

Legal Philosophers: Savigny: German Lawgiver

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SAVIGNY: GERMAN LAWGIVER

[L]aw . . . is first developed by custom and popular faith, next by judicial decisions—everywhere, therefore, by internal, silently operating powers, not by the arbitrary will of a law-giver.

—F. K. von Savigny

I. INTRODUCTION

The great German jurist, Friedrich Karl von Savigny, stands as the undisputed head of the influential historical school of jurisprudence, which he pioneered in the first half of the 19th century, and as the founder of the study of relations between social and legal developments.¹ A trail-blazing legal scientist, Savigny made many lasting contributions to jurisprudence that greatly influenced all the social disciplines as well. Among these contributions are included the revealing of continuity between present legal institutions and those of the past,² the laying of foundations for legal sociology,³ and the articulating of methods for historical research.⁴ In light of the work of Savigny, it is thus the intent of this paper to present a full, in-depth profile of this legal scholar and his influence on the law in society.

II. EARLY LIFE AND WORK

Savigny was born of French Protestant stock at Frankfurt-am-Main on February 21, 1779.⁵ Orphaned at 13, he came under the guardianship of M. de Neurath, who dominated his early education. Neurath, a lawyer and imperial official, employed the stereotyped, catechistic method to immerse his ward into the study of the natural law of Wolff and Vattel, international law, and Roman and German law. Undoubtedly as a result of this tutelage, Savigny was eager to commence studies at the University of Marburg and at Göttingen. It was there that he not only received an orthodox

1. J. STONE, *THE PROVINCE AND FUNCTION OF LAW* 421-22 (1946) [hereinafter cited as *FUNCTION OF LAW*].

2. Montmorency, *Friedrich Carl von Savigny*, in *GREAT JURISTS OF THE WORLD* 573-74 (J. Macdonell & E. Manson ed. 1914) [hereinafter cited as *GREAT JURISTS*].

3. J. STONE, *SOCIAL DIMENSIONS OF LAW AND JUSTICE* 35-36 (1966) [hereinafter cited as *SOCIAL DIMENSIONS*].

4. *Id.* at 100-01.

5. *GREAT JURISTS* at 561.

education but, also, got a taste of the new stirrings of historicism. His early teaching and writing would later be of a similar mix.⁶

In 1800, Savigny became a doctor of law at Marburg and, as such, one of the first of the German nobility to teach at a university. Subsequently, he taught criminal law, Roman law and its history, property law and the law of contracts at Marburg and Landshut.⁷ In 1810, he became a professor at the newly formed University of Berlin, where he spent most of his academic career until 1842.⁸ The qualities Savigny possessed as a scholar were joined with those of an enthusiastic teacher. To Savigny, it was for the professor to personify science to the student by transmitting the knowledge gathered "as if science revealed itself suddenly to him." He noted further of his students that "it is not merely instruction which they receive, but a process which goes on beneath the eye and which they themselves reproduce."⁹ During his tenure, Savigny also gained practical judicial and administrative experience through his rendering of such services as judge on the law faculty, advisor to the ordinary courts, and counsellor of the Court of Appeal and Tax at Berlin.¹⁰

Savigny's book on the right of possession, *Das Recht des Besitzes*, appeared in 1803.¹¹ The work clearly showed sociological implications, for it represented an early classic, expounding on the study of the Roman system of law as produced by the ancient Roman civilization.¹² The metaphysical version of the Roman theory of occupation was said to have provided a linkage between the 18th century and Savigny's pronouncement that all property was founded in adverse possession ripened by prescription.¹³ He wrote, in fact, pounds of pages on possession when the German law was pervaded with broad premises—often half-mystical—which were rigorously followed (all in contrast to American empiricism, with its case-by-case approach).¹⁴ Shortly after *Recht des Besitzes*

6. *Id.* at 562-63.

7. *Id.* at 563.

8. *Id.* at 572.

