

The Age of Antiquarius: On Legal History
in a Time of Troubles

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During the greater part of the past hundred years the American law schools enjoyed a spectacular success. The students, the professors, even the deans, shared a buoyant self-confidence, an ebullient enthusiasm, a pervasive intellectual and spiritual euphoria. It is only during the past twenty years or so that we have begun to doubt, to question ourselves, to wonder whether, after all, we were on the right track. The self-confidence of our predecessors has given way to a disquieting intellectual disarray. Various proposals have been put forward in the attempt to rekindle the enthusiasm of the past in the service of new causes. One such proposal, which has recently enlisted a considerable amount of support, is that, abandoning the antihistorical bias which has characterized most American legal writing in this century, we should, at long last, become historians and turn our energies to the reconstruction of our long despised past. If indeed the study of law is to become a branch of the study of history, we will do well to give some thought to the problem which the adoption of an historical approach—to law or anything else—poses in the declining years of the twentieth century.

The legal profession in this country has always taken pride in being up to the minute. This present-mindedness has indeed been quite as apparent in the law schools as in the marketplace. Our case books must be revised every year or two, so that the old cases can be weeded out and replaced by new ones. Our treatises must receive annual infusions

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of new blood; for the truth, the whole truth and nothing but the truth, you must consult the Pocket Part. Our course offerings must be realigned year by year to reflect our current crises and concerns: how to rebuild a city; how to clean up our sadly polluted environment; how to make the poor people content with their station in life.

Our present-mindedness has led us to hold jurisprudential theory in low esteem. We have looked on ourselves as problem solvers, not as system builders. But lawyers can no more escape jurisprudence than people can escape humanity. If we do not have one system, we shall have another system; the one thing we cannot conceive of is that there is no system. Our pretense that we are all pragmatic anarchists has never been more than skin deep.

I

We have, I suggest, been living for a long time—too long a time—within the mainstream of nineteenth century thought. Our current malaise may reflect the obscure realization that the nineteenth century ended some time ago. Still, it was a great century while it lasted and we may congratulate ourselves on having been able to go on living in it as long as we have. A review of some of the characteristic features of nineteenth century theory will help us understand both why the promise it held out was a peculiarly attractive one to lawyers—practitioners and academics alike—and why it has taken us so long to break out of its magic spell.

To the nineteenth century mind it was self-evident that the course of events was arranged in a developmental sequence and was not a merely random series of accidental happenings.¹ That was the common thread which ran through many celebrated nineteenth century formulations in apparently diverse fields. From that basic assumption it naturally followed that if we could catch hold of the process which had been at work in any area of human endeavor or of the physical universe, we would already know what the end result must be: the end is contained in the beginning as the flower is contained in the seed. Belief in the existence of some developmental process usually went hand in hand with the belief that the process, at least in the long run, was one of progressive improvement—*toward* some vaguely conceived, perhaps distant, yet realizable Utopia where clean-limbed men, beautiful women and well-behaved children would live in peace and abundance, devoting them-

¹ M. MANDELBAUM, *HISTORY, MAN, & REASON: A STUDY IN NINETEENTH-CENTURY THOUGHT* (1971) is a rich and rewarding essay in intellectual history. In the following discussion I have borrowed liberally from Professor Mandelbaum's analysis.

selves to exercises of intellectual exploration and spiritual contemplation.²

Thus to Darwin came the hypothesis that the process of natural selection was that of the survival of the fittest. To Marx came the hypothesis that the process of political organization was the successive dominance of the several classes into which he found society divided—from feudalism, to capitalism, to communism. To Auguste Comte, the father of sociology, the successive stages of human thought ran in linear sequence from the theological through the metaphysical to the scientific; in Comte's mind there was no doubt that there was a clear gain as revelation was succeeded by philosophical speculation and speculation by empirical knowledge.³ To Herbert Spencer—whose *Social Statics*, we once had to be reminded, were not written into the fourteenth amendment⁴—it was clear that the law of development was “an advance from homogeneity of structure to heterogeneity of structure.”

