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Toward an Integrative Jurisprudence: Politics, Morality, History

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"Without philosophy, history is meaningless. Without history, philosophy is empty."

— Anon.

Integrative jurisprudence is a legal philosophy that combines the three classical schools: legal positivism, natural-law theory, and the historical school. It is premised on the belief that each of these three competing schools has isolated a single important dimension of law, and that it is both possible and important to bring the several dimensions together into a common focus.¹ After exploring some of the tensions and interconnections among the three competing schools, I shall draw upon the

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1. For some years I used the term "integrative jurisprudence" without knowing that it was first used by Jerome Hall. I am glad to have the opportunity now to apologize for this substantial oversight. My usage differs from Professor Hall's but contains some of the same basic characteristics. See J. HALL, FOUNDATIONS OF JURISPRUDENCE (1973) (especially chapter 6 "Towards an Integrative Jurisprudence"); J. HALL, STUDIES IN JURISPRUDENCE AND CRIMINAL THEORY 37-47 (1958) ("Toward an Integrative Jurisprudence"); Hall, *From Legal Theory to Integrative Jurisprudence*, 33 U. CIN. L. REV. 153 (1964); Hall, *Integrative Jurisprudence in INTERPRETATIONS OF MODERN LEGAL PHILOSOPHIES: ESSAYS IN HONOR OF ROSCOE POUND* 313 (P. Sayre ed. 1947) (combining positivism and natural-law theory with a sociological jurisprudence); see also Bodenheimer, *Seventy-Five Years of Evolution in Legal Philosophy*, 23 AM. J. JURIS. 181, 204-05 (1978) (in which Professor Bodenheimer writes of "The Need for an Integrative Jurisprudence," citing, in addition to Hall, E. FECHNER, RECHTSPHILOSOPHIE: SOZIOLOGIE UND METAPHYSIK DES RECHTS (2d ed. 1963)).

For earlier expressions of my views, see H. BERMAN, LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION vii (1983) [hereinafter H. BERMAN, LAW AND REVOLUTION] ("We need a jurisprudence that integrates the three traditional schools and goes beyond them."); *id.* at 44 ("A social theory of law . . . should bring the three traditional schools of

development of contemporary international law to illustrate the virtues of integrating them in a single, complex theory.

I

THE MAIN DIFFERENCES AMONG THE THREE CLASSICAL SCHOOLS

The positivist school treats law essentially as a particular type of political instrument: a body of rules laid down ("posited") by the state, having its own independent self-contained character separate and distinct from both morality and history. The natural-law school, by contrast, treats law essentially as the embodiment in legal rules and concepts of moral principles derived from reason and conscience. Finally, the historical school treats law as a manifestation of the historically developing ethos—the traditional social representations and attitudes—of a people or a society. Thus positivists analyze the rules of law existing in a given polity at a given time independently of principles of right and wrong and independently of the history or social consciousness of the given polity. Only after it is established what the law is, they argue, can one legitimately ask what the law ought to be or how it came to be what it is. Naturalists, on the other hand, believe that one cannot know what the law is unless one considers at the same time what it ought to be, since, they argue, it is implicit in legal norms that they are to be analyzed, interpreted, and applied in the light of the moral purposes for which they exist. Indeed, it is a tenet of natural-law theory that governmental acts or commands that grossly contravene fundamental principles of justice do not deserve to be called law at all. The historicists impose limitations both on the sovereignty of the lawmaking power and on the authority of reason and conscience: They argue that what the law "is" politically and "ought to be" morally is to be found in the national character, the cul-

jurisprudence—the political school (positivism), the moral school (natural-law theory), and the historical school (historical jurisprudence)—together in an integrative jurisprudence.").

In earlier works, I did not use the phrase "integrative jurisprudence," but did express some of its basic concepts:

We might view the whole Soviet legal system analytically, in terms of the needs and interests of a socialist state, [or] historically, in terms of the characteristic features of Russian society over the past thousand years of its development, [or] philosophically, in terms of the parental concept of law and of man implicit in it. It has seemed more fruitful to use these three methods—the analytical, the historical, and the philosophical—as three screens to be placed successively over Soviet law. . . . Together they may suggest the main outlines of the Soviet legal system as a whole, and its main implications not only for an understanding of Soviet Russia but also for an understanding of law.

H. BERMAN, *JUSTICE IN RUSSIA: AN INTERPRETATION OF SOVIET LAW* 4 (1950); *see also* H. BERMAN, *THE NATURE AND FUNCTIONS OF LAW* 29 (1958) ("Once one juxtaposes the three schools of jurisprudence which have been described, it becomes apparent that what is needed is not a choice of one to the exclusion of the others but rather a synthesis which will build on what is valid in all three.").

ture, and the historical ideals and traditions of the people or society whose law it is.

Each of these three main schools of jurisprudence has developed in various directions. Some positivists, especially those of the Kelsen school, have adopted an extreme conceptualism: Consistency of legal norms is for them the only criterion of legality once a sovereign lawmaker is postulated.² At the opposite pole of positivist jurisprudence, self-styled American legal realists and many adherents of the Critical Legal Studies movement treat legal rules as rationalizations of the empirical behavior of legal officials and find the sources of that behavior in economic, political, and other non-legal factors.³ Natural-law theory has also moved in various directions. Some Roman Catholic theorists, building on Thomistic premises, have found in an elaborately constructed set of moral principles the criteria for judging the validity of legal rules and for analyzing, interpreting, and applying them. Other naturalists have found such criteria in broad conceptions of procedural and substantive fairness. Still others have looked to an "oughtness" or "purposiveness" presupposed in the very nature of legal rules and in the very enterprise of making and interpreting them. The historical school has also undergone division. Some of its adherents have emphasized the specific historical traditions of given national legal systems while others have turned to sociological concepts of the relation of law to custom, to class structure, and to other social and economic factors.

The three competing approaches can only be brought together by giving a broader definition to law than that which is usually adopted by each of the schools. Most positivists define positive law (which is the only law they recognize) as official rules or, in the case of the American legal realists, as official conduct rationalized or disguised in rules. Most naturalists also define positive law as rules but they test the rules of positive law by moral principles or standards, which they consider to be equally part of law. The historicists define law in terms of both rules and moral principles. Unlike the positivists, however, they tend to be more concerned with the rules of customary law than the rules of enacted law and, unlike the naturalists, they are apt to be concerned with those spe-

2. H. KELSEN, *GENERAL THEORY OF LAW AND STATE* (A. Wedberg trans. 1945). A concise evaluation of Kelsen's jurisprudence, with ample bibliographical references, may be found in J. STONE, *THE PROVINCE AND FUNCTION OF LAW* 91-111 (1950). For a valuable analysis of analytical positivism, of which Kelsen's theory is an example, see E. BODENHEIMER, *JURISPRUDENCE: THE PHILOSOPHY AND METHOD OF LAW* 91-109 (rev. ed. 1974).

3. It has been argued that Critical Legal Studies is an "anti-positivist phenomenon" but this characterization refers to its ultimate purpose of undermining law rather than to its definition of the nature of law. See Note, *Critical Legal Studies as an Anti-Positivist Phenomenon*, 72 VA. L. REV. 983 (1986). Similarly, American legal realism, although it is sometimes said to be opposed to positivism, rests on the premise that the law which it realistically "sees through" consists of rules laid down by legislators, judges, and administrative officers.

cific moral principles that correspond to the character and traditions of a given people or a given society rather than with universal moral principles.

