

Rechtsgeschichte

www.rg.mpg.de

<http://www.rg-rechtsgeschichte.de/rg4>
Zitiervorschlag: Rechtsgeschichte Rg 4 (2004)
<http://dx.doi.org/10.12946/rg04/074-081>

Rg **4** 2004 74–81

James Q. Whitman

Bring back the Glory!

Dieser Beitrag steht unter einer
Creative Commons cc-by-nc-nd 3.0



Abstract

This paper, drafted in response to Dr. Kiesow's question, »Wozu Rechtsgeschichte?«, begins with a backward glance at the nineteenth century, when legal history played a leading role in the intellectual life of the western world. Since those great days, when legal history attracted figures like Karl Marx and Max Weber, the field has fallen on hard times. This is in large part the inevitable consequence of the declining prestige of law itself, which no longer seems to matter in the way that it did in the nineteenth century. Nevertheless, the paper pleads for something of a Return of Grand Theory in legal history. It is true that we can never bring back the glory years. But we can be figures of importance in the public debates of our time if we remain mindful of what it is that gives law itself its enduring social importance. Law reflects, in an unsystematic but telling way, some of the basic value commitments of society—commitments such as the contemporary American commitment to the free market, or the contemporary European commitment to »human dignity«. Law also reflects stylized histories of a given society's past—histories like that of the American triumph over race slavery, or the European triumph over Nazism. These value commitments and stylized histories are the natural territory of legal historians, who can best claim a role for themselves in public debate if they think of themselves as historians of values, rather than as historians of social realities.



Bring back the Glory!

I

It is obvious enough that the glory years of legal history lie in the past. What do we have to compare to the nineteenth century? During the nineteenth century, legal history was the nursery of the social sciences. Marx was trained as a legal historian. So was Weber. Jhering, who never ceased working as a legal historian, produced social scientific work of memorable ingenuity and fertility. Henry Maine's work was taken as an inspiration by intellectuals all over the anglophone world. Durkheim and Mauss began by working on problems of legal history. The ideas of Tönnies would have been unthinkable without decades of debate between Germanist and Romanist legal historians. And on it goes. The core propositions of nineteenth-century social science were almost all produced by legal historians, and any well-educated nineteenth-century reader was obliged to follow the newest developments in the legal historical literature. We do not enjoy that sort of position in the intellectual world any more. Today legal history is an *ancilla* of the law faculty, and one whose services are often dismissed with a patronizing wave of the hand.

What happened? The whole intellectual world changed, of course – not least because law itself seems to fade in importance. In the nineteenth century, the law had relatively few competitors among the academic disciplines. When the young Marx or the young Weber began university studies, there were no modern economics departments, no modern sociology departments, no modern departments of political science. An intellectually ambitious kid had

few choices, especially if he was not drawn to theology or classical philology. If he wanted to understand the nature of human society, he was likely to end up choosing between philosophy and law. Of those two, the law might easily seem the more promising. The old Enlightenment concept of »the laws« was not yet quite dead: Like Montesquieu or John Millar, nineteenth-century scholars could still begin from the quaint but stirring assumption that law offered a faithful account of the functioning of the social world. The law still seemed, as it were, to be the map of society.

Indeed, the very methodology of the legal science of the nineteenth century seemed to offer privileged access to the hidden workings of the human world. The nineteenth century was the long age of Puchta, an age when scholars all over the western world thought that they could identify the basic principles that stood at the foundation of any given legal system. Law was a *system*, with basic principles – and that suggested that society too might be a system with basic principles. Thus if the basic principle of the nineteenth-century European legal system was the exercise of the free will, it seemed perfectly fair to conclude that the basic principle of nineteenth-century European society itself was the exercise of the free will. What could be more intellectually thrilling than to identify the »basic principles« of a society? Many scholars thus gravitated to the law, applying juristic methodology to the understanding of history and society. The most famous and familiar examples were books involving broadly legal questions, such as the *Römisches Staatsrecht* of Mommsen. But in fact almost all nineteenth-century social

scientists adopted something like the methodology of Puchta, plunging into an exciting pseudo-juristic hunt for basic social principles and basic social logics.

At the same time, nineteenth-century societies were of course obsessed with historical explanation. More than that: Nineteenth-century societies were conscious of themselves as the products of a number of historic legal triumphs. They were the products of the triumph of *Rechtssprüche* over *Machtsprüche*, of the triumph of private property over feudalism, of the triumph of contract over status, of the triumph of policing over crime. In this atmosphere, legal historians seemed to have a natural public role, as the chroniclers of these transformations, or alternatively as their peculiarly well-informed critics.

All of that is now definitively past. The aspiring Marxes and Webers of today are much more likely to choose sociology or economics (or even philosophy) than law. Nobody really believes any longer that »the laws« are the map of society. Nobody really believes that there are legal »systems«, in the full sense of the word, that can be reduced deductively to certain basic principles. Certainly no one believes that the basic principles of the legal system, if they exist, are necessarily in any sense the basic principles of society. On the contrary, it seems to us comically naïve to treat legal sources as straightforward evidence of the way society works.

