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THE VOLKSGEIST AND A PIECE OF SULPHUR

Frank W. Elliott*

Savigny was a principal architect of the historical theory of jurisprudence which holds that law must be consonant with the spirit of the people it governs. In his own times, however, he was more than a philosopher. As a participant in a great debate, Savigny developed his theory as a weapon to resist the wholesale imposition of a legal code which he regarded as alien to and ill suited for the emerging German states. Professor Elliott explores the thought of this controversial man in a fashion which is of interest not only to the philosopher and historian, but also to the lawyer who practices in an age, like Savigny's, preoccupied with the adoption of uniform legal codes.

In 1814 a remarkable little volume appeared on the German legal and academic scene. It aroused great controversy, accomplished its intended purpose for over eighty years, and is still being discussed. The book was *Ueber den Beruf unserer Zeit fuer Gesetzgebung und Rechtswissenschaft*,¹ [translated as *Of the Vocation of Our Age for Legislation and Jurisprudence* (hereinafter referred to as *Vocation*)] its author was Friedrich Carl von Savigny, and its purpose was to prevent the impending codification of German law. It has been said that it was written in "white heat"² and, on the contrary, that it was written as a preface to a larger work,³ *Die Geschichte des Roemischen Rechts im Mittelalter*.⁴ Whatever the purpose of its composition, there is no doubt that it was published as an argumentative reply to the demand for codification. Many of its ideas

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¹ SAVIGNY, *UEBER DEN BERUF UNSERER ZEIT FUEER GESETZGEBUNG UND RECHTSWISSENSCHAFT* (1814), translated as SAVIGNY, *OF THE VOCATION OF OUR AGE FOR LEGISLATION AND JURISPRUDENCE* (2d ed. Hayward transl. 1831) (hereinafter cited as *VOCATION*). A word of explanation on the lengthy quotations from the *Vocation* and other of Savigny's works is in order. Copies of the Hayward translation are rare, and copies of the translations of the other works are almost non-existent. Therefore, unless the reader has the ability to read German, first-hand knowledge of Savigny's theory is difficult to obtain. There are fairly extensive excerpts from the *Vocation* in MORRIS, *THE GREAT LEGAL PHILOSOPHERS* (1959), but they are far from a complete exposition of the theory.

² PATTERSON, *JURISPRUDENCE* 410 (1953).

³ Kantorowicz, *Savigny and the Historical School of Law*, 53 L.Q. REV. 326, 340 (1937).

⁴ SAVIGNY, *DIE GESCHICHTE DES ROEMISCHEN RECHTS IM MITTELALTER* (1815-1831) (*The History of Roman Law in the Middle Ages*).

were repeated, somewhat more calmly, in the *System des Heutigen Roemischen Rechts*.⁵

Savigny's basic theory is that it is impossible to create law out of whole cloth—it grows in a slow, unconscious, organic way from its primitive beginning in the minds of the people of a nation.

In the earliest times to which authentic history extends, the law will be found to have already attained a fixed character, peculiar to the people, like their language, manners and constitution. Nay, these phenomena have no separate existence, they are but the particular faculties and tendencies of an individual people, inseparably united in nature, and only wearing the semblance of distinct attributes to our view. That which binds them into one whole is the common conviction of the people, the kindred consciousness of an inward necessity, excluding all notion of an accidental and arbitrary origin.⁶

This "common conviction," this "kindred consciousness," this "inward necessity" came to be known as the *Volksgeist*. The theory is as elemental as the early belief that all matter is composed of earth, air, fire, and water; perhaps as attractive as that belief; and certainly as false when considered as an absolute. Surely law can be consciously created; the state of legislation today cannot be ignored. Not all law is purely national in origin and development. The progress of evolution shows a general continuity of experience, but man can check, or at least divert, the march of history. But it is not necessary to consider the theory as indivisible and thereby be led to reject it completely. There is much in Savigny's writings worth keeping.

Though legislation can be effective, distrust of legislation is shared by many. "There is, indeed, a science of legislation; but though allied to the science of jurisprudence, it does not include it, and is quite different from it. . . . Legislation is, in one aspect, the *opposite* of jurisprudence. . . ."⁷ "The truth is that many of us, bred in common law traditions, view statutes with a distrust which we may deplore, but not deny."⁸ Of course, Savigny would not deplore the distrust, but rather applaud it.

It validly can be asked where the kindred consciousness of inward necessity for the Rule in Shelley's Case may be found. But it can just as validly be answered:

⁵ SAVIGNY, *SYSTEM DES HEUTIGEN ROEMISCHEN RECHTS* (1840) (System of Modern Roman Law).

⁶ VOCATION 24.

⁷ CARTER, *THE PROVINCES OF THE WRITTEN AND THE UNWRITTEN LAW* 4 (1889).

⁸ CARDOZO, *THE PARADOXES OF LEGAL SCIENCE* 9 (1927).