9. SOCIAL DIMENSIONS at 87.

10. *Id.*

11. GREAT JURISTS at 568. Austin declared this work to be "of all books upon law, the most consummate and masterly." J. AUSTIN, PROVINCE OF JURISPRUDENCE DETERMINED 38 (3d. 1832).

12. FUNCTION OF LAW at 428.

13. R. POUND, AN INTRODUCTION TO THE PHILOSOPHY OF LAW 213 (1922).

14. K. LEWELLYN, JURISPRUDENCE 177 (1962).

was published, Savigny turned his attention toward the historical and jurisprudential interests that would dominate the rest of his career.

III. DEBATE OVER CODIFICATION—THE BEGINNINGS OF THE HISTORICAL SCHOOL

The event which immediately occasioned Savigny to direct his interests in the area of historical jurisprudence was the publication of another work, *Civilistesche Abhandlungen*, in 1814.¹⁵ Germany being without a unified civil code at this time, Anton F.L. Thibaut, a professor of Roman law at Heidelberg, wrote the aforementioned book to demand that a general civil code be adopted for the nation.¹⁶ Under his plan, Professor Thibaut proposed that a single, unified code of laws for the German states be drafted by an interstate committee on the laws. Indulging in natural law, Thibaut assumed that such a committee of jurists and practitioners would be able to draw up a suitable code, and, further, dogmatically asserted that codification could revolutionize a legal system overnight.¹⁷

This proposal had been published by Thibaut after the Napoleonic wars, while the Congress of Vienna was deciding the fate of Europe in general, and Germany in particular;¹⁸ given these circumstances, the book naturally revealed both the stirrings of the new nationalism that was then on the rise in Germany and the growing reaction against Roman or any other foreign law. The French occupation of Germany had greatly solidified a sense of unity among the many existing German states, and, following the defeat of Napoleon, the codes he had forced upon them were discarded because they were considered to be alien.¹⁹ Clearly the new nationalist idea rejected adoption of the French code for Germany;²⁰ the very lack of analogy to the French situation was used as an aid in the call for a German code.²¹ Likewise, Roman law, which was taught at the universities and had dominated German legal administration and adjudication, was also condemned by the

15. SOCIAL DIMENSIONS at 94.

16. W. SEAGLE, THE HISTORY OF THE LAW 290-91 (1946) [hereinafter cited as SEAGLE].

17. FUNCTION OF LAW at 430.

18. SOCIAL DIMENSIONS at 94.

19. FUNCTION OF LAW at 424.

20. *Id.* at 428.

21. S. AMOS, A SYSTEMATIC VIEW OF THE SCIENCE OF JURISPRUDENCE 384-85 (1876).

nationalists as an "alien law." How could a system of laws created by the ancient Romans for their needs between the 5th century B.C. and the 6th century A.D. be applicable to the needs of the German people in the 19th century? Hence, it was proposed that the "alien law" be replaced by a system of law indigenous to Germany.²²

Against such a backdrop, it seems understandable that Savigny, along with his followers, would necessarily enter into this legal field, having been moved to speculate on the central thesis of the law and its relation to the social context. By so doing, they gave the field its first modern juristic theories.²³

Of course, the founding of the historical school, which identified law with custom, as championed by Savigny, developed out of the codification controversy.²⁴ In vigorously opposing codification in his monograph, *Vom Beruf unsrer Zeit fur Gesetzgebung und Rechtswissenschaft*, which he wrote in response to Thibaut's work,²⁵ Savigny provided impetus for the emerging historical theory of law. Underlying this reply to Thibaut was a basic hypothesis of later sociological jurisprudence: that law was to be understood as an aspect of social life. To Savigny, law was a part of the complex of a people's experience and character. Thus, he countered the natural right assumptions of Thibaut by maintaining that the law was not a self-contained phenomena of collected verbal formulae in some universal body of ideal or "natural" propositions.²⁶ To assume that law was "universal," as the natural-law philosophers had, would, in Savigny's mind, be fallacious and illusory.²⁷ Thus, in opposing codification, Savigny's historical jurisprudence also attacked the philosophy of natural law.²⁸