[T]his law of organic progress [he wrote] is the law of all progress. Whether it be in the development of the Earth, in the development of Life upon its surface, in the development of Society, of Government, of Manufactures, of Commerce, of Language, Literature, Science, Art, this same evolution of the simple into the complex, through successive differentiations, holds throughout.⁵

The nineteenth century invented history, as it invented so many other things. The nineteenth century historian looked on himself as engaged in the same line of work as other scientists and theorists—his being different from theirs only in that the materials he worked with related to the past instead of the present. But his function, like theirs, was to lay bare the developmental sequence which would explain the progress of human society and thus reveal the goal toward which it was headed. Most nineteenth century historians shared the pervasive Utopianism of the time—which no doubt explains why such an inordinate amount of time and energy was spent in trying to account for the dissolution of the Roman Empire and the regression of European society for five hundred years into something like barbarism. Extraordinary ingenuity was lavished on the demonstration that the Empire had not really dissolved

² There were, of course, exceptions to the prevalent Utopianism—such as Spengler's apocalyptic visions in *The Decline of the West* (first published in Germany in 1918–22). Whether the fantasies of that eminent Victorian, Professor Toynbee, are to be classified as Utopian or the reverse depends on the reader's predilections.

³ Comte seems to have followed Saint-Simon in this formulation. On the “law of the three stages,” see M. MANDELBAUM, *supra* note 1, at 63 *et seq.*

⁴ *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting).

⁵ H. SPENCER, *Progress: Its Law and Cause*, in 1 *ESSAYS: SCIENTIFIC, POLITICAL AND SPECULATIVE* 10 (1857), *quoted in* M. MANDELBAUM, *supra* note 1, at 90.

and that society had not really relapsed into barbarism—at most there had been a few minor setbacks and temporary reversals in the steady march toward the good life.⁶

The various emerging disciplines, both in the natural sciences and in what were later called the social sciences, were looked on as being merely so many alternative routes toward the ultimate truth which would some day be revealed—the ultimate truth about man, about his society, about his environment, about his universe. The philosopher, the scientist, the economist, the sociologist, the historian were all brothers-in-arms in the prosecution of this essentially theological enterprise. And just as every river must some time reach the sea, so their divergent labors would some day all come together in the final, stupefying revelation of all the truth about everything.

The underlying hypothesis of nineteenth century theory was that, once we had correctly identified the relevant developmental process, we held not only the explanation of why things are as they are but also the key to unlock the future. In practice it proved quite as impossible as ever to predict what was going to happen next year or next decade or next century. The past could be plausibly arranged in sequence but what the next link in the chain was going to be remained as unpredictable as ever. The theorists, particularly those who concerned themselves with the organization of human society, seem to have reacted instinctively to this uncomfortable fact of life with the reassuring belief that the process had almost come to its predetermined end, the goal had been nearly reached, Utopia was just around the corner if it was not already here and now. Indeed any one who had the good fortune to be born into the late nineteenth century establishment in Western Europe or England or the United States might reasonably have felt that further progress was unimaginable, just as a reversal of fortune—a decline and fall—was inconceivable. Thus most nineteenth century social theory, including nineteenth century historical theory, seems to come implicitly to a dead stop as of the date of publication. Just as the theologians had concluded that the age of miracles was over, so their

⁶ The war was carried on, so to say, on two fronts. One line was that, despite the barbarian invasions of the late fifth century, the Empire, even in the West, continued to flourish (in somewhat altered form to be sure) for another several hundred years. See, e.g., H. PIRENNE, *MOHAMMED AND CHARLEMAGNE* (Am. ed. 1939). For a variety of current approaches to Pirenne's ideas, see *THE PIRENNE THESIS: ANALYSIS, CRITICISM AND REVISION* (rev. ed. A. Havighurst 1969), particularly Lopez, *Mohammed and Charlemagne: A Revision*, *id.* at 40–55. The other line was to persist in antedating the beginnings of economic and social recovery in Western Europe—back to, for example, the ninth or tenth century. On the origins of feudalism, see the altogether fascinating work by the late Marc Bloch, *Feudal Society* (Am. ed. 1964).

successors concluded that the age of mutations was over. The theorists, however ingenious their reconstruction of the dynamism of the past had been, ended by presenting us with a static model which, it was assumed, would hold good for all time to come. Even in the Marxist version there was only one more revolution to look forward to. History and the other social sciences became, we might say, the continuation of theology by other means.