No lawgiver meditating a code of laws conceived the system of feudal tenures. History built up the system and the law that went with it. Never by a process of logical deduction from the idea of abstract ownership could we distinguish the incidents of an estate in fee simple from those of an estate for life, or those of an estate for life from those of an estate for years. Upon these points, 'a page of history is worth a volume of logic.'⁹

What, then, is the nucleus of the idea which remains today as acceptable and perhaps accepted? What is left of the theory when its inconsistencies, its exaggerations, its prejudices, are stripped from it? The search for such a nucleus is the purpose of this paper. Little if any attention will be paid to the great fight over codification, even though the *Vocation* was published as a weapon in that fight, and Savigny was a passionate participant in it throughout his life. Emphasis will rather be placed on his theory of the historical origin and development of the law, and the part of that theory which may still have some value for us.

I. ORIGIN AND DEVELOPMENT

Some of the criticism of the *Volksgeist* theory has been based on the fact that dominant minority groups many times have been more influential in molding the law than the common feeling of a nation as a whole. It is difficult to conceive of a mass of inhabitants clamoring for the yoke of the feudal system. There could be little felt necessity for specific rules of the law merchant. But a *caveat* must be inserted here. Savigny was speaking initially of a nation in its youth, developing its primitive rules. These rules were communicated by word of mouth, by symbolical acts.¹⁰ If the system of land tenure and common law conveyancing did spring full grown from a lawgiver, I cannot believe that the name of such a diabolical genius would have been lost in antiquity. Certainly we cannot say that the young nation lay awake nights yearning for an estate in fee tail male, or inwardly felt that a conveyance of Pinkacre to *A* for life with remainder to his heirs should be considered as a conveyance to *A* in fee simple. But perhaps there was some feeling for the right of free disposition of property, and the symbolical passing of twigs or stones in livery of seisin seems to fit within Savigny's description very well.

Let us go beyond the *caveat*, however, and examine the case of the law merchant. Just because the entire population does not have a common

⁹ CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 54 (1921).

¹⁰ *VOCATION* 26, 130.

conviction, is this to say that the general idea is worthless? If the law develops through the customs and practices of specialized groups, and that development applies to that group, some of the thought clearly has merit. Although it may not be strict Savigny, it is feasible to consider a *Volksgeist* of the merchant class, the only group that really has a deep interest in certain specific problems.

In addition, and to return to the *caveat*, Savigny realized that as the nation matured, as civilization progressed, so did the law. "[H]e supplemented his 'popular spirit' origin with the theory that the jurists (legal scholars including professors and judges), who become legal specialists with the advance of civilization, are the representatives of the community spirit and are thus authorized to carry on the law in its technical aspects."¹¹ This concept is not without its own critics, and is not posed here as an answer to the present question. It will be discussed at greater length in the next section.

Even if we assume that the *Volksgeist* is merely superstition, we must admit that history, the slow, perhaps unguided movement of time, has played an important part in the birth and growth of the law.

[I]f we consider the law of contract we find it full of history. The distinctions between debt, covenant and assumpsit are merely historical. The classification of certain obligations to pay money, imposed by the law irrespective of any bargain as quasi-contracts, is merely historical. The doctrine of consideration is merely historical. The effect given to a seal is to be explained by history alone.¹²

At this point, one may ask, and rightly so, "So what? Does that make it right and proper? If this is all that the theory shows or does, what is its worth?" Savigny has been severely criticized for allegedly believing that the primitive customs and attitudes of a people should have primacy over later developments,¹³ and for tending to advocate the perpetuation of what has grown up historically, even if it has ceased to have any rational purpose.¹⁴ In short, it is alleged that he does not believe in a living, growing law. Even the critics, however, concede that he gave at least lip service to the contrary.¹⁵ This is what he said:

For law . . . there is no moment of absolute cessation; it is subject to the same movement and development as every other popular

¹¹ PATTERSON, *op. cit. supra* note 2, at 411-12.

¹² Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 472 (1897).

¹³ PATTERSON, *op. cit. supra* note 2, at 414.

¹⁴ STONE, *THE PROVINCE AND FUNCTION OF THE LAW* 445-46 (1950).

¹⁵ See *id.* at 445-47.

tendency; and this very development remains under the same law of inward necessity, as in its earliest stages. Law grows with the growth, and strengthens with the strength of the people.¹⁶

The historical view of jurisprudence is entirely misunderstood and distorted when it is regarded as setting up the law which has descended to us from the past as supreme, and requiring the maintenance of its unimpaired authority over the present and the future. The essential characteristic is rather the equal recognition of the value and independence of each age, and it merely lays the chief weight on the recognition of the organic connection between the present and the past, without the knowledge of which we can only perceive the external appearance of existing legal institutions, but cannot understand their true essence.¹⁷

Lip service indeed! Throughout his works the law is noted as something organic, something dynamic. The law does not stop growing until a nation in its dotage starts to wither away, and then so does the law.¹⁸ Holmes has compared the development of the law to that of plant—mind, like matter, simply obeying a law of spontaneous growth.¹⁹ Savigny has compared it to the growth of a member of a human body, “not as a garment merely that has been made to please the fancy and can be taken off at pleasure and exchanged for another.”²⁰

The accusation that Savigny is interested only in the primitive rules calls for a further comparison at this point.²¹ I hope the reader will find the parallel in these passages that I did.