It was to be expected that Savigny would react—and react quickly—to those tenets of natural law he had found to be repugnant. As a young lad he had been rigorously subjected to the study of natural law by his tutor. Later, being directly influenced at Göttingen by Professor Hugo, whose book on Roman legal history was published in 1790, Savigny asserted that the peculiar relation-

22. FUNCTION OF LAW at 424.

23. *Id.* at 429-30.

24. SEAGLE at 23, 290-91.

25. SOCIAL DIMENSIONS at 94.

26. FUNCTION OF LAW at 430-31.

27. SOCIAL DIMENSIONS at 95.

28. *Id.* at 88-89.

ship between the law and the life of each particular society under-
mined natural law from the viewpoint of history and human experi-
ence. Thus, he challenged the natural law idea of a universal code
because he thought, evidencing Hugo's influence, that the law
should reflect the unique needs and character of the people of each
nation.²⁹ Here, then, Savigny was able to masterfully turn around
the previously cited argument for codification by utilizing it instead
as an objection to a general code for all Germany on the grounds
that such a code would be a reckless importation and an imitation
of Napoleon's work in France and the other countries he
subdued.³⁰

In repudiating the 18th century doctrine of natural rights and
the law of nature³¹—that which was truly to be honored in the
legal field³²—Savigny's school of thought substituted in its place
the notion of historical right: any individual exultation of natural
order would set that order in opposition to history, placing the
creations of history under constant threat of either violent or grad-
ual destruction.³³

To the historical school, the law existed independent of the
state; it was the creation, not of nature or nature's God, but of the
national consciousness. The rule of law was, thus, mysteriously
begotten of this "spirit of the people" (or *Volksgeist*) in whom it
had already existed.³⁴ Therefore, since law originated in the
unique spirit of the people it could not be made, and the *Volksgeist*
became the basis for study in all its manifestations.³⁵

Savigny's *Volksgeist* doctrine, the first to recognize each par-
ticular nation as having a continuity and uniqueness of experience
all its own, was a juristic expression of the romantic revival which
had an influence on Savigny, himself.³⁶ Indeed, the whole perspec-
tive of historical jurisprudence was a part of the romantic move-
ment which had begun in the latter period of the 18th century. In
Germany it took the form of a movement back to the simplest
tribal origins of the Germanic people, their folk songs and tales,

29. FUNCTION OF LAW at 423.

30. S. AMOS, *supra* note 21, at 385.

31. C. HAINES, REVIVAL OF NATURAL LAW CONCEPTS 69 (1965).

32. K. LLEWELLYN, *supra* note 14, at 480.

33. Y. SIMON, THE TRADITION OF NATURAL LAW 38 (1965).

34. H. KELSON, WHAT IS JUSTICE? 299 (1957).

35. SOCIAL DIMENSIONS at 95.

36. FUNCTION OF LAW at 424.

and their distinctive national spirit. It was in Grimm's fairy tales, the Roman history of Barthold Niebuhr, and the philosophy of Johann Gottfried von Herder that the movement found expression; and, in association with such minds as Niebuhr, during his professorship at Berlin, Savigny had molded his own views for this later movement.³⁷

In *Vom Beruf unsrer Zeit* Savigny emphasized the historic-organic growth of the law and its courts through the common, popular, ethical, legal consciousness prevailing among the people.³⁸ Since the historical school insisted upon thorough research into legal origins and transformations, Savigny believed that law had its own history and followed its own stages of growth.³⁹ He was led to theorize that the law was a changing, evolving whole—although it was there as a whole just the same.⁴⁰ (On this point, Karl Llewellyn compared Savigny with Bentham and other older writers in that he seemed “sometimes to have written as if work in jurisprudence had no point unless it could at the moment of its doing be brought into its right relation with a whole and rounded view of all of law and all of law's work.”)⁴¹ To Savigny, the integral history of law was the history of the legal profession.⁴² What was said to be true of the law was also true of the history of the law.⁴³