II

In the history of American legal thought the half century which preceded World War I was a period of prodigious and unprecedented achievement. The major categories into which we have subdivided our legal systems were, one by one, reduced to order and certainty in treatises which were as notable for their intellectual excellence as they were for the uncontrolled exuberance of their footnotes. We may take the *Restatements* of the 1920s as the last gasp of this explosion of intellectual energy.

All this literature was inspired by the nineteenth century predisposition to believe that the age of miracles and mutations was over. It was clear enough that the common law had changed since its emergence in England after the Norman Conquest. The early writs had given way to the forms of action, which had in turn been consigned to the grave, from which, it may be, they still rule us. Equity had arisen to supplement the common law and then to disappear within it. Rules and doctrines had emerged, flourished for a while and vanished. The law book writers arranged the past in sequence and then, like their counterparts in the social sciences, came to a dead stop. In law, as elsewhere, we ended up with a static model, assumed to be incapable of further development or change. The one, true rule of law having been discovered and proclaimed, there was no need to give the matter further thought. By 1910 or 1920 we had apparently arrived at our legal Utopia.

All this was carried out not in the name of history but in the name of science. Dean Langdell of Harvard, who had as much as anyone to do with making us what we have become, once remarked that "law is a science" and that "all the available materials of that science are contained in printed books."

[T]he library [he went on] is to us all that the laboratories of the university are to the chemists and physicists, all that the museum of natural history is to the zoologists, all that the botanical garden is to the botanists.⁷

⁷ Quoted in A. SUTHERLAND, *THE LAW AT HARVARD 175* (1967). The passage quoted was

Implicit in Langdell's analogy of law to the natural sciences was the assumption that legal theorists, like his chemists, physicists, zoologists and botanists, were engaged in research designed to lead to the progressive discovery and revelation of truth. The essential quality of scientific truth, as the nineteenth century saw it, was its immutability. From the same cause the same effect must always follow. The controlled experiment must always lead to the same result. Once the classification of animal life and plant life has been completed, we know, for all time, what the classification is. The legal scholar in his laboratory, the library, was engaged in a comparable endeavor. The rules and doctrines which his patient labors illuminated, the fundamental principles of the common law which they illustrated, all shared the immutability of scientific truth.

Langdellian jurisprudence led its adepts to the conclusion that law is a neat and tidy structure of interlocking logical propositions. Holmes began his first lecture on the common law with the celebrated epigram: "The life of the law has not been logic: it has been experience."⁸ The flashing thrust was apparently meant as, and understood by his audience as, a direct attack on Dean Langdell, who may indeed have been seated in the front row.⁹ Holmes, a nineteenth century man, was not without his own ideas of process. He hypothesized that the inevitable course of legal development is from a starting point at which rules of law are based on moral judgments about subjective fault or guilt toward an end point at which all moral content will have disappeared and the defendant's state of mind will have become irrelevant. At the hypothetical end point, law should become, as he liked to put it, formal, objective and external.¹⁰ However, Holmes succeeded, as the Langdellians did not, in keeping his theory open-ended by his insistence that rules of law merely reflect changing social conditions and must change as they change.¹¹ Thus the process which he hypothesized was a never-

from an address to the Harvard Law School Association in 1886. Langdell had expressed the same idea in the preface to his *A Selection of Cases on the Law of Contracts* (1871).

⁸ O.W. HOLMES, *THE COMMON LAW* 5 (M. Howe ed. 1963).