History must be a part of the study, because without it we cannot know the precise scope of rules which it is our business to know. It is a part of the rational study, because it is the first step toward an enlightened skepticism, that is, towards a deliberate reconsideration of the worth of those rules. When you get the dragon out of his cave on to the plain and in the daylight, you can count his teeth and claws, and see just what is his strength. But to get him out is only

¹⁶ VOCATION 27.

¹⁷ *Preface to SAVIGNY, SYSTEM OF MODERN ROMAN LAW* (1840), quoted in Guthrie, *Introduction to SAVIGNY, PRIVATE INTERNATIONAL LAW* at 13 (2d ed. Guthrie transl. 1880).

¹⁸ VOCATION 27.

¹⁹ Holmes, *supra* note 12, at 468.

²⁰ SAVIGNY, *PRIVATE INTERNATIONAL LAW* 530 (2d ed. Guthrie transl. 1880).

²¹ I have explained in note 1 why there are so many extensive quotations of Savigny. It may be wise to explain now why there are also other extensive quotations. First, the men who I quote are famous for the clarity and quality of their writing. Second, ancillary to the first, I cannot hope to match by paraphrase what they have said. And third, I quote because to paraphrase might lead to complaints of inaccuracy, and I want to show that Savigny is not so esoteric and ancient as has been thought. Of course, I can still be accused of quoting out of context, but I will bear that burden if it comes.

the first step. The next is either to kill him, or to tame him and make him a useful animal. . . . 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. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.²²

There is consequently no mode of avoiding this overruling influence of the existing matter; it will be injurious to us so long as we ignorantly submit to it; but beneficial, if we oppose to it a vivid creative energy,—obtain the mastery over it by a thorough grounding in history, and thus appropriate to ourselves the whole intellectual wealth of preceding generations. . . . Its object is to trace every established system to its root, and thus discover an organic principle, whereby that which still has life, may be separated from that which is lifeless and only belongs to history.²³

Patterson has suggested that the latter sentence could be taken to state the role of the courts in Anglo-American law.²⁴ I submit that Savigny is just as interested in killing or taming the dragon as is Holmes. And to what does this mastery over history lead?

We must beware of the pitfall of antiquarianism, and must remember that for our purposes our only interest in the past is for the light it throws upon the present. I look forward to a time when the part played by history in the explanation of dogma shall be very small, and instead of ingenious research we shall spend our energy on a study of the ends sought to be attained and the reasons for desiring them.²⁵

Let jurisprudence be once generally diffused amongst the jurists . . . and we again possess, in the legal profession, a subject for living customary law,—consequently, for real improvement. . . . The historical matter of law, which now hems us in on all sides, will then be brought under subjection, and constitute our wealth. We shall then possess a truly national law, and a powerful expressive language will not be wanting to it. We may then give up the Roman law to history, and we shall have, not merely a feeble imitation of the Roman system, but a truly national and new system of our own.²⁶

In short, some of the alleged errors in Savigny's work are like the troubles of Samuel Clemens—they never happened. To one reading "a copy of the rare English translation of Savigny's writing,"²⁷ and that

²² Holmes, *supra* note 12, at 469.

²³ VOCATION 137.

²⁴ PATTERSON, *op. cit.* *supra* note 2, at 412.

²⁵ Holmes, *supra* note 12, at 474.

²⁶ VOCATION 154-55.

²⁷ Kantorowicz, *supra* note 3, at 332 n.21.

only, it becomes even more apparent. Whatever he may have done later, whatever he may have taught his students in the university, it remains that his conception of the law as expressed in the *Vocation* and in the *System of Modern Roman Law* was not that of a reactionary, static, tradition-bound body of primitive rules.

There is another, and perhaps more telling criticism. To believe that all law develops without arbitrary origin, gradually, unconsciously, but in the kindred consciousness of a people, is to ignore reality. In wholly primitive stages of a nation's life it possibly could be so; but except for such a situation, a tenuous one at best, at least some law has been created by conscious effort. Kantorowicz has suggested that all law has been so created.²⁸ Even customary law has passed through "the brains of prophets, sages, doomsmen, judges, advocates, and notaries, who formulate and apply it, and thus gradually separate it from mere usages and from ethical rules."²⁹

Jhering, at first a follower of the historical school, later came to believe that the progress of the law is not merely the result of unconscious growth, but also the result of conscious attempts to solve social problems—an activity directed toward aims, receiving its orientation not only from the past, but from the future.³⁰

Cardozo, to whom I shall return in a later discussion, first mentions Savigny and his work in a tentative way, expressing the problem of conscious effort very well.

Savigny's conception of law as something realized without struggle or aim or purpose, a process of silent growth, the fruition in life and manners of a people's history and genius, gives a picture incomplete and partial. It is true if we understand it to mean that the judge in shaping the rules of law must heed the *mores* of his day. It is one-sided and therefore false in so far as it implies that the *mores* of the day automatically shape rules which, full grown and ready made, are handed to the judge. . . . Law is, indeed, an historical growth, for it is an expression of customary morality which develops silently and unconsciously from one age to another. That is the great truth in Savigny's theory of its origin. But law is also a conscious or purposed growth, for the expression of customary morality will be false unless the mind of the judge is directed to the attainment of the moral end and its embodiment in legal forms. Nothing less than conscious effort will be adequate if the end in view is to prevail. The standards or patterns of utility and morals will be found by the

²⁸ *Id.* at 334.