Professor Jerome Hall, who invented the term "integrative jurisprudence,"⁴ respects each of these definitions of law, but goes beyond them. He defines law as a type of social action, a process, in which rules and values and facts—all three—coalesce and are actualized.⁵ It is, in my view, the actualizing of law that is its most essential feature. If law is defined as the activity or enterprise of legislating, adjudicating, administering, and otherwise—through unofficial as well as official conduct—giving a legal order to social relations, then its political, its moral, and its historical aspects can be brought together.⁶

II

THE SEARCH FOR PRIMACY

What has divided the three traditional schools most sharply has been the assertion by each of its own primacy. The question of primacy only became critical in the eighteenth and nineteenth centuries when legal philosophy in the West was first divorced from theology. Prior to that time it was believed that ultimately it is God who is the author of law—indeed, in the words of the thirteenth-century German law book the *Sachsenspiegel*, "God is himself law and therefore law is dear to him."⁷ Since order, justice, and human destiny were all thought to be derived from the same divine source, it was possible to integrate in theological terms the political, the moral, and the historical dimensions of law. Pre-Enlightenment Christian writers such as Aquinas, Grotius, Locke, and Blackstone, who, despite their diversity, are often characterized as natural-law theorists were in fact also positivists and historicists—all three. They believed, to be sure, that God implanted reason and conscience in the minds and hearts of men and women. But they also believed that God ordained earthly rulers with the power to make and enforce laws, and that the history of law represented the providential fulfillment of God's plan. They resolved the tensions among these three aspects of the human condition—the political, the moral, and the historical—by finding their common source in the triune God, who is an all-

4. See *supra* note 1.

5. J. HALL, *COMPARATIVE LAW AND SOCIAL THEORY* 78-82 (1963); J. HALL, *LAW, SOCIAL SCIENCE AND CRIMINAL THEORY* 124 (1982).

6. This definition is expanded in H. BERMAN, *LAW AND REVOLUTION*, *supra* note 1, at 4-5 and in H. BERMAN, *THE INTERACTION OF LAW AND RELIGION* 24 (1974). It takes one step further Lon L. Fuller's definition of law as "the enterprise of subjecting human conduct to the governance of rules." L. FULLER, *THE MORALITY OF LAW* 106 (2d rev. ed. 1969).

7. *SACHSENSPIEGEL V: LANDRECHT IN HOCHDEUTSCHER ÜBERTRAGUNG* ii (K. Eckhardt ed. 1967) (prolog).

powerful lawmaker, a just and compassionate judge, and the inspirer of historical change in legal as in other social institutions. Prior to the eighteenth century, positivist, naturalist, and historicist theories were not separate schools but rather three complementary perspectives on law.

With the Enlightenment, Western legal philosophers sought a new ultimate authority. Some found that ultimate authority in politics, others found it in morality, still others found it in history. The positivists say that the ultimate source of law is the will of the lawmaker and its ultimate sanction is political compulsion: They deify the state. The naturalists say that the ultimate source of law is reason and conscience and its ultimate sanction is moral condemnation: They deify the mind. The historicists say that the ultimate source of law is national character, or the historically developing traditions of the people, or what in the United States is sometimes called the unwritten constitution,⁸ and that its ultimate sanction is acceptance or repudiation by the people: They deify the people, the nation.

III

POSITIVISM AND NATURAL LAW AS COMPLEMENTARY THEORIES

The rich classical dialogue between positivist and naturalist theories of law, whose roots lie in ancient Greek philosophy and religion, in Roman Catholic and Protestant theology, and in early Enlightenment thought, has for the most part degenerated in twentieth-century English and American jurisprudence to a debate about two questions: First, does law have an inherent moral character so that commands or rules issued by political authorities which lack that moral character do not deserve to be called laws? Second, should particular laws be interpreted and applied solely according to the will and intent of the lawmaker, whether broadly or narrowly construed, or also according to the moral purposes that are implicit in the particular laws as well as in the legal system as a whole? I say "degenerated," not only because these are not the most important questions that can be asked about the nature of law,⁹ but also

8. See, e.g., Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703 (1975); cf. C. TIEDEMAN, *THE UNWRITTEN CONSTITUTION OF THE UNITED STATES* 18 (1890) ("[c]onstitutions are effective only so far as their principles have their roots imbedded in the national character").

9. Lloyd L. Weinreb has criticized the reduction of natural law to an ethical—as contrasted with an ontological—theory, and has stated that at the merely ethical level "it is very hard indeed to explain the fuss that is made in legal philosophy about the debate between natural law and legal positivism." Weinreb, *The Natural Law Tradition: Comments on Finnis*, 36 J. LEGAL EDUC. 501 (1986). In his important book, *Natural Law and Justice* (1987), Professor Weinreb shows that classical natural-law theory is based on a concept of either fate or providence, and that it presupposes that the universe itself, including human life, contains an external standard of judgment of human conduct. See also Alexander, *Beyond Positivism: A Theological Perspective*, 20 GA. L.

because they cannot be answered adequately in terms of either of the two opposing theories.

Positivists and naturalists have begun to soften their opposition to each other in recent decades. Each side has shown itself more willing than in the past to accept, in modified form, certain doctrines propounded by the other. It is doubtful, for example, that a positivist would say today what Oliver Wendell Holmes, Jr., once said: "I hate justice, which means that I know if a man begins to talk about that, for one reason or another he is shirking thinking in legal terms."¹⁰ It was in those days that a Harvard Law School student asked in class, "But sir, is that just?" and the professor replied, "If it's justice you're looking for, you should have gone to the divinity school!" Today, even ardent defenders of positivism concede that it is a legitimate function not only of the law student and law professor, but also of the judge and, above all, the legislator, to ask of a legal rule, once it is determined analytically what it says and what it means, "Is it just?"¹¹

Moreover, positivists acknowledge that a legal system may expressly include certain ethical norms, such as the due process and equal protection clauses of the United States Constitution, which govern the application of legal rules. Even apart from such basic constitutional provisions, positivists acknowledge that there are "principles, policies and values which lie behind legal rules" and which "impart at least a partial element of the moral into any legal system's operation."¹² Indeed, the positivist definition of law as a body of general rules itself presupposes the moral principle that like cases should be decided alike. Such moral principles are, to be sure, viewed by the positivist not as speaking directly to the mind of the interpreter of the rule but rather as "express[ing] what those empowered to implement the rules see as being justifying rationalizations of the valid rules."¹³

As positivists have increasingly taken account of the effect of morality on law, so naturalists have increasingly taken account of the political elements in law. Naturalists have always understood that the morality by which law is to be tested includes the moral duty to preserve the legal order, including the system of legal rules imposed and enforced by the

REV. 1089, 1090 (1986). Professor Alexander criticizes both positivists and naturalists for failing to deal with ontological questions concerning the purposes of law in the fulfillment of individuality and community.

10. O.W. HOLMES, HIS BOOK NOTICES AND UNCOLLECTED LETTERS AND PAPERS 201 (H. Shriver ed. 1936).

11. This is essentially the position taken in H.L.A. HART, THE CONCEPT OF LAW 181-207 (1961) ("Law and Morals"). Hart does not discuss the historical school but concentrates on the opposition between positivism and natural-law theory.