⁹ Holmes had already used the epigram in his unsigned review of the second edition of Langdell's *A Selection of Cases on the Law of Contracts* (14 AM. L. REV. 233 (1880)). See M. HOWE, *JUSTICE OLIVER WENDELL HOLMES: THE PROVING YEARS 1870-1882*, at 155 *et seq.* (1963).

¹⁰ The series of lectures which makes up *The Common Law* is devoted to demonstrating that this hypothesis holds true in all the fields he deals with—criminal law, torts, contracts and so on. I do not know what the source of Holmes's hypothesis was or if, indeed, there was a source.

¹¹ The following passage, from his 1897 address "The Path of the Law," is no doubt the most celebrated, as it is the most eloquent, statement of this aspect of Holmes's thought:

You can always imply a condition in a contract. But why do you imply it? It is because of some belief as to the practice of the community or of a class, or because

ending one, never quite to be completed, always to be started again from scratch. The true Langdellians rejected or ignored that complicated thought and pursued their own simple-minded search for truth. Never, I dare say, has any field of law appeared to be as perfectly structured, as free from any kind of fault or flaw, as the law of contracts in Williston's great treatise.¹²

The legal realists, after World War I, found the entire Langdellian structure absurd and, during the period of their ascendancy, effectively demolished it.¹³ The realists, however, did not in the least challenge the basic idea that "law is a science." Langdell's error lay in having analogized law to the natural sciences. According to the realists, what law was like—indeed what law was—was a social science. It soon came to be an article of faith that our fellow social scientists had outstripped us in the quest for truth and that we had much to learn from them. Wherefore—under the bright banner of "interdisciplinary studies"—we turned to the "models" which the economists, the anthropologists, the sociologists, the psychologists and the psychoanalysts were more than willing to provide us with. The interdisciplinarians were most successful when they remained at the highest possible level of abstraction. When they attempted to prove, through "empirical studies," the relationship of the theoretical model to the real world, with which lawyers cannot help but be concerned, they mostly came to grief.¹⁴

After World War II the eager faith of the realists came to seem as absurd as the simple dogma of the Langdellians had seemed after World War I. Now that the natural sciences and the social sciences have suc-

of some opinion as to policy, or, in short, because of some attitude of yours upon a matter not capable of exact quantitative measurement, and therefore not capable of founding exact logical conclusions. Such matters really are battle grounds where the means do not exist for determinations that shall be good for all time, and where the decision can do no more than embody the preference of a given body in a given time and place. We do not realize how large a part of our law is open to reconsideration upon a slight change in the habit of the public mind.

O.W. HOLMES, *The Path of the Law*, in COLLECTED LEGAL PAPERS 167, 181 (1920).

¹² The first edition of *Williston on The Law of Contracts* was published in 1920-22.

¹³ Llewellyn, *Some Realism about Realism—Responding to Dean Pound*, 44 HARV. L. REV. 1222 (1931), might be described as the manifesto of the "realist school," except for the fact that Professor Llewellyn consistently maintained that there was not, and never had been, a "realist school" or even a "realist theory." In Gilmore, *Legal Realism: Its Cause and Cure*, 70 YALE L.J. 1037 (1961), I attempted to account for the emergence of realism during the 1920s with the suggestion that it represented a reaction to the progressive breakdown of a relatively pure case law system. Professor Llewellyn, in conversation, commented that I had gone wrong in assuming that there had ever been a "realist theory." All there was, he said, was a methodology.

¹⁴ One of the most elaborate studies of this type was undertaken by the late Underhill Moore, following the "theoretical model" of so-called stimulus-response psychology. See Moore & Callahan, *Law and Learning Theory: A Study in Legal Control*, 53 YALE L.J. 1 (1943).

cessively failed us, we are, it seems, to look to history as our guiding star and steer our course by that. I dare say that if we had started by looking on ourselves as historians instead of scientists a hundred years ago, we would have come out approximately where we have, since nineteenth century ideas about history were quite as heavily influenced by the ideas of process, development and sequence as were nineteenth century ideas about science. But we are proposing to become historians in the 1970s, not in the 1870s. I trust that the historical approach to law will not be made the vehicle or the excuse for a further prolongation of our already over-long affair with the nineteenth century.

