws of England." They are found in 2 BACON, *WORKS* 229-36 (Philadelphia ed. 1852).

53. SAVIGNY, *op. cit. supra* note 51.

54. For this and what follows see *THE CODE NAPOLEON AND THE COMMON LAW WORLD* (Schwartz ed. 1956), especially my essay, *The Ideological and Philosophical Background*, *id.* at 1-18, and A. P. Sereni's essay, *The Code*

very sharp criticism is primarily directed at the ignorance of the four men who drafted the code, since the *Conseil d'Etat* contained so many (in his view) juristically incompetent persons. How relatively irrelevant this sort of criticism was, has been pointed out.⁵⁵ For Savigny was inclined to gainsay the true historical functions of the Code Civil which lay in the cementing of national unity and to belittle the great principles underlying it, namely (1) freedom of the person and of contract, as well as equal right to engage in professions and to possess property; (2) suppression of all the old privileges, equality of all Frenchmen regardless of status, sex, or social condition; and (3) freedom of civil society from all ecclesiastical control. These were of course at the heart of the French revolution, and for this revolution Savigny had little use. For him, as for so many other historicist thinkers, the rationalist ingredient of the revolutionary credo was anathema. Yet, the Code contained many notions deeply embedded in the old customary law, or *coutumes*, and it is truly surprising to note to how large an extent Savigny could overlook this element. "The Germanic, conservative and popular content [of the Code] Savigny did not recognize."⁵⁶ The "errors" which Savigny charged the drafters with were mistakes about the Roman law which he knew so well; that their great achievement lay in the skillful use of Pothier by Poutalis he did not acknowledge.

It has been rightly said that "the promulgation of the Civil Code in the year 1804 is, historically, the legislative response to a desire expressed during many centuries by the French people."⁵⁷ The Code was not the hiatus in French legal development which Savigny's criticism implied. In the perspective of a century and a half, it is quite plain to see that the Code was a culmination and a starting point. If we approach the Code as historians, the codification can be seen as part of that ebb and flow of ideas by which the law is molded as it evolves. The seamless web of history appears then as not torn apart by a Code, but as merely reinforced by such a "digest." Actually, the Code had become an inescapable necessity through the very work of the revolution which *threatened* to disrupt the legal continuity. This threat was averted and the continuity preserved with the help of the code which, in terms of Hegel's dialectic phrase, suspended, super-

and Case Law, Id. at 55-79. In a number of other essays, S. D. Elliott, A. von Mehren, Max Rheinstein and others show how the code has been transformed by legislative and judicial interpretation.

55. Thus the renowned Rene Cassin remarked that "on the technical level, proponents of the historical school could criticize the codification for having ossified the rules of civil law and prevented certain necessary development." *Codification and National Unity*, in SCHWARTZ, *op. cit. supra* note 54, at 49.

56. WOLF, *op. cit. supra* note 51, at 476.

57. Tunc, *The Grand Outlines of the Code*, in SCHWARTZ, *op. cit. supra* note 54, at 19.

sed and preserved the old law. At this point, a distinction needs to be drawn between different kinds of codes.

The idea of a code and of codification appears in at least three distinguishable forms. The Justinian Code represents a first type; one might call it the digest type. It tries to bring together and "digest" a body of existing law, clarifying it, eliminating possible contradictions, but not intending to alter it in any significant way. The work of the American Law Institute has been essentially of this character. Bacon, in the above cited memoranda, spoke as if such a digest were what he had in mind. "The work which I propound, tendeth to the pruning and grafting the law, and not to the ploughing up and planting it again; for such a remove I hold indeed for a perilous innovation . . ." ⁵⁸ But he actually aimed at the second type. This sort of code seeks to codify the law in terms of natural law or other general principles which would provide a pattern for systematization. These general principles are philosophical and political in nature and serve as a yardstick for the evaluation of existing law; that is to say, such a code seeks the clarification and reformation of the law in whole or in part. General philosophical reason is here assigned a distinctive role. Such were the codes the enlightened despots favored and enacted, the Prussian Common Code and the Austrian Civil Law Code, as well as the more limited codes made under Louis XIV with the help of Colbert. Such a code was in the mind of Bacon who flattered the king about his knowledge of "justice and judicature" which enabled him to be a "lawgiver"; he proclaimed that "as the common law is more worthy than the statute law, so the law of nature is more worthy than them both." ⁵⁹ Such codes were in line with the thinking of enlightened despotism. The *philosophes* were the authors of the general principles; the jurists, of the detailed application.