²⁹ *Id.* at 335.

³⁰ VINOGRADOFF, *HISTORICAL JURISPRUDENCE* 135 (1923).

judge in the life of the community. They will be found in the same way by the legislator. That does not mean, however, that the work of the one any more than that of the other is a replica of nature's forms.³¹

II. JURIST—REPRESENTATION

A. In General

Still unanswered to some extent is the claim that Savigny gave only lip service to the idea of growth and change in the law. It is said that he has not shown *how* it grows. "If the law evolves the historical school must tell us how it evolves; if it is incapable of that, or refuses to do it, that is tantamount to saying that it ceases to be a juristic school, since it is powerless to furnish a creative method."³² I believe, however, that Savigny has told us how, or at least has laid a predicate for finding how. As has been briefly mentioned, he carried his theory beyond the primitive state of a nation. In this way he provided, or it can be argued that he provided, a way in which the law does grow. As civilization progresses, what otherwise would have remained common becomes appropriated to particular classes.

The law, originally the common property of the collected people, in consequence of the ramifying relations of real life, is so developed in its details that it can no more be mastered by the people generally. Then a separate class of legal experts is formed which, itself an element of the people, represents the community in this domain of thought. In the special consciousness of this class, the law is only a continuation and peculiar development of the *Volksrecht*. The last leads, henceforth, a double life. In its fundamental principles it continues to live in the common consciousness of the people; the exact determination and the application to details is the special calling of the class of juristconsults.³³

This, according to Savigny, explains how even the immense detail of mature laws rises from organic causes, still without any exertion of ar-

³¹ CARDOZO, *op. cit. supra* note 9, at 104-05.

³² Saleilles, *L'Ecole Historique et Droit Naturel*, 1 REVUE TRIMESTRIELLE DE DROIT CIVIL 80, quoted in STONE, *op. cit. supra* note 14, at 447.

³³ SAVIGNY, *op. cit. supra* note 17, at § 14. See also VOCATION 28. An interesting parallel may be found in Moslem legal theory. One of the roots of Islamic law is *ijma'* (consensus). Such consensus was reckoned to be of two kinds: consensus of the whole community, and consensus of the leaders, or great law teachers. See KHADDURI & LIEBESNY, *LAW IN THE MIDDLE EAST* 87, 95 (1955). The distinction between the two forms is remarkably similar to Savigny's political and technical dichotomy.

bitrary will or intention. He classifies the dual life of the law as being made up of the "political" element—the connection of law with the general existence of the people; and the "technical" element—the distinct scientific existence of law.³⁴

The general theory is difficult to master. Kantorowicz called it "fantastic," and excused it, "perhaps," by Savigny's love for Roman law and his necessity for explaining how it became a part of the German *Volksgeist*.³⁵ He went on to regret that neither Savigny nor his followers had ever fully developed the idea, and this regret may be shared by all. Was this one of the cases of direct representation allowed by Roman law? Was it a "queer case of agency in contract"? No matter, it is denominated as "brittle" and left.³⁶

John Chipman Gray posed a situation which could not be answered without the concept of jurist-representation, then sought to show that the concept itself gave no answer. Most law, he says, is unknown to the people. Suppose that a contract by letter is not complete in Massachusetts until the answer is received, but in New York it is complete when the answer is mailed. Is the common consciousness of the people of Massachusetts different from that of the people of New York? Does the population of one state feel the necessity of one thing as law, while the population of another feel the necessity of the opposite? Of course, he continues, not one man in a hundred has the foggiest notion of what the law is or what he feels about it, and the one who may have a notion is likely to be wrong.³⁷

This seems to be a fair criticism as far as it goes, with some answer given by another theory of Savigny, which is a digression from the present discussion, and shall be banished to a footnote.³⁸ But what of the representation theory? Gray maintains it is groundless. In common law countries it is less absurd, but in Germany, and other nations of similar

³⁴ VOCATION 28.

³⁵ Kantorowicz, *supra* note 3, at 338.

³⁶ *Id.* at 338-39.

³⁷ GRAY, *THE NATURE AND SOURCES OF THE LAW* 90-91 (2d ed. 1927).

³⁸ In answer to the complaint of great diversity in German provincial laws, Savigny said: "The well-being of every organic being, (consequently of states), depends on the maintenance of an equipoise between the whole and its parts—on each having its due." Law merits praise when it coincides with the feelings of the people; blame if it leaves the people without participation. "No state of law appears more favourable than . . . great variety and individuality in particulars, but with the common law for the general foundation." VOCATION 59. Apparently the law of the several states of the United States would be viewed favorably by Savigny.

legal background, it is almost impossible to believe that the writings of the unofficial and undeterminate class of "jurists," from which so much of the law has been derived, express the opinions of the people.