Belief in the inevitability of progress has not quite disappeared from among us. Mr. Chiao Kuan-hua, Vice-Minister for Foreign Affairs of the People's Republic of China, remarked in the course of his first address to the General Assembly of the United Nations:

Countries want independence, nations want liberation and the people want revolution. This has become an irresistible trend of history.

Human society invariably makes constant progress, and such progress is always achieved through innumerable revolutions and transformations

The advance of history and social progress gladdens the hearts and inspires the peoples of the world and throws into panic a handful of decadent reactionary forces who do their utmost to put up desperate struggles

. . . Although there are twists and turns and reverses in the people's struggles, adverse currents against the people and against progress, in the final analysis, cannot hold back the main current of the continuous development of human society.

The world will surely move toward progress and light, and definitely not toward reaction and darkness.¹⁵

No doubt the Davids of this world who have, against the odds, finished off some pitiful, helpless Goliath are, forever after, inclined to take the optimistic view. But what about the rest of us?

To people who are professionally situated as lawyers are, the idea that the future is, or can be made, predictable is almost irresistibly appealing. "The object of our study," Holmes told us, "is prediction" and went on to say that the very idea of law comes down to "prophecies of what the courts will do in fact, and nothing more pretentious"¹⁶ Instinctively, we nod approvingly. Indeed, if we are not certified soothsayers, qualified fortune tellers, expert readers of the crystal ball, what is

¹⁵ N.Y. Times, Nov. 16, 1971, at 16.

¹⁶ O.W. HOLMES, *supra* note 11, at 167, 173.

it that we are supposed to be doing? Lawyers in practice advise their clients on the legality or illegality of their proposed course of action or on whether they will win or lose their case if it comes to litigation. Professors who write law review articles and treatises look on themselves as a sort of service of supply, whose function is to provide the shock troops in the law offices and courtrooms with the weaponry which will insure victory. The good lawyer is the one whose predictions are consistently correct—whose prophecies turn out to coincide with what actually comes to pass.

Closely allied, in the legal mind, with the idea of predictability is the idea of certainty. The two ideas, in the legal context, are so closely related as to be very nearly identical twins. If the law is certain, then we shall be able to give our clients sound advice on what they should or should not do. If the law is uncertain, if the precedents are ambiguous, if the statute is badly drafted, then the best we can say (if we are honest) is that the question is interesting, but no one really knows what the answer is.

Our obsessive need for certainty has led us to place a high premium on unity of doctrine. Few things are more frustrating to a lawyer than the situation in which it appears that there are competing rules but that nobody really knows which rule is followed in state X.¹⁷ Even worse is the situation in which it appears that within a single jurisdiction there are divergent lines of cases, never cross-cited to each other, which, on identical facts, lead to opposite results.¹⁸ The great treatises of the

¹⁷ For example, there were three common law rules (which were usually known as the New York rule, the Massachusetts rule and the English rule) on the priorities between successive assignees of the same chose in action. Following the decision in *Corn Exchange Nat'l Bank & Trust Co. v. Klaunder*, 318 U.S. 434 (1943), it became of vital importance for banks and finance companies engaged in nonnotification accounts receivable financing to know which of the rules was followed in which states. According to Kupfer & Livingston, *Corn Exchange National Bank & Trust Co. v. Klaunder Revisited: The Aftermath of Its Implications*, 32 VA. L. REV. 910, 914-15 (1946), fourteen states probably followed either the New York rule or the Massachusetts rule and three more states possibly followed one of those rules; seven states probably followed the English rule and possibly seven more did too; in the remaining states there was no way of telling what rule was followed, either because there were no decisions or because there were conflicting decisions. Following the *Klaunder* case, financing arrangements of the type mentioned were unquestionably invalid in bankruptcy in all English rule states and were probably invalid in all Massachusetts rule states. Since a great deal of money was at risk, the New York rule was quickly adopted by statute in all states in which the issue was in the slightest degree doubtful. See 2 G. GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY § 25.7 (1965). Such a happy legislative ending is usually not available to counsel who find themselves mired in common law confusion.