12. MacCormick, *A Moralistic Case for A-Moralistic Law?*, 20 VAL. U.L. REV. 1, 8 (1985).

13. *Id.*

state. From this point of view, the role of reason and conscience, whose objectivity the positivists tend to doubt, is more limited in much natural-law theory than many positivists have supposed. One need only read Lon Fuller's brilliant essay, "Reason and Fiat in Case Law," to realize how close the two sides are to each other in that respect. In Fuller's words, "law. . . is compounded of reason and fiat, of order discovered and order imposed, and . . . to attempt to eliminate either of these aspects of the law is to denature and falsify it."¹⁴

Naturalists and positivists, however, ultimately diverge at two points: First, and most obviously, when the sovereign enacts a law, or supports a procedure, which is grossly and fundamentally contrary to reason and conscience; second, when a court or other law enforcement agency interprets a law, or a legal rule, without sufficient regard to the moral purposes for which it exists. In these two types of situations, the positivist denies the legal relevance of the categories reason, conscience, and moral purpose. The positivist denies that these categories reflect universal and timeless truths from which the positive law itself is derived, asserting instead that the legal issues to be resolved are not universal but local and not timeless but contingent. The positivist accepts the ultimate supremacy of the will, or desire, or intent, of the lawmaker, as revealed, in the first instance, in the language of the rule itself. In contrast, the naturalist, in interpreting law, accepts the ultimate supremacy of reason or conscience. In current terminology, the naturalist says that the Right is prior to the Good while the positivist says that the Good is prior to the Right.¹⁵

14. Fuller, *Reason and Fiat in Case Law*, 59 HARV. L. REV. 376, 382 (1946).

15. Cf. J. RAWLS, *A THEORY OF JUSTICE* 446-52 (1971) ("Several Contrasts Between the Right and the Good").

Ronald Dworkin deals with the same problem in terms of individual "rights" versus collective "interests." He defines the "anti-utilitarian concept of a right," which he calls characteristic of U.S. constitutional theory, as follows: "If someone has a right to something, then it is wrong for the government to deny it to him even though it would be in the general interest to do so." R. DWORKIN, *TAKING RIGHTS SERIOUSLY* 269 (1977); In Dworkin's terminology, rights are "trumps" over collective goals. *Id.* at xi, xv; see also R. DWORKIN, *LAW'S EMPIRE* 160, 223 (1986).

Dworkin seems to be groping towards an integrative jurisprudence as he struggles to reconcile the general interests of the state with the fundamental rights of individuals. On the one hand, he refers to law in positivist terms, as "the rights and duties that flow from past collective decisions and for that reason license or require coercion. . . ." *Id.* at 227. On the other hand, he follows a natural-law approach in suggesting that the "right to concern and respect" is fundamental, and must act as a trump, limiting collective goals when the two conflict. Indeed, he states that "the idea of a collective goal may itself be derived from that fundamental right." *TAKING RIGHTS SERIOUSLY*, *supra*, at xv.

He does not, however, recognize the specific virtues of historical jurisprudence. He writes of "historicism," *LAW'S EMPIRE*, *supra*, at 167, 227, which he sees (in positivist terms) as closely linked both with the interpretation of the intent of the lawmaker and with the desire for certainty. *Id.* at 359-69. Discussing U.S. constitutional law, Dworkin distinguishes between what he calls weak historicism, which asks judges to follow the concrete opinions of the framers "so far as these concrete opinions can be discovered," and strong historicism, which requires judges to treat

In practice, however, the positivists' and naturalists' conclusions are not genuine antinomies, but only opposite sides of the same coin. The naturalist, or moralist, is also taking a political position; the positivist, or politician, is also taking a moral position. In real life, other things being equal, they reach the same practical results.¹⁶ In real life—that is, in history—the universal and the local, the timeless and the timely, interact; so do reason and will, values and rules, justice and order.

The jurisprudential debate is closely related in these respects to current controversies in the fields of moral philosophy and political theory. The word "justice" is, after all, common to all three disciplines. In all three, the heirs of Immanuel Kant contend with the heirs of Jeremy Bentham. Nevertheless, the moral philosophers and political theorists hardly deal with law, and the jurists deal only casually with moral philosophy or political theory. Thus John Rawls, in his book, *A Theory of Justice*, which has attracted such an enormous amount of attention during the past seventeen years, discusses law only briefly.¹⁷ Michael

"historical concrete intentions even more firmly: it requires them to treat these intentions as exhausting the constitution altogether." *Id.* at 368-69.

Although Dworkin concludes that law "aims . . . to show the best route to a better future, keeping the right faith with the past," *id.* at 413, he rarely discusses the specific historical background in which constitutional problems have arisen. For example, in dealing with the religion clauses of the first amendment, Dworkin's judge Hercules "must develop a theory of the constitution, in the shape of a complex set of principles and policies that justify that scheme of government. . . . He must develop that theory by referring alternately to political philosophy and institutional detail." *TAKING RIGHTS SERIOUSLY*, *supra*, at 107. Nothing is said about the fundamental changes in the character of American society as well as of American law which took place during the period from 1868, when the fourteenth amendment was adopted, and 1940, when the Supreme Court held that the fourteenth amendment incorporated by implication the religion clauses of the first amendment. *Cf.* Berman, *Religion and Law: The First Amendment in Historical Perspective*, 35 *EMORY L.J.* 777 (1986) (arguing that these historical shifts necessitate interpretations of the religion clauses partly at variance with the framers' intent).

16. *See* Beyleveld & Brownsord, *The Practical Difference Between Natural-Law Theory and Legal Positivism*, 5 *OXFORD J. LEGAL STUD.* 1, 22 (1985) ("(1) since neither natural-law theory nor positivism is tied to any specific ethical position there would be nothing in principle to prevent rival conceptual protagonists holding an identical view of ethics; in which case (2) there would be no necessary practically significant disagreement between such conceptual rivals.").

Cf. Gavison, *Natural Law, Positivism, and the Limits of Jurisprudence: A Modern Round*, 91 *YALE L.J.* 1250, 1274, 1283 (1982). Gavison argues more generally that positivism and natural law are "complementary and equally necessary approaches" to law, and calls for an integration of their perspectives. *Id.* at 1250. It is not clear from her article, however, what the basis of such integration is to be, other than that there are areas of agreement between the two schools (especially as represented in the work of the positivist Joseph Raz and the natural-law theorist John Finnis). She makes no mention of the historical school of jurisprudence.

The fact that positivists and naturalists can agree on the solution to specific ethical questions, and even on some important aspects of the nature of law itself, does not negate the fact there are still important differences between them in theory and in outlook.

17. *See* J. RAWLS, *supra* note 15, at 58-60, 235-43. Rawls characterizes a legal system as "an order of public rules addressed to rational persons in order to regulate their cooperation," and assigns to it the purpose of securing governmental action in accordance with the principle of liberty. *Id.* at 241. His only specific legal reference is to penal sanctions.