At the earliest level of its development, the law was expressed spontaneously as an unfolding of ideas of right based upon customary habits and traditions to which people gave their obeisance. That the only true source of all law came directly from custom, as Savigny contended,⁴⁴ was evidence of its existence.⁴⁵ The law, evolving only from the spirit of the people,⁴⁶ was seen as being slow, almost imperceptible in its growth: the product of dark, anonymous forces (those “internal, silently operating powers”)⁴⁷ and not

37. *Id.* at 420.

38. A. ROSS, *ON LAW AND JUSTICE* 345 (1959).

39. *READINGS IN JURISPRUDENCE* 87 (J. HALL ed. 1938).

40. J. SHKLAR, *LEGALISM* 137-38 (1964).

41. K. LLEWELLYN, *supra* note 14, at 154.

42. J. SHKLAR, *supra* note 40.

43. *FUNCTION OF LAW* at 421.

44. SEAGLE at 290.

45. A. ROSS, *supra* note 38.

46. SEAGLE at 291.

47. *FUNCTION OF LAW* at 431.

the creation of deliberate and arbitrary decisions.⁴⁸ This evolutionary product resulted in rights which did not belong to man, as such. Demonstrating his high regard for the past of his own people, Savigny summarized this theory as follows:

The motley world of legal forms . . . does not evolve in virtue of deliberate natural reflection or reasoned considerations of utility, it springs rather from the common conviction of the people, from the like feeling of inner necessity which excludes all thought of fortuitous and arbitrary origin.⁴⁹

While Savigny stressed the deep origins of law in social attitudes and ways of life, he noted that as a people's life became more specialized and artificial, the law, too, became "more artificial and complex." Where the law had "formerly . . . existed in the consciousness of the community," as it matured it devolved upon the jurists, who, in this department, represented the community.⁵⁰ This special class, the legal profession, was entrusted with the duty of interpreting and elaborating the ethical-legal consciousness of the people. In taking the place of custom, the academic study of law, thus, became the most important form of revealing the law⁵¹—as interpreted by the judges in formal decisions.⁵² Despite this development, however, Savigny recognized that part of the law (especially for young peoples) remained related to the popular consciousness and way of life, still simple in concept; this part he termed, "the political element." That which was artificially elaborated by juristic activity he called, "the technical element."⁵³

It was in light of all he had said on the nature of the law that Savigny considered codification, which he defined as a special kind of legislation involving both the reduction of a people's whole stock of law to writing impressed with the exclusive stamp of state authority, and the death of all other pre-code sources of law. Each nation, he felt, must decide for itself whether the proper time for codification of its laws had arrived.⁵⁴ Perhaps expressing a reactionary sentiment in the wake of the Congress of Vienna, Savigny

48. H. KELSON, *supra* note 34, at 299.

49. H. ROMMEN, *THE NATURAL LAW* 116 (T. Hanley transl. 1959).

50. *FUNCTION OF LAW* at 430-31.

51. A. ROSS, *supra* note 38.

52. SEAGLE at 291.

53. *FUNCTION OF LAW* at 431.