¹⁸ See, for example, the two lines of New York cases on modification of executory contracts which trace back to *Lattimore v. Harsen*, 14 Johns. 330 (N.Y. Sup. Ct. 1817), and *Bartlett v. Wyman*, 14 Johns. 260 (N.Y. Sup. Ct. 1817). There is an excellent Comment,

golden age before World War I were essentially attempts to reduce the evident diversity of case law to a formal unity. If the "majority rule" and the "minority rule" could not plausibly be collapsed into a single rule, then the "better rule" was confidently stated, with the regretful notation that a few aberrant jurisdictions had not, as yet, seen the light. In the 1920s the first series of *Restatements* pursued the same goal on what could be called a quasi-statutory level. The draftsmen and sponsors of the current second series of *Restatements* do not appear to be entirely clear in their own minds what they are about.

Our obsession with unity, certainty and predictability has led us to convert those values into absolutes. Our goal—our Utopia—has been complete unity, total certainty, absolute predictability. (Of course if the goal had ever been reached or reachable, there would have been no need for lawyers and our venerable profession would have been one with the dodo and the dinosaur.) Our understandable professional concerns made us unusually vulnerable to nineteenth century theories which seemed to promise exactly the things we most wanted and needed. No doubt the same professional concerns account for the fact that we were able to go on living in the nineteenth century long after the bleak light of the twentieth century had, in most quarters, revealed that the bright Victorian promise had been a hollow fraud.

The word "historicism" has come into use to describe the idea that the past can be arranged in a meaningful sequence which will not only explain the present but reveal the future. Let us by all means become historians; let us not become historicists.¹⁹ Let us resist the temptation to make the real world conform to some all-purpose theoretical model borrowed from our betters, the economists or the sociologists, or even created for our own use. Let us particularly refrain from saying that anything that cannot be made to fit the model is "wrong" and should be disregarded if it cannot be forcibly repressed or turned into its own opposite. I do not in the least mean to suggest that whatever is is right or that we should always float with the stream or vote with the majority. I am, however, deeply suspicious of value judgments which are presented as the logically inevitable consequences which flow from the unchallengeable premises of whatever theoretical model is assumed to be true.

Historicism in its origins looked to the future, which was usually con-

Modification of a Contract in New York: Criteria for Enforcement, 35 U. CHI. L. REV. 173 (1967).

¹⁹ Among the critical attacks on the "historicism" thesis, see I. BERLIN, *HISTORICAL INEVITABILITY* (1954); M. MANDELBAUM, *supra* note 1; K. POPPER, *THE POVERTY OF HISTORICISM* (2d ed. 1960).

ceived to be Utopian. We have the misfortune to live in the future which the first generation of historicists could only dream of. Most of us find that the present condition of the human race leaves much to be desired. Our twentieth century despair has led some of us to a sort of perverted historicism in reverse which finds Utopia at some more or less distant point in the past. Once upon a time economic laws worked as they are supposed to; the streams of legal doctrine ran sweet and pure; order, tranquillity and harmony governed our society. If, by a strict construction of the Constitution and a stern repression of all antisocial behavior, we can return to our lost paradise, all will be well. This reverse historicism has the merit of being active instead of passive. I cannot see that there is anything else to be said for it.

However, apart from some version of historicism, what point can there be to the study of the past? If, say, the doctrine of consideration is moribund or dead, why waste our time—and our students' time—in reconstructions of what the doctrine was once supposed to mean? If we eschew historicism, can we escape the reproach that our historical studies are mere—as it is usually put—antiquarianism?