But there was implicit in this kind of thinking a yet more radical position enunciated by the greatest of the *philosophes*, Voltaire, when he exclaimed: "Do you want good laws? Burn yours and make new ones!" Voltaire's dramatic demand symbolizes the revolutionary attitude that underlay the insistent demand for a code of laws during the revolution. The original French revolutionary codes were of this type of "rationality." The draft code of 1793 was revolutionary in both intent and content. It was meant to change everything at once, it was "the fruit of liberty." The drafters told the assembly that "the nation will receive it as the guarantee of its happiness, and it will offer it one day to all the peoples . . ." There was only one

58. 2 BACON, *op. cit. supra* note 52, at 231.

59. *Id.* at 169. POUND, *THE DEVELOPMENT OF CONSTITUTIONAL GUARANTEES OF LIBERTY* 43 (1957), stresses Bacon's favoring absolute monarchy.

truth, and that was the revolutionary ideology which they had embodied in their draft code. A still more radical code was presented the following year; it was, in the words of one eminent French legal scholar, "much more a manual of practical morals than a code of civil law." Neither was adopted. The codifications of the USSR (and subsequently of the Communist states) are really the best examples of this type of code.⁶⁰ Thus the problem of codification shows dramatically the range of continuity and change that law in its historical dimension can exhibit.

It is clear that the two-fold danger of which Maine had warned is at the heart of the argument over the problem of codification; that is, does it make the law too rigid, or does it help to give it that tensile strength which it requires for fulfilling its societal functions? As has been often remarked, law in a certain sense is an organon, an organic whole extending over centuries. Being embedded in the history of nations, it must be seen in the perspective of their over-all significance. We may have come a long way from the Romantic notions of a Gierke who would interpret all history in terms of the struggle of the Romanist principle of *Herrschaft* with the Germanic principle of *Genossenschaft*; we may have left far behind the equally Romantic notion of a Savigny who would interpret the Roman law in terms of the folk spirit of the Roman people; we may have outdistanced Maine's utilitarian enthusiasm for the progress from status to contract as the key to all legal development. But we cannot escape from the need of identifying our own philosophy of history, if we are to see the historical phenomena of law-in-the-making in the perspective of truth claims, whether scientific or humanist.⁶¹

Any attempt to answer the question "What is history?" involves a philosophy of history in the sense of "general thoughts upon history." We have postponed this question until now, but we can avoid it no longer. Our time has produced a rich variety of answers and rejoinders to answers. Lord Acton, one of the great minds working in that field in the recent past, thought it "the office of historical science to maintain morality as the sole impartial criterion of men

60. See BERMAN, *JUSTICE IN RUSSIA* (1950); KONSTANTINOVSKY, *SOVIET LAW IN ACTION* (Berman ed. 1953) concerned with the codification problem; cf. also VYSHINSKY, *THE LAW OF THE SOVIET STATE* (1948) for an ex cathedra exposition.

61. Besides Collingwood and the writers cited in the next few footnotes, the following deserve mention as significant contributions to the recent discussion: ARON, *INTRODUCTION A LA PHILOSOPHIE DE L'HISTOIRE* (1948); BERLIN, *HISTORICAL INEVITABILITY* (1954); BURKE, *ORIGIN OF HISTORY AS METAPHYSIC* (1950); LITTE, *WEGE UND IRRWEGE GESCHICHTLICHEN DENKENS* (1947); MARROU, *DE LA CONNAISSANCE HISTORIQUE* (1954); PADOVANI, *FILOSOFIA E TEOLOGIA DELLA STORIA* (1953).