54. S. AMOS, *supra* note 21, at 385.

had decided that the time was not ripe in Germany for such legislative reform.⁵⁵

First, he specifically condemned plans for codification on the ground that the "state of the public mind" of the German people was "deficient" in "the law-making faculty" because it lacked the legal consciousness upon which to base the new legislative formulation.⁵⁶ While use of the power of the state could very well cut off extra-code developments,⁵⁷ the state's function was merely to discover and enforce customary law. No amount of state authority could produce a real, suitable, or stable code if the political element were not mature. That the state of the German *Volksgeist*, whose lives the code would govern, had not yet fulfilled this "political" prerequisite was clearly emphasized by Savigny, who further added that to ignore these limitations in attempting "to establish an exhaustive system of legislation" would only mean that the code would

inevitably attract all attention to itself, away from the real source of the law, so that the latter, left in darkness and obscurity, [would] derive no assistance from the moral energies of the nation, by which alone it [could] attain a satisfactory state.⁵⁸

Legislation and codes could, at best, only give verbal expression to existing law. Opposed to "armchair legislation," Savigny favored the idea of continuity of experience, the mastery of which was wholly essential for any progress. This belief that conditions of time and place limited effective legal action stood as a forerunner of socio-psychological doctrine.⁵⁹

Secondly, Savigny believed that a code could not be drafted if the juristic maturity of the "technical element" were not available to perform the task: what matter if even the political element were adequate for codification when jurists of sufficient genius, well-versed in the tradition and spirit of the law, were lacking. Codification presupposed a highly developed study of law so that the code could be an adequate interpretation of the living law. This "technical" expertise Savigny believed his contemporaries lacked.⁶⁰ In

55. SEAGLE at 291.

56. SOCIAL DIMENSIONS at 96-98.

57. FUNCTION OF LAW at 432.

58. *Id.*

59. *Id.* at 423, 433.

60. A. ROSS, *supra* note 38.

denying any such competence to so legislate,⁶¹ Savigny, while noting signs of rising juristic talents, found none equal to achieving the task at hand. To Savigny, the framers of a civil code were only dilettantes.⁶² He pointed out that Thibaut, in his codification proposal, ignored this "technical" inadequacy of the age (as he had the deficiency in the "political" prerequisite). Unlike the proponents of codification who proposed it as a remedy for the legal deficiency in the state of the sources, Savigny found the deficiency "in ourselves, and [I] believe for this very reason that we are not qualified to form a code."⁶³

He urged judges to master the materials of existing mixed Roman and German law not yet assimilated—that "immense mass of juridical notions and theories which have descended and been multiplied through generations."⁶⁴ Once these materials were mastered, faith in the supposed dictates of "pure" reason carried over from the natural law of the 18th century could then be subjected to the vital test of experience.⁶⁵

Indispensable to the jurist, continued Savigny, was (1) the historical spirit, "to seize with readiness the peculiarities of every age and every form of law," and (2) the systematic spirit, "to view every notion and every rule in lively connection and co-operation with the whole, that is, the only true and natural relation."⁶⁶ As a gardener looks after the growth of a plant, the natural development of the law could be furthered with the support of academic studies, rather than by legislative interference which misconstrued the mission in a vain attempt fated to be crushed by the forces of development. Therefore, any codification claiming to be final would be in conflict with the organic growth of the law.⁶⁷ While codification was always harmful, the best conditions for its success were to be found in the "middle period development"—at the height of a people's development, when the civilization and knowledge of the age surpassed that of all preceding ages. Such an undertaking at any other time would only mutilate the products of the past. Only at the right time, in the right place, could the right code be pro-

61. H. KELSON, *supra* note 34.

62. SEAGLE at 291.

63. FUNCTION OF LAW at 433-34.

64. *Id.* at 433.

65. *Id.*

66. *Id.*

67. A. ROSS, *supra* note 38, at 345.

duced. A code drafted in this middle period would aid not that age, itself, where it was not needed, but future declining ages when "almost everything is wanting, the knowledge of the matter as well as the language."⁶⁸ Hence, codification could only be justified for periods of cultural deterioration.⁶⁹

Moreover, ripe though the materials of the law might become, still needed were technical juristic knowledge, superb skill, and that degree of precision appropriate to the subject matter to be codified. This could be done only by extracting concepts and principles, defining them, and tracing their consequences and interrelations—a process which Savigny referred to as being one of the most difficult in the area of jurisprudence. He felt that Thibaut's proposal of codification without such skills would, if adopted, result in contradictions, ambiguities, omissions, and confusion. This would do grave harm because a bad code would insulate law from its sources of popular consciousness. As a case in point, Savigny cited, in *Vom Beruf*, the decay of juristic study in the German states of Austria and Prussia, as well as in France.⁷⁰