Sandel, in his powerful rebuttal of Rawls, *Liberalism and the Limits of Justice*, does not discuss law at all.¹⁸ Yet Rawls, in arguing for the primacy of individual liberty and individual rights as the basis of justice, and Sandel, in arguing for the primacy of the community and of the common good, carry on a debate which is closely related to the debate carried on between those legal philosophers who argue that positive law derives its legitimacy from natural law and those who argue that positive law derives its legitimacy from the political institutions through which the will of the community is expressed.¹⁹ The naturalists defend the primacy of the moral order, which they translate into the language of legal rights. The positivists defend the primacy of the political order, which they translate into the language of social utility or the common good. Yet all these claims to primacy are problematic. It can be said of the Right and the Good, as it can be said of reason and will, or of moral values and political rules, that—despite tensions and even contradictions between them—in real life, in history, they interact.²⁰

What is missing, above all, from the debate between the naturalists and the positivists is precisely the historical dimension of law. Law is more than morality or politics and more than morality and politics combined. Law is also history. What is morally right in one set of historical circumstances may be morally wrong in another; likewise, what is politically required in one set of historical circumstances may be politically objectionable in another. More important, the apparent conflict between

18. M. SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE* (1982). Sandel mentions law in passing, *id.* at 16 n.1, and discusses Locke's theory of the Law of Nature and of God, *id.* at 116-17.

19. Sandel does not spell out the implications of his communitarian theory for modern political institutions. His critics, however, have claimed that when applied to the large, complex, and pluralistic societies governed by modern nation-states, Sandel's theory translates into a crude majoritarianism. They argue that without Right, without some countervailing notion of justice transcending the community (if the modern nation-state can properly be termed a "community"), any political expression of the common good must stand, regardless of its adverse effects on individuals or minority groups. See, e.g., Hirsch, *The Threnody of Liberalism: Constitutional Liberty and the Renewal of Community*, 14 POL. THEORY 423 (1986); cf. Rorty, *The Priority of Democracy to Philosophy* in THE VIRGINIA STATUTE FOR RELIGIOUS FREEDOM (1988) (arguing that justice is essentially a political—not metaphysical—concept); see generally Berman, *Individualistic and Communitarian Theories of Justice: An Historical Approach* 21 U.C. DAVIS L. REV. 549 (1988) (tracing the historical development in the 11th and 12th centuries of the individualistic concept of justice from the communitarian concept of justice which predominated in the Germanic law of the 6th to 11th centuries).

20. The communitarian view shares some characteristics with the historical school. Sandel argues that, contrary to the deontological theory of Kant and Rawls, our identities are constituted by our "aims and attachments:" "as members of this family or community or nation or people, as bearers of this history, as sons and daughters of that revolution, as citizens of this republic." M. Sandel, *supra* note 18, at 179. In *The Procedural Republic and the Unencumbered Self*, 12 POL. THEORY 81, 95 (1984), Sandel moves closer to a historical theory insofar as he seeks in the conclusion of the article to ground the values of the contemporary American nation-state in the fragmented collective identity of the American people which has unfolded during the past half-century.

a moral and a political approach to law may be resolved in the context of historical circumstances: history—the experienced life of the community—may bring morality and politics together, permitting and even compelling an accommodation between the two. Law, indeed, may be defined as the balancing of justice and order in the light of experience.²¹

The example of a statute which deprives certain races of basic political and civil rights may illustrate the point: A positivist might say that it is in fact a law, albeit an unjust law, which should, as a purely moral matter, be disobeyed; a naturalist might say that, in view of its fundamentally immoral character, the statute lacks essential features of legality and is no law at all. Both are right and both are wrong. Only under given historical circumstances can either of these arguments make a substantial practical difference. To say that such a statute is no law at all may be quite important in a revolutionary situation, when the very lawfulness of the political regime that enforces it is being challenged—as may become the case in Nelson Mandela's South Africa. To say, on the contrary, that it is a bad and unjust law, but nevertheless a law, might be quite important in a time of reform, when there is a chance of amending the law to reduce its injustice—as was indeed the case when Martin Luther King, Jr. wrote his Letter From Birmingham City Jail.²²

IV

THE HISTORICAL SCHOOL

It is characteristic of the historical school that it was founded in

21. Holmes is sometimes misrepresented as an exponent of historical jurisprudence, and in that connection his famous aphorism is quoted: "The life of the law has not been logic: it has been experience." O.W. HOLMES, *THE COMMON LAW* 1 (M. Howe ed. 1963). Holmes did indeed pay great attention to the historical development of legal concepts and rules, and he attributed their development to unarticulated political and social premises. "Behind the logical form lies a judgment as to the relative worth and importance of competing legislative grounds," he wrote in Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 466 (1897). Nevertheless, as Martin Golding has said, "He remained a positivist to the last, because it was his view, I believe, that these [value] judgments are extra-legal." Golding, *Jurisprudence and Legal Philosophy in Twentieth Century America: Major Themes and Developments*, 36 J. LEGAL EDUC. 441, 445 (1986). Experience, for Holmes, was not the law itself, which he conceived as rules applied to cases ("a prediction of what courts will do"), but rather the hidden source of its vitality. Holmes's emphasis on the historical development of legal doctrine derived from his recognition of the importance of judge-made law in England and America; since the judges in that tradition explain their decisions in terms of precedent, it was necessary for Holmes, as a positivist, to analyze the meanings attributed to the rules at various times. In Holmes's view, history explained but did not justify the rules and the chief value of a historical explanation was, in fact, to remove the veil that concealed their essentially political character. Once the historical derivation of the legal rules was established, their application was for Holmes analytical and logical. See R. POUND, *AN INTRODUCTION TO THE PHILOSOPHY OF LAW* 62 (rev. ed. 1954).

22. Martin Luther King, *Letter from Birmingham City Jail* (Apr. 16, 1963) reprinted in *A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS OF MARTIN LUTHER KING, JR.* 289-302 (J. Washington ed. 1986).

response to historical events.²³ In 1814 an eminent German jurist named Thibaut published a plan to draft a code of laws for all the states that comprised the German confederation, to be drawn up by an interstate committee of legal scholars and practitioners. (This was before the establishment of Germany as a unified national state). Another German jurist, Friedrich Karl von Savigny, responded in the same year with an essay entitled, in English translation, *On the Calling of Our Time for Legislation and Jurisprudence*.²⁴ In it, the thirty-five-year-old Savigny, who was to become the most important German legal figure of the nineteenth century, set forth a theory of what law is, how it is related to the social life as well as the beliefs and values of the community of which it is a part, and how it develops over time. He then argued that to attempt to codify German law in the year 1814 would be to freeze its development and to threaten its historical foundations—its rootedness in the past and its calling for the future.

Savigny's theory of law was directed in part against ideas that had come to prevail in France after the French Revolution and that had spread throughout Europe: that legislation is the primary source of law, and that the legislator's primary task is to protect the "rights of man" or the "greatest good of the greatest number," or both, without deference to the prerogatives and prejudices of the past. In opposing these views, Savigny was influenced by Edmund Burke's conception of the nation as a partnership of the generations in time. Like Burke, Savigny considered law to be an integral part of the common consciousness of the nation, organically connected with the mind and the spirit of the people. Law, wrote Savigny, "is developed first by custom and by popular belief, then by juristic activity—everywhere, therefore, by internal, silently operating powers, not by the arbitrary will of a legislator."²⁵ As a people becomes more mature, Savigny wrote, and its social and economic life becomes more complex, its law loses some of its simplicity: It becomes less symbolic and more abstract, more technical, requiring administration and development by a professional class of trained jurists. Nevertheless, law must never become merely a body of ideal propositions or a mere system of rules promulgated by the state; it must always remain a particular expression of the social and historical consciousness of a people at a given time and place. The professional or technical element must never become divorced from the symbolic element or from the community

23. For an exposition and critique of the historical school of jurisprudence, see J. STONE, *THE PROVINCE AND FUNCTION OF LAW* 419-48 (2d ed. 1950).