III

This lecture inaugurates a series of lectures on legal history named in honor of the late William Winslow Crosskey. The thesis of Professor Crosskey's great work *Politics and the Constitution*²⁰ was that the Constitution had been intended to establish a central government of plenary powers. That intention, he argued, had been subverted as the result of the political controversies—particularly the question of slavery—which raged during the first half century of the life of the Republic. The advocates of the position that the Constitution established a central government of severely limited powers eventually prevailed—and that has, of course, ever since been the orthodox view of the matter, even while the federal government has been in process of becoming, *de facto* if not *de jure*, the sort of government which, if Crosskey was right, we were originally meant to have. Failing health made it impossible for him to complete his work. The two volumes which he published were devoted to establishing what the original intention of the Founding Fathers had been. The volumes which would have detailed the process by which their intention was subverted were never written.

The Crosskey thesis was savagely attacked by most of the constitutional law experts of the time. I am not in any sense a constitutional law

²⁰ W. CROSSKEY, *POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES* (1953).

expert, so that my own opinion carries no great weight. However, for what it is worth, my thought is that the attacks on Crosskey were most successful when they were directed to peripheral aspects of his argument—such as the question of judicial review—with the reader being invited to conclude that, if Crosskey was wrong (or had overlooked much available evidence) on this point, he must be wrong on all the other points too.²¹

I have heard it said, however, that, even if Crosskey was right, it was all a great waste of time and effort. Suppose that Madison and others had indeed falsified the historical record. Their hoax or fraud or forgery having succeeded, what difference can it make what the Constitution was originally supposed to mean? Surely it is not seriously proposed to scrap a hundred and fifty years of history simply because words like “commerce” and “among” and “states” carried different meanings in the late eighteenth century from the meanings they now have. And, if that is not what is being proposed, what is there in *Politics and the Constitution* except antiquarianism—and mere antiquarianism at that?

I take it that the thought which is implicit in the “mere antiquarianism” line is that historical study is worthwhile or justifiable only if the result illuminates—is, as we said a year or two ago, relevant to—our present condition.²² Absent relevance, there is only an aimless rooting around in the trash heap of history, which is no more to be recommended than any other type of scavenging operation.

The idea that the only use of the past is to explain the present illustrates, I suggest, another of the vices of historicism—which is its tendency grossly to oversimplify the historical process.²³ At any given moment in time, there exists an indefinite number of possibilities for future development. We know that this is true when we look around us. But when we look backward in time, we can see that, of all the things that might have happened, only a few were made flesh. In the historicist reconstruction, only the things that actually happened count; the things that might have happened, but did not, are cast out of the equation.

²¹ See Hart, *Professor Crosskey and Judicial Review*, 67 HARV. L. REV. 1456 (1954). Fairman, *The Supreme Court and the Constitutional Limitations on State Governmental Authority*, 21 U. CHI. L. REV. 40 (1953), and Goebel, *Ex Parte Clio*, 54 COLUM. L. REV. 450 (1954), were equally savage. Crosskey was not without his defenders but, naturally, the favorable reviews were written in bland terms of general approval; the unfavorable reviews went in for detailed infighting.

²² Thus Holmes: “We must beware of the pitfall of antiquarianism and must remember that for our purposes our only interest in the past is for the light it throws on the present.” O.W. HOLMES, *supra* note 11, at 195.

²³ M. MANDELBAUM, *supra* note 1, at 134 *et seq.*, refers to this oversimplifying tendency as “the retrospective fallacy.”

Under the historicist hypothesis that the course of history is predetermined and inevitable, the only relevant facts about the past are those which can be made to fit into what later turned out to be the actual course of events. By picking out a few "relevant" facts and ignoring everything else, we succeed in reducing the past to a logical and orderly sequence and in persuading ourselves that what happened in fact was the only thing that could have happened.

It was the great merit of Professor Crosskey's work to have demonstrated that the conventional reading of our constitutional history involved a considerable amount of historicist oversimplification. He restored to public view a great deal which had been swept under the rug for the past hundred years. Scorn and derision were heaped on him because, ultimately, he failed to prove that his own reading of the constitutional text was the only one which a competent lawyer or a reasonably well-informed citizen could have entertained in the 1780s and 1790s. He may indeed, in the heat of argument, have overstated his case. But he did prove that the reading of the text which was, for example, put forward by Hamilton and Madison and Jay in the *Federalist Papers* was not the only possible one either—which was already a considerable accomplishment.