Savigny's *Vom Beruf unsrer Zeit* directly influenced the course of a country's legal development perhaps as no other single, comparable essay had. As was the author's intent, it delayed German codification for more than half a century. Under the work of historical jurists, older concepts of natural law and rights were replaced by legal ideas as an outgrowth of history. Germany became distinguished for its great legal historians, as jurists soon turned their attentions from "living law" to the law of the ancient Romans and the German peoples. Not until 1896 did Germany adopt the *Code Civil*, which became effective on January 1, 1900.⁷¹

One legal scholar has suggested that "Savigny might have spared himself the trouble of replying to Thibaut" because "[t]he creation of a unified national law was then a political impossibility, for there were no legislative organs in the German confederation capable of accomplishing the task."⁷² But this statement only seems to buttress what Savigny said in opposing codification in the first place. The same scholar also found it ironic that two decades

68. FUNCTION OF LAW at 433, 435.

69. A. ROSS, *supra* note 38, at 345.

70. FUNCTION OF LAW at 434, 436.

71. SEAGLE at 290-91.

72. *Id.* at 291.

later it was Savigny who was entrusted with the work of codification and that nothing came of the project.⁷³ However, it would be doing Savigny an injustice here to assert that he simply opposed any codification or legislation,⁷⁴ for he only opposed codification for the Germany of his time. Indeed, he was not content with merely negating codification in his *Beruf*, but even went so far as to set down his own program for legal development in the German states.⁷⁵

Savigny's constructive proposals for the development of the German law involved the mastery of three sets of legal materials. The first was the original Roman law, which was to serve as an historical base and a model of refined techniques upon which the jurists could build. Savigny emphasized the importance here of "the confirmed habit of viewing every notion and every doctrine in its proper historical light." The second, taking into account continuity of experience, was the material of the less cultivated Germanic law, as it was intimately related to the German people. Finally, he included a modification of these two primary systems of Roman and local law, believing that jurists should purge all those materials "produced through the mere ignorance and dullness of uncultivated times without any real practical demand for it." Savigny was convinced that once his program was executed, the burden of German legal heritage could then—and only then—be turned to a national advantage, resulting in acquisition of a vigorous legal system, not "merely a feeble imitation" of the Roman law.⁷⁶

Then, too, may future degenerate times be provided for and then will be the time for considering whether this will be done best by codes or in another form.⁷⁷

Although he might have doubted whether a code would ever be desirable from a practical standpoint, Savigny always held out hope for some future codification, his later works extending the program he outlined in *Vom Beruf unsrer Zeit*. These works helped

73. *Id.*

74. For a discussion of the question as to whether Savigny did deny the efficacy of conscious creative legislation in general, see SOCIAL DIMENSIONS at 98-99.

75. FUNCTION OF LAW at 435-36.

76. *Id.* at 435-37.

77. *Id.* at 437.

make the codification in Germany at the turn of the century a success.⁷⁸

IV. SAVIGNY AS A ROMANIST

It seems paradoxical for Savigny both to have emphasized the intimate bond between the whole social development of a people and their law and, at the same time, to have espoused the retention of Roman law as the law of the state, over and against the development of German law. To those who sought to rid the German state of "alien" law in the spirit of nationalism, the second line of Savigny's thought flew in the face of his *Volksgeist* theory, which was turned against him.⁷⁹ According to Vaughan Hawkins in the *Juridical Society Papers*, Savigny was said to have preferred the Roman law because it was "neither too plain nor too obscure, but expressed in a sort of middling obscurity—'auf einem schmalen Raume mittelmässiger Dunkelheit.'"⁸⁰