The jurists set forth the opinions of the people no more and no less than any other specially educated or trained class in a community set forth the opinions of that community, each in its own sphere. . . . It might be very desirable that the conceptions of the *Volksgeist* should be those of the most skillful of the community, but however desirable this might be, it is not the case. The *Volksgeist* carries a piece of sulphur in its waistcoat pocket to keep off rheumatism, and thinks that butchers cannot sit on juries.³⁹

Other writers have accepted Savigny's explanation, or at least have been more charitable in their treatment of it. "What has been the great factor in the creation of the Mercantile Law?" asks one, then answers:

Not legislative intervention: our Mercantile Law has been the product almost entirely of custom and judicial decision, and in the various stages of its history it has moulded and adjusted itself with the most remarkable sensitiveness to the progress of commerce and civilization. . . . [A]ll these doctrines have involved themselves into the state of high moral refinement in which they at present exist, not so much by the special moral elevation of particular judges, as by the concurrent onward impetus of the whole community, which all the judges have shared and felt the influence of. . . . This is what Savigny means when he says . . . that the largest portion of the unwritten law of every nation is the exact product and measure of the national character and temper—a reflex of its life and progress.⁴⁰

Not many have taken Savigny as a straight draught without some chaser, however. We have already seen one statement by Cardozo, "It is true if we understand it to mean that the judge in shaping the rules of law must heed the *mores* of his day. It is . . . false in so far as it implies that the *mores* . . . automatically shape rules which, full grown and ready made, are handed to the judge."⁴¹ It is surely more mystical, and, therefore, perhaps more accurate, to attribute the second meaning to Savigny. Maybe he did mean that the *Volksgeist* somehow settles into the consciousness of the jurist and thereby he feels the necessity which people at large would be able to feel had not law become so complex.

I do not choose to take that course, however, since a box canyon would

³⁹ GRAY, *op. cit. supra* note 37, at 92.

⁴⁰ DIXON, *JOURNAL OF JURISPRUDENCE* 312 (1874), quoted in CARTER, *LAW, ITS ORIGIN, GROWTH AND FUNCTION* 329 n.1 (1907).

⁴¹ CARDOZO, *op. cit. supra* note 9, at 104.

be its resting place, and mysticism, though fascinating, is not very enlightening in the present context. Furthermore, even some of Savigny's critics have chosen the first alternative. Julius Stone has said that if the jurist-representation theory is to be accepted, then it is the only way in which the law can develop and grow. This places a very heavy burden on the jurists—scholars, lawyers, and judges alike. This burden can be met only by attention to the contemporary social facts, the study and acceptance, perhaps, of the voice of the people. But, says Stone, and it is a very large "but," responsibility was not accepted, the attention was not given, and the theory fails in practice.⁴² Stone is right in one respect if Savigny's theory is taken as an absolute. If accepted literally, the jurist-representation theory does give the only way for legal growth. But again I must ask the critics not to throw out the baby with the bath water. Law can grow in other ways, but it can also grow by the works of the jurists. It is true that some judges have not accepted the responsibility placed upon them, but others have. The common law tradition is too great to be treated cavalierly.

Although he does not mention Savigny directly, Warren Seavey has provided an answer to the objection that the theory does not show how the law can grow.

The common law was and should remain as the response of the judges to the civilization of the times in view of its history. There is no principle of common law which prevents the weeding out of historical anachronisms or the correction of judicial errors, and this without resort to Parliament. The judges have at times succeeded in making changes without appearing to do so. . . . In whatever manner the result has been accomplished, it is clear that the common law has moved with the development of economic needs and judicial insight.⁴³

The judges, the legal scholars and the lawyers, then, are the ones who can and will get the dragon out of his cave for killing or taming.

In a continuation of what has become one of the most famous of legal quotations, Holmes expressed what I like to believe is at the heart of Savigny's idea.

The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the

⁴² STONE, *op. cit. supra* note 14, at 447.

⁴³ Seavey, *Candler v. Crane, Christmas & Co.: Negligent Misrepresentation by Accountants*, 67 L.Q. REV. 466, 468 (1951).

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.⁴⁴

The role of the judge is to discover, and follow, so far as he can, the substance of the law which at a given time corresponds with what is understood to be convenient—not in the sense of easiness, but in the sense of the ideas prevailing in the nation.⁴⁵

Cardozo has buttressed his belief that *his* first alternative is true. When, for example, norms or standards of behavior in the commercial field change, then the rule of law which corresponded to the old norms will be changed by the same forces or tendencies which brought the law into correspondence in the first place. What is true of business is true of morals. Manners and customs are at least a source of law.

The judge, so far as freedom of choice is given to him, tends to a result that attaches legal obligation to the folkways, the norms or standards of behavior exemplified in the life about him. . . . The pressure of society invests new forms of conduct in the minds of the multitude with the sanction of moral obligation, and the same pressure working upon the mind of the judge invests them finally through his action with the sanction of the law.⁴⁶

In short, “[The judges] are interpreters of the social mind, its will, its expectation, its desires.”⁴⁷

The emphasis placed by the later “sociological” school of law on public policy, social pressures, the people’s feeling of right as against the dead letter of statute or precedent, can be traced, at least in a germinal state, to Savigny’s teachings.⁴⁸ The historical school established the organic growth of institutions and rules, and substituted for rationalistic concepts a wider view of individual and social psychology. The two schools have been contrasted, but many who profess to use the historical method actually use more of the sociological than the professed adherents of that theory. Although members of the historical school may have exaggerated the “nonvolitional” element in the development of the law, they do not exact blind adherence to the past, but insist that law is the expression of

⁴⁴ HOLMES, *THE COMMON LAW* 1 (1881).