So we leave the business of understanding *society* as such to the economists, political scientists and sociologists. They are the ones who study how the real decisions are made. We tend to think of ourselves as the students of something much less grand: We are the students of how the decisions are carried out. For us, »the laws« are no longer what they were for Montesquieu or

Puchta. Instead, they have become what they were for Karl Kraus: the ugly stuff undertaken by *Richter und Henker*. »The law« has become the technical execution of the unsystematic, and indeed unprincipled, decisions made by the persons at the real centers of social power. To be a historian of law is thus to be the historian of two unprepossessing activities, both confined to seamy corners of society: doctrinal manipulation and punishment. So, at least, many legal historians seem to think, in their darker moments. With the law reduced to such a role, it is no surprise that we are no longer attracting the young Max Webers of this world to our classrooms.

Law matters less, and so legal history matters less. At the same time other factors have conspired to diminish the importance of our discipline. The universe of primary sources has changed since the nineteenth century. Nineteenth-century historians were strongly drawn to legal sources, which abound in the archives, and which seem to shed obvious light on the societies that produced them. The legal sources are still there, of course. But today they compete with a variety of other sources: The clever social or cultural historian would often rather discuss odd fables and works of art than law. Then there is the tragedy of the Nazi period, which did so much to destroy the German culture that provided intellectual leadership for all of us. This was a blow that fell particularly hard on legal historians, since so many of the leaders in the profession, if they were not chased out of Germany, became engaged collaborators. Legal history has suffered the fate of most established disciplines in an age of specialization, allowing its audience to shrink steadily. The study of law carries relatively little social prestige – at least in Europe; the United States is different. Low-prestige fields rarely flourish intellectually. The study

of law is inevitably oriented toward practice, which is off-putting to many intellectually-gifted students ...

II

All pretty bleak. But, we might say, so what? Many of us will see nothing to regret in the collapse of the great intellectual pretensions of the nineteenth century. Why should we put any effort into searching for absurdities like the basic principles of the social system? In any case, most legal historians have no interest in posing as big-time public intellectuals. Most of us are in the business for other reasons: We like legal history simply because we get pleasure from poking around in old books and records, or perhaps because we get pleasure from showing that other scholars are wrong – a very fine pleasure indeed. Legal history, for most of us, is fun, and we don't have any great desire to re-live the grandiose aspirations of a Karl Marx or Max Weber or Marcel Mauss.

So perhaps I should not expect much of an echo if I plead for a legal history that still clings to some of its great ambition. Nevertheless, that is what I want to plead for. I do not think we should accept the shrunken role that has been assigned to us. Other social sciences have seen the »Return of Grand Theory«.¹ Why can't we?

Here is my plea: The core problem is indeed that legal history matters less than it did in the nineteenth century because law itself matters less. Correspondingly, if we want to claim a larger place in the intellectual world for legal history, we must begin by insisting on the importance of law itself. In particular, we must transcend the view of law as the banal labor entrusted to *Richter und Henker*. If that is all that we study, we will always occupy a subordinate

position in the intellectual world. We need less jaundiced ways of thinking about the nature of law, ways that bring to the fore the peculiar values of legal history. Let me propose two such ways – one involving a return to some of the great intellectual programs of the nineteenth century, and one involving what Marie Theres Fögen calls »Rechtsgeschichten«.

The first way of vindicating the importance of legal history is to return, in a critical spirit, to the ambitious intellectual programs of the nineteenth century. Nineteenth-century legal historians managed to do such inspiring work because they did not shy away from dramatic generalizations about the evolution of human society. New basic principles had emerged! There had been a movement from status to contract! The state had gradually monopolized the legitimate use of violence! These exciting slogans still ring on among other social scientists, but legal historians show little creative interest in them. We have abandoned the business of doing interpretations of human history with that kind of sweep and grandeur. Of course this is partly because *all* professional historians have given up on Grand Theory, and most especially any form of Grand Theory that smacks of evolutionism. But there are other things going on too: We have experienced a kind of loss of faith in our sources. Can we really conclude all that much, we ask ourselves, from the dispersed, uneven, and fragmentary records of the unsystematic stuff that has been called »law« in different human societies?

Well, we will certainly never again offer the kind of confident conclusions that a Henry Maine offered. Nevertheless, I think there are ways in which we can continue to address the great questions of the nineteenth century. Some of this involves purely negative critical work:

1 The Return of Grand Theory in the Human Sciences, ed. QUENTIN SKINNER, Cambridge University Press 1985.

We can show the world our significance by proving the generalizations of the nineteenth century wrong. This is well worth doing, precisely because the social sciences continue to feed on the claims of our nineteenth-century predecessors. *We* may have lost faith in the possibility of establishing general claims on the order of »the state has gradually succeeded in monopolizing the use of legitimate violence« or »there has been a movement from status to contract«. But our cousins in the departments of sociology continue to repeat those claims as though they were proven scientific truths. If we do nothing more than attack the great generalizations of the past, we will have done a great deal to bring legal history into the healthy daylight of a general readership.