In 1815, the same year in which he, together with Karl Friedrich Eichhorn and Johann Friedrich Ludwig Goschen, founded the organ for the new historical school, *Zeitschrift für geschichtliche Rechtswissenschaft*, Savigny published the first volume of his treatise on medieval Roman law, *Geschichte des römischen Rechts im Mittelalter*. The sixth and last volume of this treatise did not appear until 1831, the delay having been caused by the author's ill-health.⁸¹ Addressing himself to the issue of whether the Roman law as received into Germany had been transformed to meet German needs, Savigny intended in this work, to trace the development from its ancient origin to its adoption in modern Europe. Thus, there can be seen in *Geschichte* a linkage with the program in *Vom Beruf*. In *Geschichte*, Savigny sought to prove that the rules of the adapted Roman law could be traced "to their historical roots" by uncovering the history of Roman law during the least-known period of Roman legal development. In the process, Savigny also showed that juristic activity was a highly important component of legal history and that a close interrelationship existed between the legal and the general history of the respective peoples.⁸² Savigny

78. *Id.* at 436-38.

79. *Id.* at 422-24.

80. C. CURTIS, *IT'S YOUR LAW* 61 (1954).

81. *FUNCTION OF LAW* at 437.

82. *Id.* at 428.

introduced his opus in the following words:

In analysing the practice of modern law we see that the greater part of the principles or notions which compose it are of Roman origin. But these notions and these principles did not fall upon us from the sky; they reached us through a continuous tradition of six centuries of profound ignorance and seven other centuries of profound literary activity more or less good. The centuries of the regenerated activity, in transmitting Roman law, have not failed to modify it exceedingly. . . .

It is impossible to ignore what the intermediate centuries have added to the original Roman law for all that we learn from our professors and our books is imbued with it. We sail this sea and it would be a dangerous illusion to wish to abstract the element upon which we are. . . . [W]e must turn this formless mass of legal authorities into an organized body. Thus one will succeed in distinguishing the good from the bad, the original from the borrowed, so that one discovers the ramifications and geneology of ideas, the creative life of the spirit in a region which at first only inspires confusion and distaste.⁸³

Savigny had delved into the wealth of material left behind by the scholar Ceyus, whose commentary on the *Corpus Juris* of Justinian during the Renaissance proved to be most enlightening.⁸⁴ During this 12th century revival of Roman law, there were compiled all the provisions enacted by Justinian under his great *Corpus Juris*, which had maintained its force through medieval Europe.⁸⁵ To be sure, through his investigatory work, it was Savigny who proved beyond question in *Geschichte* that the books of the *Corpus Juris*, since promulgated, had been known and continued to be in use in Italy during the Middle Ages.⁸⁶

In review, *Geschichte* "was an impressive addition to existing knowledge" and inspired other works. It "fell short," however, of the author's purpose. Savigny tended to concentrate more on the historical continuity of legal doctrine than on the relationship between doctrine and social conditions existent just prior to the revival.⁸⁷ In this vein, Marx criticized Savigny as having become so

83. *Id.* at 437-38.

84. J. ZANE, *THE STORY OF THE LAW* 218 (1927).

85. *FUNCTION OF LAW* at 425-26.

86. J. HADLEY, *INTRODUCTION TO ROMAN LAW* 33 (1890).

87. *FUNCTION OF LAW* at 437.

engrossed in the source of the law that he forgot all about its stream.⁸⁸

After his history was completed, Savigny's next venture was that of authoring a more elaborate treatise on the system of modern Roman law, *System des heutigen romischen Rechts*. This work contained Savigny's theory of private international law and his further study on possession and error.⁸⁹ It was not, however, a text on Roman law per se, for *System* only dealt with those parts of the law which had been adapted to German life and modified by German institutions. This being the case, Roman Criminal law and all law not compiled before Justinian were, of course, excluded because they had not been so "naturalized."⁹⁰ Given Savigny's life-long preoccupation with the adaptation of Roman law to modern conditions, he wished to discuss in these volumes how the Roman law had taken root and grown in the soil of modern European society.⁹¹ In sum, therefore, this work represented an exposition on that which Savigny had made his life's work: development of a Roman *Gemeinesrecht* for Germany. Not without profound influence, the treatise was regarded as "a masterpiece of analytical jurisprudence of a particular system." More importantly, *System* was part of Savigny's program for bringing the law of modern Germany into a better form through mastery of the legal materials he had found to be wanting.