⁴⁵ See BIDDLE, *JUSTICE HOLMES, NATURAL LAW, AND THE SUPREME COURT* 23 (1961).

⁴⁶ CARDOZO, *op. cit. supra* note 8, at 15–18.

⁴⁷ *Id.* at 48.

⁴⁸ See *e.g.*, FRIEDMANN, *LEGAL THEORY* 135, 139 (4th ed. 1960); POUND, *INTERPRETATIONS OF LEGAL HISTORY* 18 (1930); STONE, *op. cit. supra* note 14, at 431, 447; VINOGRADOFF, *op. cit. supra* note 30, at 134.

the convictions of the present.⁴⁹ The *Volksgeist* may be found in the prevailing standards of utility and welfare.⁵⁰ Even John Austin, who called the *Vocation* "specious but hollow,"⁵¹ said that Jeremy Bentham belonged to the historical school in one sense. A body of law cannot be assumed *a priori*, but "must be founded on experience of the subjects and objects with which law is conversant."⁵²

Leon Green, who likely would deny belonging to any "school," has expressed his ideas of the importance of public policy, social pressures, etc., in the terms of "we the people." "We the people" are a party to every lawsuit.⁵³ The court determines issues of law and fact, and it is in that determination that "we the people" exert out influence, even though little formal presentation of our views may have been made. Judge and jury, being of "us," have within themselves a feeling of our desires and interests.

They are a part of our environment as are we ourselves and draw their daily sustenance from it, and they cannot ignore their environment which is limitless in time and content. Its influence is as pulling on us and on them as the gravitation of the earth is on all objects within its environment and is as difficult to overcome. But perhaps unlike gravitation it is constantly kept in flux by the changes in our desires and needs. . . . Thus it is that jurors and judges do their work as it were through our eyes, or at least with those of us interested in their work always looking over their shoulders, nodding our heads in approval, or shaking them in disapproval.⁵⁴

It is difficult to add anything to this as a modern portrayal of the theory that the jurist represents the people in the development and progress of the law.

⁴⁹ CARDOZO, *THE GROWTH OF THE LAW* 105 (1924).

⁵⁰ *Ibid.*

⁵¹ AUSTIN, *JURISPRUDENCE* 666 (5th ed. 1911). Austin dismissed Savigny's abhorrence of codification thus:

But the truth seems to be that Savigny's dislike to the codification is not the effect of his own arguments, or of any arguments, but of a natural antipathy to the French (who were long hated in Germany because they behaved infamously there), transferred by a natural association from the French to their code, and from the French code to all codes.

AUSTIN, *op. cit. supra* at 679. It is interesting to note that he did not condemn all of Savigny's works. He called *Das Recht des Besitzes* "of all books upon law, the most consummate and masterly; and of all books which I pretend to know accurately, the least alloyed with error and imperfection." AUSTIN, *PROVINCE OF JURISPRUDENCE DETERMINED* lxxxviii (2d ed. 1861).

⁵² AUSTIN, *JURISPRUDENCE* 679 (5th ed. 1911).

⁵³ See Green, *Tort Law Public Law in Disguise*, 38 *TEXAS L. REV.* 1 (1959).

⁵⁴ *Id.* at 3.

B. Ministry of Justice

Another area in which the idea of jurist-representation is alive today is that of professional responsibility. Savigny proposed three things as necessary in the achievement of a good legal system.⁵⁵ The first is a body of authorities: precedents, legal writings, historical studies, which we can put to one side in the present context. The second is a proper "ministry of justice," to which we shall return shortly. The third is good forms of procedure. It is interesting to note that Savigny would allow, indeed, rely on, legislation to accomplish the third—one of the few instances of such. How much more he would have approved of the current practice of allowing the courts themselves, with the constant aid of the bar, to establish and maintain their own procedural rules!

The second necessity is of primary concern. He proposed that a free communication between the legal scholars at the university law schools and the judges would be an excellent means of establishing the proper balance of theory and practice which would administer justice beneficially.⁵⁶ This connection of practice with a strong, vital, progressive theory would be an ideal means of keeping talented men on the bench. The profession as a whole should assume a scientific character, and by the work of all, the law would develop in the correct manner, and the administration of justice would be complete.

1. THE LEGAL PROFESSION

Much time and many words have been expended recently in discussions of the role of the legal profession in modern society.⁵⁷ A similar conclusion is reached by most, if not all, of those interested—the lawyer, the law teacher, the judge and the bar as a group have an individual and a collective responsibility for the administration of justice. That the lawyer has a duty to represent his client with all of the legal means at his disposal does not relieve him from the duty of improving those means.⁵⁸ If some of the things which legally may be done for a client are suspect in the lawyer's mind, he should neither refuse to do them, for this would be a failure to properly represent his client, nor should he ignore them after use, for that would be a failure to properly represent the people in the

⁵⁵ VOCATION 130.

⁵⁶ VOCATION 149.

⁵⁷ See, e.g., SCHWARTZ, *CASES ON PROFESSIONAL RESPONSIBILITY AND THE ADMINISTRATION OF CRIMINAL JUSTICE* (1961).