and things." Others, from St. Augustine to Hegel, have seen history as the theodicy in which God and the march of spirit were revealed in the world of man.⁶² "Historicism," if not of the Augustinian, then certainly of the Hegelian and Marxian variety, has been flailed again and again from different viewpoints. In a perspective somewhat akin to that of Lord Acton, one contemporary philosopher has juxtaposed a doctrine of natural right with all such historicism which he has called "self-contradictory or absurd."⁶³ Another, noting the "poverty of historicism," argues on the contrary that historicism, "an antique and tottering philosophy," proclaims:

Social science is nothing but history, not however history in the traditional sense of a mere chronicle of historical facts . . . but . . . of the laws of social development . . . [I]t could be described as historical theory or as theoretical history, since the only universally valid social laws have been identified as historical laws.⁶⁴

In writing thus, he emphasizes the exact opposite of the preceding critic, namely the doctrinaire, dogmatic aspect of historicism as contrasted with its relativist notions. Crucially conclusive against such a view is, in this critic's opinion, the fact that "we cannot predict, by rational or scientific methods, the future growth of our scientific knowledge," and "if there is such a thing as growing human knowledge, then we cannot anticipate to-day what we shall know only to-morrow."⁶⁵ The trouble with historicism (and with certain kinds of sociology derived from it) is that it believes it can predict confidently. But neither can you so predict on the basis of some kind of unchanging "human nature," as the other critic with his faith in natural right believed.

The contradiction in the two ways of seeing "historicism" is embedded in the phenomenon itself, as well as in the outlook of the critics. Of these the first hopes to return to an "unchanging world"

62. For these, see LOEWITH, *MEANING IN HISTORY* (1949), who examines a baker's dozen writers from Burckhardt to Orosius.

63. STRAUSS, *NATURAL RIGHT AND HISTORY* 25 (1953). See *id.*, ch. I. Strauss states the position of "radical historicism" as follows: "All understanding, all knowledge, however limited and 'scientific,' presupposes a frame of reference; it presupposes a horizon, a comprehensive view within which understanding and knowing take place. Only such a comprehensive vision makes possible any seeing, any observation, any orientation. The comprehensive view of the whole cannot be validated by reasoning, since it is the basis of all reasoning. Accordingly, there is a variety of such comprehensive views, each as legitimate as any other: we have to choose such a view without any rational guidance." *Id.* at 26-27.

64. POPPER, *THE POVERTY OF HISTORICISM* 45 (1957). Popper, the philosopher of science, is impressed with the passive, contemplative aspect of historicism, its "quietism"; he notes that "the historicist can only *interpret* social development and aid it in various ways; . . . *nobody can change it.*" *Id.* at 52.

65. POPPER, *op. cit. supra* note 64, at x. The last quoted passage is given by Popper in italics.

such as was believed in before the historicists took over; the second wants to transcend the "fear of change" which has driven the historicist into believing in an "unchanging law" which governs the changing world.⁶⁶ To both it might be objected that the particular view of history which they reject is the only view worthy of respect as "philosophy of history."⁶⁷ For only when history is seen as a whole, is seen as world history with a meaning, can we in this perspective speak of a "philosophy of history." Now it has been asserted that if seen thus, philosophy of history is "entirely dependent upon theology," that is to say upon the "theological interpretation of history as salvation."⁶⁸ Whether this be true or not, it is certainly a fact that such philosophies of history have been a peculiar and distinctive feature of the West, with definite roots in the Bible, more especially the Old Testament. The theological roots may have something to do with the political function which such philosophies have had.

The great syntheses of these philosophies of history are closely related to the unique importance of historical thought for the West. For through them the *self* achieves the relatedness which he seeks as a cultural being. It provides the frame within which it becomes possible to say what needs to be said about the meaning and destiny of this particular human being, as well of man.⁶⁹ At the same time, such a projection of the self of man and his culture *expresses* and gives verisimilitude to a sense of superiority—cultural, spiritual, religious. Philosophies of history are, in this perspective, expressions of an intellectual or spiritual imperialism such as has characterized the West until recently and is now being transformed and reincarnated in the Soviet Union. This quality is inherent in such syntheses, because they presuppose a universal goal or end of history which can only be asserted on the basis of faith. Thus philosophies of history are expressions of a will to power, a will to conquest even. They correspond to other forms of ideological aggression, and the will (or at any rate the desire) to subjugate mankind in terms of its own good. Such destiny is apt to be described as manifest and well calculated to heal the ills of the world, in one form or another. It is evident that all such philosophies are variants upon the theme of the