24. See *infra* note 25.

25. F. VON SAVIGNY, *VOM BERUF UNSRER ZEIT FÜR GESETZGEBUNG UND RECHTSWISSENSCHAFT* 13-14 (1814) [hereinafter SAVIGNY, *VOM BERUF*]. A slightly different translation is given in SAVIGNY, *OF THE VOCATION OF OUR AGE FOR LEGISLATION AND JURISPRUDENCE* 30 (A. Hayward trans. 1831).

ideas and ideals which underlie both the early and the later stages of legal development.

Those who rallied to Savigny's banner called themselves "the historical school" of jurisprudence. They succeeded in postponing codification of German civil law for nearly eighty-five years. At the same time they succeeded in making the civil code that was eventually adopted a far better code than could have been drafted in 1814.²⁶ As Savigny wrote in his famous essay of that year, the very language of German law had so deteriorated in the eighteenth and early nineteenth centuries that any code drafted at that time would inevitably have been a failure.²⁷

Critics of the historical school have focused on the conservatism and romanticism of historicists who opposed legislative reform in the name of the *Volksgeist*, the "spirit of the people." The issues, however, were much deeper. Savigny did not oppose all legislative reform; on the contrary, he worked actively for reform.²⁸ And the concept *Volksgeist*, which translates so awkwardly into English, corresponds in some ways, as I have suggested earlier, to the American concept of the unwritten constitution; it could be translated "national ideals," or even "community values." The deeper issues involved the conflict between what can accurately be called the German "common law tradition" and the new rationalism that was associated with the Enlightenment and the French Revolution. In locating the ultimate source of law, the new rationalism emphasized public opinion and the will of the legislature. Savigny's historical school, by contrast, emphasized the older Germanic (*germanische*) tradition of popular participation in lawmaking and adjudication as well as the more modern German (*deutsche*) tradition of professional scholarly interpretation and systematization of the *jus commune*, the common law, which had been developed over the centuries from the texts of the Roman law of Justinian and the canon law of the Church. Prior to the nineteenth century the Romano-canonical *jus commune* of the nations of Europe had been customary law in the same

26. For an account of the drafting of the German Civil Code, which was enacted on July 1, 1896, to take effect on January 1, 1900, see A. VON MEHREN & J. GORDLEY, *THE CIVIL LAW SYSTEM* 75-79 (2d ed. 1977).

27. SAVIGNY, *VOM BERUF*, *supra* note 25, at 52; *cf.* Hayward's translation, *supra* note 25, 68-69.

28. Savigny was a professor at the University of Berlin from 1810 until his death in 1861. He was made a member of the Prussian Privy Council in 1817 and was appointed to the Berlin Court of Appeal for the Rhine Provinces in 1819. He became a member of the commission for revising the Prussian code in 1826 and served from 1842 through 1848 as head of the department for revision of statutes. See J. STONE, *supra* note 23, at 421-422; Kiefner, *Savigny, Friedrich Karl von*, in 10 *ENCYCLOPAEDIA BRITANNICA* 481-82 (15th ed. 1985). Although he opposed imposing a codification on the entire German federation, Savigny strongly favored legislative reform. Further, he and his followers elaborated a systematic method of analysis of Roman law, which eventually served the cause of national codification.

sense that the English common law was customary law; that is, it was traditional law, unenacted law. The *jus commune* of the continental European nations was derived primarily, however, not from judicial decisions, as was the common law of England, but from scholarly glosses and comments on treatises and ancient texts. Just as the English common law was supposed to reflect the common sense of the English people, so the German *jus commune* was supposed to reflect the common consciousness of the German nation as it developed.

I offer two examples from personal knowledge of the application of historical jurisprudence to legal problems in Germany today. The first is the abolition of capital punishment. The German social philosopher Jürgen Habermas was asked in October 1986, at a meeting in Cambridge, Massachusetts, what he thought of capital punishment. He might have answered in natural-law terms: "It violates the sanctity of life, it violates the Kantian categorical imperative," or alternatively, "It is the just desert of the murderer or traitor." He might also have answered in positivist terms: "It should be retained because it is useful in deterring murder and treason," or alternatively, "It should be abolished because it is not useful in deterring the crimes to which it is made applicable." Habermas did not, however, give either of these sets of answers. Instead he said, "You must understand that after what Germany lived through under Nazism, it would have been impossible to restore capital punishment."²⁹

The second example is like the first. Some years ago, several American pro-life organizations sponsored a visit to the United States by the President of the German Constitutional Court, which in 1975 had declared a German statute that permitted abortion, virtually on demand, during the first twelve weeks of pregnancy to be in violation of the "fundamental law" (*Grundgesetz*) of the German Constitution. The distinguished German judge spoke in various cities, including, once again, Cambridge, Massachusetts. To the dismay of many in his audience, he announced in his lecture that he personally did not oppose abortion on moral grounds. He also said that he considered it to be the responsibility of his court to uphold statutes unless they clearly violate the Constitution. Nevertheless, he said, it is perfectly clear that after the Nazi experience of genetic engineering and racial extermination the German Constitution could not possibly be interpreted as permitting abortions.³⁰

29. Discussion at Harvard University (October 3, 1986).

30. Address by Ernst Benda, Harvard Law School, approximately 1987. This was the reasoning of the German Constitutional Court in the 1975 case. The court stated: "The express incorporation into the Basic Law of the self-evident right to life . . . may be explained principally as a reaction to the 'destruction of life unworthy of life,' to the 'final solution' and 'liquidations,' which were carried out by the National Socialistic Regime as measures of state." Jonas & Gorby, *Translation of the German Federal Constitutional Court Decision*, 9 J. MARSHALL J. PRAC. & PROC.

Ironically, Habermas expounded in his lecture a natural-law theory, based on Kantian premises, and the President of the German Constitutional Court expounded in his lecture a positivist theory, based on the supremacy of the enacted law. Nevertheless, in the crucial matters of capital punishment and abortion they followed, in effect, an historical jurisprudence.

In the nineteenth and twentieth centuries Savigny's historical school developed in various directions in various countries. It remained always concerned with instruments and processes of legal development and with stages in the growth of law. Nevertheless, it was not always concerned primarily with the relation of legal change to the national character of a single people. It increasingly took on the character of an empirical sociology of law, or became simply technical legal history. Insofar as the historical school took on these new forms, it lost its normative character and became, for the legal philosophers, a mere datum—an explanation but not a justification.³¹

In England and America, however, judges, as contrasted with legal philosophers, sociologists, and historians, have traditionally applied and sometimes expounded a normative historical jurisprudence, similar to that of Savigny. In fact, historical jurisprudence is embodied in the Anglo-American common law, together with positivism and natural-law theory. In the Anglo-American tradition of adjudication, judges analyze the rules of positive law in order to determine their meaning, having in mind the will and intent of the legislature or court or other agency that made them; in addition, they interpret the rules in terms of reasonable-

605, 637 (1976) (translating Decision of the Federal Supreme Court, Feb. 25, 1975, 39 BVerfGE 1). The court continued: "Underlying the Basic Law are principles for the structuring of the state that may be understood only in light of the historical experience and the spiritual-moral confrontation with the previous system of National Socialism." *Id.* at 662. Compare George Fletcher's perceptive article on the relation of law to national character, in which he writes of the above case that "by the court's own admission, it is 'the historical experience and the moral, humanistic confrontation with National Socialism' that makes a difference in Germany." Fletcher, *Lawmaking as an Expression of Self*, 13 N. KY. L. REV. 201, 208 (1986).