V. OTHER LATER WORKS AND LEGACY

Savigny was appointed chancellor of Prussia in 1842 by Fredrich William IV; in this capacity he carried out several important reforms, including those relative to bills of exchange and divorce. He retired in 1848, and later died at Berlin in 1861. In the interim, a collection of his minor works, *Vermischte Schriften*, were published in 1850.⁹²

An assessment of Savigny's work demonstrates how his historical school pioneered the study of law in society. To be sure, in any significant history of legal change over a given period, the mutually dependent legal and social developments have come to be taken

88. SEAGLE at 377.

89. This work on modern Roman law was later supplemented by another two-volume work entitled, *DAS OBLIGATIONENRECHT* (1851-53).

90. *FUNCTION OF LAW* at 438.

91. *Id.* at 428-29.

92. Hall, *Friedrick Karl von Savigny*, in 19 *ENCYCLOPEDIA BRITANNICA* 1099 (1971).

into account; and, in applying scientific methods to human relations, it has been found much easier to begin with the materials of past civilizations. When the techniques of investigation and interpretation have been developed from a study of the past, man's subjective attitude toward contemporary data can be overcome.⁹³

Savigny opened up the entire field of inquiry into law and law-making as a social phenomenon in his juristic doctrine of continuity of development from the people's *Geist* to the legal specialists. There was, in his stress on continuity, a pre-Darwinian evolutionism.⁹⁴

Savigny's conception of common social experience, with the law emanating from the *Volksgeist*, resulted, in one case, in the beliefs expressed in Hegelian philosophy, which elevated the *Volksgeist* concept into an absolute idea of a world spirit unfolding in human history. Out of this fallacy of the *Volksgeist* in the Hegelian state came a compounded 20th century perversion witnessed by the "race doctrine" of fascist and nazi ideologies, inherent in the leadership principle under the National Socialist nation. Remarkably successful in consciously directing group attitudes and ways toward evil, the Nazi dictatorship rose as a natural development from the German juristic character that might makes right.⁹⁵ Although the Nazis glorified the German *Volk* for their own ends, surely Savigny, himself, would have thoroughly disapproved of the racist interpretations.

Even those, however, who tended to exaggerate that unscientific element in the historical philosophy had to admit that under Savigny's doctrine the *Volk* were regarded as an ultimate reality, a mystical soul—or even a biological conception. The law which emanated from it was to be watched for and discovered, rather than tampered with by mere human legislators.⁹⁶

Of other contributions to social thought, Savigny accorded early juristic recognition to the relativity and dependence of the nature of law and ideas of the just as but one manifestation of social life, for he showed that while the law seeks to control men, it is a product of living men in a particular time, place, and society—only in relation to which experience can the law be operative

93. FUNCTION OF LAW at 447-48.

94. *Id.* at 438-39.

95. *Id.* at 440-42.

96. *Id.* at 447.

upon them.⁹⁷

In conclusion, it seems appropriate to quote the caveat which Savigny left for future legal scholars when he noted that the study of law was

of its very nature exposed to a double danger; that of soaring through theory into empty abstractions of a fancied law of nature, and that of sinking through practice into a soulless, unsatisfactory handicraft.⁹⁸

97. *Id.* at 445.

98. F. JOHNSTON, JR., *MODERN CONCEPTIONS OF LAW* 20 (1925).