66. POPPER, *op. cit. supra* note 64, at 161.

67. This appears to be the tendency of Loewith who in his discriminating study, cited above, would not credit "every opinion about history" as a philosophy of history, but only "the systematic interpretation of world history on the basis of a principle." LOEWITH, *op. cit. supra* note 62, at 11.

68. LOEWITH, *op. cit. supra* note 62, at 11. Loewith speaks of *Heilsgeschehen*, that is to say literally "the happening of salvation," and the title of the German edition of his book has therefore been changed into *WELTGESCHICHTE ALS HEILSGESCHEHEN* (1953).

69. NIEBUHR, *THE NATURE AND DESTINY OF MAN* vol. II, at 299-321 (1949). *Human Destiny*, esp. pp. 299 ff.

"chosen people."⁷⁰ Legal history, though rarely involved in the broad universalism of such philosophies, has tended to partake of the valuational aggressiveness. The well-known conceit of the common law lawyers is readily matched by the "Germanism" of a Gierke or the "Romanism" of a Savigny. That is to say, legal history is frequently infused by a pre-conceived notion of what constitutes valid law.

As against such extravagancies, a more sober view of history, a more skeptical philosophy, might provide a possible antidote. The great Burckhardt, in his *Reflections on World History*, clearly indicated his lack of interest in broad constructions. History, he thought, was not a science of objective, "neutral" facts, but a "report about such facts as one age finds remarkable in another." Only by thus selecting and interpreting the reports about past events can we determine which facts are noteworthy, important, of real significance. He noted that "Thucydides may mention a fact the importance of which will only be recognized in a hundred years." Such a view of history is eminently suited to the pursuit of legal history in the best sense. For is it not typical of the work of jurists that they re-assess the law of past decisions—judicial, legislative, administrative—in the light of present concerns and pre-occupations? But is it enough? Do we not need some kind of notion of an inner development, of an unfolding of the potentialities of the body that is law? In the work of the greatest historians of the law, some such idea seems to have been alive and a major motivating force of their work. Before considering this notion of "intrinsic" development in the Aristotelian sense of a *telos* that is embedded in the seed, let us consider yet another approach.

One of the best-known students of these problems believed that the idea of history could be circumscribed in four basic propositions, to wit, that "history should be (a) a science, or an answering of questions; (b) concerned with human actions in the past; (c) pursued by interpretation of evidence; and (d) for the sake of human self-knowledge."⁷¹ In light of such a characterization, which the author believed to be generally held among historians, he asked the question: Of what can there be historical knowledge? And he answered: of that which can be re-enacted in the historian's mind. Such an answer is obviously favorable to the historical exploration of past events that belong to the realm of the mind, and law is certainly one of

70. For further detail see my article *Die Philosophie der Geschichte als Form der Ueberlagerung*, in *WIRTSCHAFT UND KULTURSYSTEM* 199 (Eisermann ed. 1955), and the literature there cited.