The trouble with oversimplifying the past is that it leads us to be overly doctrinaire about the present and the future. Even though we know perfectly well that we cannot predict who is going to win the next election or the next war or the next revolution, we turn our straight-line historicist reconstruction into a model which allows us—indeed compels us—to say that there is only one correct course to be followed. We become, in our own minds, prophets of a divine revelation and all those who disagree with us are consigned to eternal damnation. On the other hand, the historian who shows us that what in fact happened need not have happened the way it did or need not have happened at all enriches our understanding of the past and, consequently, puts us in a position where we can deal more rationally with the infinitely complex problems which confront us. The argument that historical study which has no direct and immediate relevance to our present condition is "mere antiquarianism" is simply another aspect of the historicist fallacy.

IV

The historical approach to the study of law has, if we go about it properly, much to recommend it. I doubt, however, that it will lead the law schools into another golden age. The Langdellians and the realists, in successive generations, promised their followers the truth. The promise of truth, so long as it is believable and believed, naturally generates

an almost superhuman enthusiasm and leads to accomplishment of no common order. Without Langdell's truth, we would not have had the extraordinary outpouring of energy which, for the first time, organized the scattered and disparate materials of the common law into a comprehensible pattern. We find today that they overorganized; their patterns had a geometrical precision which is not of this world. But the very failure of their attempt to confine the law within a formally perfect logical system has left us largely in their debt. Without the realists' truth, we would lack many insights into the complexity of the decisional process which we owe to them. We can see that they uncritically accepted as truths theories which were compounded largely of guesswork and error. But the truth is, if I may be permitted to use such a term, that the enthusiastic pursuit of error leads, as often as not, to major discoveries.

Situated as we are in time, we are in no position to offer our students—or ourselves—the consolations of Utopia. Only our newfound Chinese friends are still able to muster up belief in the inevitable march of history and in the progressive improvement of human society. Perhaps the law school of the University of Peking stands even now at the threshold of its golden age. The best we have to offer is a disenchanting rationalism which is not too sure of anything anymore²⁴—which is not the sort of production which has ever brought any audience to its feet cheering.

Optimism in the late twentieth century consists in believing that the course of history is not predetermined. Luckily, there is no reason to believe that it is; a hundred years of effort to prove the contrary have not produced a single theory which has ever proved anything. There is no reason to believe that there are not real alternatives of choice. We can go this way or that way. We can sink but it is, so far as we can know, equally possible that we can swim. Only in retrospect will we—or the generations which come after us—know whether our choices have been wise or foolish—which need not inhibit us from making them as wisely and rationally and responsibly as we know how.

Whether we look on ourselves as historians or as problem solvers, as philosophers or as activists, let us do what we can to preserve our students from the simplistic beliefs that there can ever be easy answers to hard questions, that the correct course which we should follow can ever be known in advance, that the process of decision can ever be reduced to one of logical deduction from infallible premises.

²⁴ "The spirit of liberty is the spirit which is not too sure that it is right . . ." L. HAND, *THE SPIRIT OF LIBERTY* 190 (3d ed. 1960).

A major function of law is to provide a mechanism for the orderly and peaceful settlement of disputes. In times of order and tranquillity the mechanism works smoothly and well. In times of disorder and conflict it works progressively less well. In such times it seems, to many people, both plausible and comforting to say that the breakdown of law is the cause of our disorder and that all will be well if we have more law and more laws and enforce them strictly. That misconceives the nature of law and overstates what, through law, can be accomplished. Law has never been the salvation of any society. A society is in good health when its legal system enlists the voluntary suffrage of the great majority of the citizens. A society is diseased when there is a widespread popular distrust of the system. But cramming more law down the throats of the people will merely aggravate the disease. It was said of the Romans that they made a desert and called it peace. It is equally possible to make a desert and call it law.

In a time of troubles the demand for truth far outruns the available supply. I trust we will not delude ourselves or others with the belief that we have, or ever will have, the truth—about man, about his society or even about the law.