31. The work of the late Alexander Bickel is exceptional in this respect. Bickel drew on the philosophy of Edmund Burke, stating that "[c]ivil society is a creature of its past, of 'a great mysterious incorporation,' and of an evolution which in improving never produces anything 'wholly new,' and in conserving never retains anything 'wholly obsolete.'" A. BICKEL, *THE MORALITY OF CONSENT* 20 (1975). Bickel wrote:

The values of . . . a society evolve, but as of any particular moment they are taken as given. Limits are set by culture, by time- and place-bound conditions, and within these limits the task of government informed by the present state of values is to make a peaceable, good, and improving society. . . . Law is the principal institution through which a society can assert its values.

Id. at 4-5. According to Bickel, "We find our visions of good and evil and the [moral] denominations we compute where Burke told us to look, in the experience of the past, in our tradition, in the secular religion of the American republic." *Id.* at 24. Professor Anthony T. Kronman notes the "puzzling" fact that "despite the high regard in which his work is held, Bickel has few contemporary followers." Kronman, *Alexander Bickel's Philosophy of Prudence*, 94 YALE L.J. 1567, 1567 (1985).

ness and fairness; and finally, they determine both the will of the lawmaker and the applicable principles of reason and fairness in the light of the history, and especially the legal history, of the nation. In having recourse to legislation, to equity, and to precedent, judges have in fact traditionally applied an integrative jurisprudence. Occasionally a judge who is also a legal scholar gives literary expression to such a jurisprudence. Benjamin Cardozo³² in this century, and Joseph Story³³ in the nineteenth century, are outstanding examples of such judges.

Integration of the three principal schools of legal philosophy has suffered greatly in recent decades due to the decline of the historical method in adjudication and due to the decline of the historical approach to law in legal scholarship and in legal education generally. This is not the place to elaborate this point. It is sufficient to note that our judges are increasingly torn between so-called judicial activism, which is usually defended in terms of a natural-law theory, and so-called judicial restraint, which is usually defended in terms of a positivist theory. Our legal philosophers are increasingly taking sides in this conflict, and devoting more of their writings to it. Each side, to be sure, bolsters its position with references to history. Those who believe that law is essentially the will of the lawmaker often refer to what was said and meant by

32. In B. CARDOZO, *THE GROWTH OF THE LAW* (1924), Cardozo wrote of a fourfold division separat[ing] the force of logic or analogy, which gives us the method of philosophy; the force of history, which gives us the historical method, or the method of evolution; the force of custom, which yields the method of tradition; and the force of justice, morals and social welfare, the *mores* of the day, with its outlet or expression in the method of sociology.

Id. at 62.

What Cardozo called "the method of philosophy" is characteristic of traditional positivism; what he called "the method of sociology" is characteristic of traditional natural-law theory; what he called "the method of evolution" and "the method of tradition" are characteristic of traditional historical jurisprudence.

An excellent example of Cardozo's integration of the three jurisprudential schools is found in his decision in the famous case of *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050 (1916), in which he relied on the holdings of previous decisions (positivism), the equities of the case (natural law), and the social and economic evolution of the United States during the previous half-century (historical jurisprudence) as interlocking grounds for declaring a new doctrine of manufacturers' liability.

33. In the 20th century Story has been characterized as an adherent of natural law theory. In fact, however, both in his judicial opinions and in his numerous scholarly writings, he combined natural law theory with positivism and historical jurisprudence. Thus R. Kent Newmyer writes that in the case of *United States v. La Jeune Eugenie*, 26 Fed. Cas. 832 (C.C.D. Mass. 1822) (No. 1551), Story relied upon "the universal morality of natural law," which, however, "rested on a firm foundation of positive law and history." R. NEWMYER, *SUPREME COURT JUSTICE JOSEPH STORY, STATESMAN OF THE OLD REPUBLIC* 350 (1985). Newmyer points out that Story conceived the common law to be not only a body of principles and not only a moral code but also an ongoing process of adaptation to the "actual concerns of life" viewed in a historical context. Story's legal system, Newmyer writes, "would accommodate historical change. History, in turn, would inform law." *Id.* at 245. Story's scholarly treatises on commercial law and on conflict of laws strongly reflect this three-dimensional quality of his legal philosophy.

lawmakers of an earlier time—"the original intent of the Founding Fathers." Similarly, those who believe that law should be understood in terms of fundamental moral values often refer to past proclamations of the spirit of freedom and equality. These are examples of blind historicism—a futile attempt at repetition of the past. They should be called historical positivism and historical moralism, respectively. In fact, they feed the widespread antipathy toward a genuine historical jurisprudence, which is considered by most American legal philosophers to be at best a form of practical wisdom or common sense that does not lead to genuine philosophical truths.

V

THE REVIVAL OF HISTORICAL JURISPRUDENCE

The historical school has been almost universally disparaged and has virtually disappeared from almost all jurisprudential writings in the 20th century, at least in England and the United States.³⁴ Indeed, the almost total neglect of historical jurisprudence during the past generation—the failure even to acknowledge its existence—has crippled English and American legal philosophy. Even Professor Hall in his jurispruden-

34. Roscoe Pound wrote that "[t]he historical school in one form or the other was dominant in Continental Europe and in America in the last half of the nineteenth century." 1 R. POUND, JURISPRUDENCE 63 (1959). Nevertheless, the historical school is not even mentioned in most of the leading jurisprudential works of the 1950s to 1980s. In an excellent short summary of legal thought in the United States since 1880, Martin Golding had nothing to say about historical jurisprudence (except that Holmes was not an exponent of it), and in the symposium on "Contemporary Legal Theory" which his article introduced, the historical school was not represented. See Golding, *supra* note 21. In 1951, Harold Gill Reuschlein reported on the theories of some 50 contemporary American legal philosophers. He did not identify any among them as adherents of the historical school. See H. REUSCHLEIN, JURISPRUDENCE—ITS AMERICAN PROPHETS, A SURVEY OF TAUGHT JURISPRUDENCE (1951).

Savigny's school had come under heavy attack in the decades after World War I. Writing in 1946, Julius Stone stated that the "creative force" of the historical school "disappeared as the [19th] century proceeded." J. STONE, *supra* note 23, at 301. He proposed that historical jurisprudence should now itself "disappear" as a separate branch of legal philosophy and should be merged into sociological jurisprudence. *Id.* at 35.

Hermann Kantorowicz also took the view that Savigny's work was essentially a "sociological description." Kantorowicz wrote that Montesquieu had listed fourteen "natural and social factors" on which law depended, including "l'esprit de la nation": "Savigny accepted this one alone and made it the one source of all law, obviously because it was more mysterious and therefore more romantic than climate, economic system or density of population, which Montesquieu had recognized and studied, though in a very aphoristic and rather journalistic spirit." Kantorowicz, *Savigny and the Historical School of Law*, 53 LAW Q. REV. 326, 335 (1937).