71. COLLINGWOOD, *THE IDEA OF HISTORY*, *Introduction* (1946). See note 2 *supra* and accompanying text.

these. It reinforces the notion, considered by us earlier, that one should have a knowledge of the law to be a legal historian; it would certainly facilitate the "re-enacting." But is there not a fatal difficulty present also, the difficulty of re-enacting anything? Heraclitus' famous proposition that you cannot step into the same river twice, that all is in flux, applies to the subtle matters of the spirit more poignantly than to the "simple" passions felt by all men—love, hatred, ambition and the rest of which so much ordinary human history is compounded. But can we ever again recapture the way men reasoned about justice in the days of Bracton or even of Coke? It seems most improbable. And when we read the detailed essays of renowned scholars in the field of legal history, it is usually clear enough what has been their concern. Think of the debunking of Magna Carta⁷² and the corresponding work on the *Declaration of Independence*.⁷³ These two venerable documents of legal history can now be said to represent striking instances of myth-making and myth-destroying. As scholars have succeeded in "re-enacting," they have also succeeded in depriving of genuine legal value these and other records of the past. Is it too much to say that the more fully a particular historical event is understood, the more remote it becomes from present concerns? J. B. Ames recounts a rather touching anecdote of the young Langdell in his memorial article on that great scholar. It takes us back to the days when Langdell was studying and assisting at the Harvard Law School. When a fellow student, the later Judge Charles E. Phelps, surprised him among his books in the alcoves of Dane Hall, studying a black letter folio, Langdell exclaimed, "in a tone of mingled exhilaration and regret, and with an emphatic gesture: 'Oh, if only I could have lived in the time of the Plantagenets!'" To have lived at the time of the Plantagenets—this is indeed the problem, and the more nearly you succeed, the less you have to offer to the twentieth century.⁷⁴

It is then clear (or at any rate suggested) that the continuity of legal thought processes is to a very considerable extent a fiction. No matter how history is conceived philosophically, the cases that are cited over and over produce in line with *stare decisis* a facade of historical support which any close inspection would reveal as largely untenable. At the same time it must be admitted that this fiction is of the greatest legal, that is, dogmatic importance.

72. See McKECHNIE, *MAGNA CHARTA* (2d ed. 1913).

73. See BECKER, *THE DECLARATION OF INDEPENDENCE* (1922).

74. Cf. AMES, *LECTURES ON LEGAL HISTORY* 471 (1913). It might be remarked in passing that Ames states the subject of his lectures to be "the origin and development of the ideas of crime, tort, contract, property and equity." The next sentence claims that "the common law is essentially of Teutonic origin." It is not fashionable to put it that way today.

In this country [England] and in the whole common-law world, the place of the systematic fiction is taken to a considerable extent by the fiction of historical continuity. Every decision appears in the cloak of a mere application or adaptation of pre-existing "principles" laid down in earlier judicial pronouncements. Where historical continuity and systematic consistency are in conflict, it is the former which prevails . . .⁷⁵

In the light of what can properly be called scientific history in the sense previously defined, this continuity is a fact only through its being a fiction; for if the historical appreciation were truly scientific, that is, if it were actually based upon the search and discovery of historical truth, it would forthwith cease to be operative as a fiction. For the cases in the past would cease to have any application to the problems of today.

This is my conclusion, then, but it is less sceptical than it sounds. History in the sense of past happenings is not the "meaningless" to which meaning is arbitrarily assigned. When these happenings are products of the mind, such as legal decisions, statutes and opinions of jurists, they presumably had a meaning to those who brought them into being. In searching for this meaning, this historian will be sitting in judgment upon the rational content, both in terms of means and ends. Thus "the judicial role appears to fit the historian's activity better than that of the scientist checking hypotheses, the politician promoting his party's cause, or the artist fashioning a work of art."⁷⁶ This "judgment" which the historian is called upon to render provides the intellectual bridge between him and the jurist. It is not an arbitrary judgment such as is often assumed to have been implied in Hegel's famous quote from Schiller's *Die Resignation*, but rather the resigned judgment of the truth seeker who knows that he will never know all of it. Why should a past decision provide authority for a present one? Because there is a fair chance that the solution it offered related sound reasoning in terms of justice to that feature of a problematic situation which is persisting in the one now confronting the jurist. It may be fiction, and the farther removed in time, the more likely this is. But "life is but a dream," and even fictions have their place in the economy of the mind, especially the legal mind. The potential antagonism between the historian who may destroy a cherished illusion and the jurist who is called upon to provide reasoned solutions to the problems of injustice that are facing us here and now may be resolved time and again by the re-enforcement of a sharpened critical insight into the true "precedents" which a history of the law can provide.

75. Kahn-Freund, *Introduction to RENNER, THE INSTITUTIONS OF PRIVATE LAW AND THEIR SOCIAL FUNCTIONS* 9-10 (1949).

76. SWABEY, *THE JUDGMENT OF HISTORY* 238 (1954).