⁵⁸ See Thode, *The Ethical Standard for the Advocate*, 39 TEXAS L. REV. 575 (1961).

administration of justice. "[A]fter the case is over, if some of the weapons or practices are not for the good of the government, . . . [the lawyer] is bound by an even stronger obligation, because now he is acting in his capacity as favored citizen of high rank, to use all his available effort to aid in mending, or abolishing the defects."⁵⁹

Granted that Gray is correct,⁶⁰ and the people do not know what the law is, the place of the legal profession, of the jurists, if you like, assumes greater proportions. If the law has become so involved and so complex that the average layman has not even a doubtful acquaintance with it, then someone must accept the responsibility for its care and maintenance. If the legal profession does not have the job of superintending the development of the law, then who does? Organized bars throughout the country have been, and are being influential in improving the legal systems of our nation and states. In this connection we should turn once again to Cardozo.

His proposal, in a paper whose title doubtless came from the *Vocation*,⁶¹ is directed toward the same idea as that of Savigny, a proper "ministry of justice." As has been mentioned, Savigny believed that upon the appearance of the jurist-representative, the law took on a twofold character, political and technical.⁶² With some possibility of departing from Savigny's meaning, we can substitute *public* and *private*, respectively, for his terms. Cardozo's plea was for a group to oversee the growth and development of the private law. "The courts are not helped as they could and ought to be in the adaptation of law to justice."⁶³ In the public field, state officials follow defects in the law by immediate suggestions for legislative reform, but the private field has no caretaker. When a series of judicial decisions has progressed to a point where it becomes obvious that the result is wrong, something should be done.⁶⁴ Unlike Savigny, who might have thrown up his hands in despair at the inexorable march of history, and in any event would have the courts themselves trace the lineage of a rule to find an organic principle, and throw it out if none were found,⁶⁵ Cardozo suggested that legislative reform was the proper remedy. The tool

⁵⁹ Stayton, *Cum Honore Officium*, 19 TEX. B.J. 765, 766 (1956). For an excellent example of this principle, see the incident involving Thomas Talford discussed in *Professional Responsibility: Report of the Joint Conference*, 44 A.B.A.J. 1159, 1162 (1958).

⁶⁰ See text accompanying notes 37-39 *supra*.

⁶¹ PATTERSON, JURISPRUDENCE 413 n.41 (1953).

⁶² See text accompanying note 34 *supra*.

⁶³ Cardozo, *A Ministry of Justice*, 35 HARV. L. REV. 113 (1921).

⁶⁴ *Id.* at 116.

⁶⁵ VOCATION 137.

to inform the legislature of such needs was to be "The Ministry of Justice." This body, to be composed of members of law faculties, judges, and representatives of the bar, would be the means of close communication between the requirements of the law and the legislature.⁶⁶ Although the body charged with the actual reform is different from that proposed by Savigny, we should not lose sight of the similarities of the suggestions. Each calls for close communication. Each calls for interest and work by bench, bar and law faculties. Each has the same end in view.

2. LEGAL SCHOLARS

That members of law faculties and other legal scholars work diligently on the improvement of the law cannot be doubted. The profusion of legal periodicals, hornbooks, treatises, and the like, is growing into Herculean proportions—nearly as fast as the flood of advance sheets. But has there been any real communication with the courts? Some examples may be observed to see how this branch of the legal profession has served to affect the development of the law.⁶⁷

The first is the impact upon the law of torts brought about by the publication of an article on the right of privacy.⁶⁸ Courts have acknowledged the debt owed to the authors, and although neither was a member of a law faculty at the time, no one should be so parochial as to doubt their legal scholarship. "This right, first brought forcefully to the attention of the profession in the year 1890 by an article . . . by Louis D. Brandeis . . . and Samuel D. Warren . . ." ⁶⁹ "All comment upon the right of privacy must stem from the famous article by Warren and Brandeis on *The Right of Privacy*. . . ." ⁷⁰ And it has been said, "the article by Warren and Brandeis 'enjoys the unique distinction of having initiated and theoretically outlined a new field of jurisprudence'." ⁷¹

The second example is of more recent vintage, and perhaps for that reason has not enjoyed the notice accorded the first. An article appeared

⁶⁶ Cardozo, *supra* note 63, at 124. It should be noted that as a result of this suggestion, the New York Commission on Law Reform was founded in 1944. N.Y. LEGISLATIVE LAW §§ 70-72.

⁶⁷ In an interesting switch, an article has been published which was originally written as an appellate opinion, but rejected by a majority of the court. Stayton, *Apportionment and the Ghost of a Rejected View*, 32 TEXAS L. REV. 682 (1954).

⁶⁸ Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

⁶⁹ *Hinish v. Meier & Frank Co.*, 166 Ore. 482, 485, 113 P.2d 438, 440 (1941).

⁷⁰ *Sidis v. F-R Publishing Corp.*, 113 F.2d 806, 808 (2d Cir.), *cert. denied*, 311 U.S. 711 (1940).