In lectures delivered in 1921-22 at Yale Law School, Roscoe Pound criticized "the historical school which ruled in our law schools in the last quarter of the nineteenth century and taught us to think that growth must inevitably follow lines which might be discovered in the Year Books." R. POUND, *supra* note 21, at 156. Lecturing at Trinity College, Cambridge in 1922, Pound stated that "[i]n the reaction from the law-of-nature theory the historical school went too far in the other direction and sought to exclude development and improvement of the law from the field of conscious human effort." R. POUND, INTERPRETATIONS OF LEGAL HISTORY 68 (1923).

tial writings has turned toward empirical sociology and away from the emphasis of the historical school on cultural factors and on the role of specific traditions in the development of specific types of legal institutions.³⁵

If historical jurisprudence is to be revived, it must be clearly differentiated not only from romantic nationalism but also from the blind historicism to which positivism and natural-law theory have sometimes resorted. The essence of historical jurisprudence is not historicism but historicity, not a return to the past but a recognition that law is an ongoing historical process, developing from the past into the future. On the other hand, historical jurisprudence is not merely a sociological statement. It starts from, but goes beyond, the general truths that law is a product of history, that the life of the law is experience, and that the legislator or judge finds in past history sources for adaptation of the law to new circumstances. A genuine historical jurisprudence—such as Savigny's or Story's—rests on the premise that certain long-term historical experiences of a people lead it in certain directions and, with respect to law, that the past times through which the legal institutions of a people have developed help to determine the standards according to which its laws should be enacted and interpreted as well as the goals toward which its legal system strives.

Historical jurisprudence, in its initial form, was Savigny's explanation of why the time was not ripe in 1814 for a federal codification of German law. Historical jurisprudence similarly helps to explain what had to happen in the United States in the twentieth century, legally and otherwise, before racial desegregation could become an effective constitutional principle. It also helps to explain—and to justify—the connections that are now being made between racial desegregation and affirmative action to achieve racial equality in employment, as constitutional principles.

Of course, history alone—and especially national history alone—is as futile and as demonic as politics alone or morality alone. National ideals, community values, and the unwritten constitution cannot justify political arbitrariness or moral depravity. Indeed, history without political and moral philosophy is meaningless. Yet those philosophies without history are empty. In American jurisprudence the time is ripe to

35. Professor Hall's classic study J. HALL, *THEFT, LAW AND SOCIETY* (2d ed. 1952) effectively combines the historical and the sociological methods. In his jurisprudential writings of the 1960s and 1970s the historical method was not stressed. In his *Foundations of Jurisprudence*, *supra* note 1, he writes that historical jurisprudence "is the bridge between the traditional legal philosophies [natural-law theory and positivism] and the new [empirical sociological] perspective." *Id.* at 143.

restore the historicity of law to its proper role alongside political principles of legal order and moral principles of legal justice.

It has been argued that history is too vague or too subjective a concept to serve as a basis for jurisprudence. The same argument is applicable, however, to morality and politics. The three must be seen as complementary approaches and methods, not as scientific formulae or philosophers' stones. Even the positivist method, which makes the strongest claim to precision and objectivity, must acknowledge that legislative intent divorced from moral purpose and historical significance is indeterminate.

The neglect of historical jurisprudence in the twentieth century is surely connected with a decline of the sense of history, the sense of destiny, the sense of mission, in America and throughout the West (and here I speak of Roman Catholic Christendom from the late eleventh to the sixteenth century, and of Catholic and Protestant Europe and America from the sixteenth to the early twentieth century). Indeed, it was the Western sense of history as destiny and as mission that gave rise to historical jurisprudence. It was in the West, and perhaps only in the West, that the belief in the ongoing character of law was conceived and came to prevail: the belief, that is, in the capacity of the body of law, the *corpus juris*, to grow over generations and centuries. Moreover, in the West and in the West alone the belief was conceived and came to prevail that the growth of law has an internal logic, that changes that are made in law over generations and centuries are part of a pattern of changes, that law is not merely ongoing, that it has a history, it tells a story.

The historicity of law in the West was linked with the concept of law's supremacy over the political authorities who make it. The developing body of law, whether at a given moment or in the long run, was considered to be binding on the state itself. The ruler could make law, but he could not make it arbitrarily, and until he remade it—lawfully—he too was bound by it.

Of course Western rulers did make law arbitrarily, and they did disregard and subvert the law that they made, and the destiny and the mission were not realized. Periodically, there were revolutionary upheavals, which sought to overthrow the *ancien régime* which had betrayed the vision and to replace the old positive laws with new laws. Every Western nation traces its legal system back to such a national revolution—and beyond that, to the eleventh century revolution of the Roman Catholic Church which established the canon law as the first modern legal system and which gave rise to the rationalization and systematization of secular legal systems.³⁶

36. This is a main theme of H. BERMAN, *LAW AND REVOLUTION*, *supra* note 1.

If it is to reestablish its credentials, historical jurisprudence must recognize the revolutionary as well as the evolutionary element in the development of the Western legal tradition, its discontinuities as well as its continuities. By the same token it must recognize the times in which we now live, the direction in which we are moving, and the alternative paths that lie ahead of us. It must combine historical insights into law with the political insights of legal positivism and the moral insights of natural-law theory.

VI

INTEGRATIVE JURISPRUDENCE AS A KEY TO UNDERSTANDING THE DEVELOPMENT OF WORLD LAW

The development of law in the world community in the latter part of the twentieth century provides a dramatic illustration of the virtue and the necessity of an integrative jurisprudence. Only by combining the valid insights of each of the three traditional schools can this development be properly explained, justified, and guided.

In speaking of law in the world community, I have in mind not only public international law, as it is traditionally defined—the law governing relations among national states—and not only United Nations law—the law governing international organizations, but also the enormous body of contractual and customary legal norms that govern relations not among states but among persons and enterprises engaged in economic and other activities that cross national boundaries.

Positivist jurisprudence once took the position that in the absence of an international sovereign, with powers of enforcement, there could be no such thing as international law. Since World War II, however, positivist jurisprudence generally has accepted international law as law and has not only played a significant role in explaining and analyzing international law but has also contributed significantly to its development. Today more than 20,000 international treaties and conventions are registered with the United Nations. These treaties constitute legislation not only of the individual states that have ratified them but also of the international community of states. Despite the weakness of international judicial and enforcement powers, such treaties and conventions are generally recognized as constituting international law in the positivist's sense of the word "law." Also, the United Nations now has 500 intergovernmental organizations charged with the administration of United Nations law. Positivist jurisprudence has contributed techniques of making, interpreting, and applying this body of international legal rules and procedures in a consistent and effective way.

Similarly, natural-law theory has played a significant part in the

development of world law. It has emphasized the rootedness of international law—the *jus gentium*—in universal principles of justice. The international law of human rights is a striking example of its contribution. Fundamental moral principles have been embodied in the two great human rights covenants—the U.N. Covenant on Civil and Political Rights and the Covenant on Economic, Social, and Cultural Rights. The doctrine has been established that the international community of states, and even in some cases individuals, may take legal action to protect citizens of a foreign state against certain forms of oppression by their own government.³⁷ Implicit in these legal instruments and procedures is the recognition that the entire world, all humankind, despite its many diversities, not only shares some common beliefs concerning human dignity but also has a common concern to protect human dignity by a body of law that stands above the law of individual states.

The political and moral aspects of the development of a world law need to be viewed, however, in the historical context of the gradual formation of a world community.³⁸ This has started primarily in the economic and cultural spheres. In the transfer of goods and services and capital and in transportation, finance, and communications, the world is experiencing the rapid development of a common language and a common law. The exporters and importers of the world, the shipowners, the

37. A leading Soviet scholar, G.I. Tunkin, has written:

The principle of respect for basic human rights has become one of the most important principles of international law. A new branch of international law is emerging which defines the duties of states to ensure the basic rights and freedoms to all peoples, irrespective of race, language, religion, or sex. . . .

Contemporary international law proceeds from the fact, and this is exceedingly important, that a close link exists between a state's ensuring basic human rights and freedoms and the maintenance of international peace and security. This link is stressed in many international conventions (particularly the Convention on the Elimination of All Forms of Racial Discrimination and the covenant on human rights) and in United Nations General Assembly resolutions.

G.I. TUNKIN, *THEORY OF INTERNATIONAL LAW* 81-82 (W. Butler trans. 1974).

Soviet theory would permit states, but not individuals, to intercede in certain instances to contest violations by a foreign state of rights of its own citizens. An American court, however, has taken jurisdiction of such a violation at the instance of the aggrieved foreign citizen. *See Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980) (suit against Paraguayan official who acted under color of authority in torturing plaintiff's son).

38. Some sociologists have undertaken to study political and cultural aspects of what they call "the modern world-system." Niklas Luhmann wrote in 1972 that:

[T]he fact of a context of interaction which extends over the whole globe is evident. The universal possibility of communication (with periodic and regional exceptions) and universal peace has been factually established. An interlinked world history has come into being. The common death of all humankind has become possible. Commercial traffic connects all parts of the world

N. LUHMANN, *A SOCIOLOGICAL THEORY OF LAW* 256 (E. King & M. Albrow trans. 1985); *see also* Meyer, *The World Polity and the Authority of the Nation-State* in *STUDIES OF THE MODERN WORLD-SYSTEM* 109-137 (A. Bergesen ed. 1980); Robertson & Lechner, *Modernization, Globalization and the Problem of Culture in World-Systems Theory*, 2 *THEORY, CULTURE & SOC.* 103 (1985).

marine insurance underwriters, and the bankers have their own law. A c.i.f. contract, bill of lading, marine insurance certificate, bill of exchange, or letter of credit has the same legal character in Paris, Moscow, Beijing, Buenos Aires, New York, and Timbuktu. This body of mercantile law, which had its origins in the rapid development of European trade after the First Crusade, has developed during more than eight centuries into a world-wide system as the economies of all countries are gradually coming to form a single market.³⁹ Similarly, the world is becoming united by science and technology, by scholarship in other fields, by literature and the arts, by medicine, by tourism, by sports, and by much else.

In the process of international economic and cultural unification there is developing a universal body of legal norms and processes, and even a common world-wide legal consciousness, connected with these types of activities. The body of law governing such international economic and social intercourse has emerged not only in the form of an expanded public international law but also, and primarily, in the form of mutual understandings among the participants, built up out of negotiation and agreement and informal methods of dispute resolution. It is a law based on custom and contract, developed in part through transnational nongovernmental associations. Only in later stages has it sometimes been codified—in some instances prematurely—by intergovernmental organizations. The law of the world community “is developed,” in Savigny’s words, “first by custom and by popular belief, then by juristic activity—everywhere, therefore, by internal, silently operating forces, not by the arbitrary will of a legislator.”⁴⁰

Thus the emerging law of the world community is explained, justified, and guided not only by the collective political will of national states, expressed in international legislation and administration, and not only by a moral order, expressed in universally accepted standards of procedural and substantive justice, but also by an ongoing shared historical experience, namely, the growth of a body of transnational customary law, which may be understood as constituting an early stage of a new era.

This, indeed, is the crisis of our legal tradition: We are at the end of one era and at the beginning of another. We are at the end of an era in which *world* history was centered in *Western* history and at the beginning of an era in which *Western* history is centered in *world* history. With respect to law, the sense of ongoingness, of progress, of destiny and mis-

39. See Berman, *The Law of International Commercial Transactions (Lex Mercatoria)*, Part III, Folio 3 of A LAWYER’S GUIDE TO INTERNATIONAL BUSINESS TRANSACTIONS (2d ed. 1983), revised edition in 2 EMORY J. INT’L DISP. RES. (1988); H. BERMAN, LAW AND REVOLUTION, *supra* note 1 (especially chapter 11, “Mercantile Law”).

40. See *supra* note 25.

sion, which has characterized the Western legal tradition for some nine centuries, and which has given the political and moral aspects of that tradition their dynamic impulse, has diminished substantially. At the same time, a new global legal tradition is emerging which in some ways threatens the Western legal tradition while also building upon it. This is a crisis in the Greek sense of that word—a *krisis*, a choosing—and in the Chinese sense, which I am told is called *wei-ji*, represented in two characters signifying respectively “danger” and “opportunity.”

As Jürgen Moltmann has emphasized, our sense of history is based on hope.⁴¹ When we say “history” we mean something more than chronology. We mean not merely change but patterns of change, implying direction in time, which in turn implies either purpose or fate. We mean either Hebrew linear history from Creation to the coming of the Messiah, or Greek cyclical history, or Enlightenment progress, or Christian history of fall and rise, decline and regeneration, death and rebirth. “History” does not mean “the past,” nor does it mean “time” in some abstract Kantian sense. It means, rather, “the times,” and especially “our times,” including the time which separates our past from our future. It inevitably contains a prophetic element.

The Western belief in a providential history is built into the Western concept of historical jurisprudence. It is also the basis of the belief that we are now living in a time of global crisis, a time of global choices having to do with the preservation of the environment, the reduction of racial conflicts, the elimination of hunger, and, above all, the establishment of peace among nations. That a body of world law is emerging to help us make these choices constitutes the historical context in which the politics and the morality of law is to be determined.

The legal positivist and the legal moralist will say, “This may—or may not—all be true, but what does it teach us about the nature of law? How does it answer the philosophical questions, ‘What is law?’ and ‘What is its relation to politics and to morality?’” An integrative jurisprudence does not deny the validity of those questions. It affirms, however, that in national legal systems, as in the developing body of transnational law, the tensions that exist between a political and a moral answer to those questions cannot be resolved unless they are viewed in the context of another set of questions: “What is a legal tradition? How does it come into being and how does it develop? To what extent are the analytical concerns of the positivist and the moral concerns of the natural-law theorist not only conditioned and structured, but also directed and resolved, by the long-term historical concerns of the community whose law it is?”

41. J. MOLTSMANN, THEOLOGY OF HOPE 230-303 (J. Leitch trans. 1967).

This is not to say that in law history “trumps” morality and politics. The issue is not the primacy of one or another of these three aspects of the legal enterprise but rather their integration. In situations where they appear to conflict with each other, the right solution can only be reached by prudentially weighing the particular virtues of each. What are trumps depends on what is bid; and sometimes the bid is no trump. Indeed, all that needs to be subtracted from each of the three major schools of jurisprudence, in order to integrate them, is its assertion of its own supremacy. All that needs to be added is a recognition of their mutual interdependence.