⁷¹ Annot., 138 A.L.R. 22, 25 (1942).

in 1956 outlining a "proposed" new implied covenant in oil and gas leases.⁷² This article was almost immediately followed by a case which adopted the proposal, with due credit given to the originator.⁷³ Although a higher court, in a later case,⁷⁴ has rejected the view, other courts have adopted the new covenant, and much discussion has been aroused.⁷⁵

The most striking example of recent times appears in an Oregon decision.⁷⁶ The court had invited briefs on the question of abandoning the doctrine of proximate cause, noting in its invitation that the doctrine should perhaps be replaced by the approach to causal relation espoused by Leon Green. Several of his writings were suggested as references for the briefs.⁷⁷ Although the majority of the court was not ready to take the step proposed, a substantial minority adopted Green's views completely.⁷⁸

3. POSTSCRIPT

The responsibility of the legal profession is a large one. "The reason why it is a profession, why people will pay lawyers to argue for them or

⁷² Meyers, *The Implied Covenant of Further Exploration*, 34 TEXAS L. REV. 553 (1956).

⁷³ Willingham v. Bryson, 294 S.W.2d 421 (Tex. Civ. App.—Ft. Worth 1956), 35 TEXAS L. REV. 617 (1957).

⁷⁴ Clifton v. Koontz, 160 Tex. 82, 325 S.W.2d 684 (1959).

⁷⁵ See, e.g., BROWN, *THE LAW OF OIL AND GAS LEASES* (1958); Meyers, *The Covenant of Further Exploration: A Comment* 37 TEXAS L. REV. 179 (1958); Brown, *The Proposed New Covenant of Further Exploration: Reply to Comment*, 37 TEXAS L. REV. 303 (1958); Galvin, *Meyers v. Brown—Jurisprudence in Action*, 7 U.C.L.A.L. REV. 589 (1960); Meyers & Williams, *The Implied Duty to Explore Further: Recent Texas Developments*, 41 TEXAS L. REV. 789 (1963); Smith, *The Implied Duty to Explore Further: Recent Texas Developments—A Disagreement*, 42 TEXAS L. REV. 199 (1963). See also Railroad Comm'n v. Williams, 163 Tex. 370, 356 S.W.2d 131 (1961), relying in part on Hardwicke, *Oil-Well Spacing Regulations and Protection of Property Rights in Texas*, 31 TEXAS L. REV. 99 (1952), and Myers, "Common Ownership and Control" in *Spacing Cases*, 31 TEXAS L. REV. 19 (1952). Of course, sometimes the communication is not so loud and clear. See the rejection of "the fantastic Charles Meyers theories" in *Coloma Oil & Gas Corp. v. Railroad Comm'n*, 163 Tex. 483, 358 S.W.2d 566, 575 (1962) (dissenting opinion). There has been some speculation as to whether the adjective applies to the professor or his theories.

⁷⁶ Dewey v. A. F. Klaveness & Co., 233 Ore. 515, 379 P.2d 560 (1963).

⁷⁷ *Id.* at 563. See also Strakos v. Gehring, 360 S.W.2d 787, 803 (Tex. 1962), 41 TEXAS L. REV. 599 (1963), using the analysis of tort cases suggested by Green, *The Causal Relation Issue in Negligence Law*, 60 MICH. L. REV. 543 (1962).

⁷⁸ This section would not be complete, particularly in the issue of the Review dedicated to him, without mention of the monumental work of Judge Stayton, Professor of Law at the University of Texas for nearly forty years. His efforts, together with those of Judge James P. Alexander, were by far the most influential in drafting and assuring the passage of the Texas Rules of Civil Procedure.

to advise them, is that in societies like ours the command of the public force is intrusted to the judges in certain cases, and the whole power of the state will be put forth, if necessary, to carry out their judgments and decrees."⁷⁹

III. CONCLUSION

Savigny and the historical school of law have been praised, fairly criticized, and much maligned. Certainly his writings must be taken with the proverbial grain of salt, but there is at least a kernel of truth, of practicality, or modern value, perhaps improved by the salt. An example has been given of two possible uses of the historical method in the judicial process, which serves well as a conclusion to this paper. In an action in New York for criminal conversation, the question for decision was whether or not the suit could be maintained by a woman. The appellate division held that it could not, citing cases back to the time of Lord Coke. The Court of Appeals reversed.

We did not ignore these precedents, but we held them inconclusive. Social, political, and legal reforms had changed the relations between the sexes, and put woman and man upon a plane of equality. Decisions founded upon the assumption of a bygone inequality were unrelated to present-day realities, and ought not to be permitted to prescribe a rule of life. The historical method was the organon of judgment in each court, but its application led in each to opposite results. One court, in its interpretation of legal history, was satisfied to treat as finalities the precedents of ancient year books. The other found a stream of thought, a tendency, a movement forward to a goal. Which, then, is the truer use of the historical method? Which exhibits the saner and the sounder loyalty? Shall the significance of events be determined by transporting them to our own time and viewing them as if they were the product of our own day and thought, or by viewing them as of the time of their occurrence, the product of their era, the expression of its beliefs and habits?⁸⁰

Would not Savigny have preferred the method of the higher court? Truly, for law there is no moment of absolute cessation.⁸¹

⁷⁹ Holmes, *The Path of the Law*, 10 HARV. L. REV. 457 (1897).

⁸⁰ CARDOZO, *op. cit. supra* note 49, at 105-06.

⁸¹ See text accompanying note 16 *supra*.