But I would like to think that we can do more than just attack our predecessors. We can offer important and fresh generalizations of our own. To be sure, we must be careful to avoid the broad evolutionist claims of the nineteenth century: There is no single story of the march of progress. We must also avoid excessive Puchta-like overgeneralizations about the supposed basic principles of this or that legal »system«. But middle-range generalizations, generalizations about particular developments within particular legal traditions, remain both possible and immensely significant for our social self-understanding.

In fact, there are even modest ways in which we can revive the methodologies of Puchta and Mommsen. Of course it is true that there are no »social systems« founded on basic principles. Nevertheless, legal orders do display certain recurrent and dominant basic value commitments. While we cannot be the historians of basic principles, I think we *can* be the historians of these basic value commitments.

Let me offer only a couple of obvious examples. American law has shown a growing commitment to the values of the free market over the last two centuries. This is not because American law is systematically and cogently derived from some »principle« of free market competition. There is nothing systematic or cogent about American law. In any case, it would be impossible to state analytically the basic principle of the free market. Nevertheless, it is perfectly correct to say that Americans are consistently drawn to free market approaches. It is also perfectly correct to say that the attachment to free market values that we find in American *law* reflects something important about the character and values of American *society*. Not least, it would be correct to say that this American romance with the free market is a fact of capital importance for contemporary legal history, and indeed contemporary world history. How did it arise? This is something that needs to be both chronicled and explained. Only legal historians can chronicle and explain it, and without intelligent history-writing our public debates will be both impoverished and silly.

Or to take another (I hope obvious) example: Continental European law has gradually come to embrace a commitment to something called »human dignity« – though it is now perhaps reaching the limits of its capacity to safeguard that »human dignity«. Here again, this is not because there is some clearly defined basic principle of »human dignity« that stands at the deductive root of all of continental law. The situation is far messier than that. Nevertheless, »human dignity« is a recurrent theme on the Continent, in ways that seem manifestly to reflect the moral ambitions of the European world.

The rise of these basic value commitments are momentous developments. They are also

developments of uncertain significance and with uncertain futures. They need their historians – and they need historians who think of themselves as having an authentic public role, just as the historians of the nineteenth century thought of themselves as having a public role. In order to take on such problems, we do not have to become full-scale historians of society as such. We do not have to trace all of the reality of the workings of the free market, or even the realities of human dignity. Writing about basic value commitments involves a different kind of task: It means, precisely, being historians of shifting *values*. But that is exactly the sort of task we are best suited to perform: Lawyers are trained to talk about values. And values matter – not only to us, but to the broadest general public.

III

As historians of values, we can investigate something else too: We can investigate what Fögen provocatively calls »Rechtsgeschichten«.²

Such *Rechtsgeschichten*, if I read her rightly, are moralized fables and histories, tales that portray the law as the product of a conflict between good and evil. Fögen's interest is in ancient Roman *Rechtsgeschichten*. These seem, at first glance, quite remote from our own world. Thus Fögen gives us the tale of Lucretia, who embodied the triumph of virtue at the founding of the Roman Republic; and the tale of Verginia, who embodied the triumph of the rule of law in the making of the Twelve Tables. Both were innocent and virtuous women, whose deaths created a kind of moral obligation: Like other sacrificial deaths – like the death of Iphigenia, or the battlefield deaths of soldiers – their deaths seemed to create moral obligations that spanned the generations. To be loyal to the values of the

Republic, and of Roman law, was to show fidelity to the sacrifices made by, and of, Lucretia and Verginia. These *Rechtsgeschichten* were of course not »law« in the narrow sense. But in some important way they laid the moral foundations of Roman law – gave it its morally imperative character.

All of that does seem, at first glance, to belong to a remote, fable-obsessed, pre-modern world. Nevertheless, as I hope Fögen would agree, such moralized fables and histories have not vanished from modern law. The law is still rich in exactly these sorts of legal histories. Take once again the example of »human dignity« in contemporary continental law. Here too we find a *Rechtsgeschichte*, a kind of Lucretia-like history. The tale is one we all know: It is the tale of the hard defeat of Nazism, followed by the inauguration of a new European era of »human dignity«, an era full of promise and moral obligation. This is certainly not a fable of the Roman type. Nevertheless, we should acknowledge that it has a narrative structure with real resemblances to the old fables, and it carries a moral message much like theirs. In particular, this story too draws its moral force, in part, from an appalling slaughter of innocents.

Let me rush to emphasize that this slaughter was by no means legendary: Members of my own family perished, among many millions of others. My purpose in comparing it to the tale of Lucretia is not to trivialize it, but to highlight its role in the moral logic of European law. To be loyal to the values of Europe today is to show fidelity to the sacrifices made in the 1940s – or perhaps, on a different reading, to the sacrifices made over the years 1914–1945. This story too serves to lay the moral foundations of the law, to give it its morally imperative character. The force of the law rests on a moral obligation, created by

² Römische Rechtsgeschichten.
Über Ursprung und Evolution
eines sozialen Systems, Göttingen
2002.

terrible crimes, vividly remembered, binding on the generations. The force of the law thus has to do with something very ancient indeed in the human world: It has to do with the moral significance of sacrifice – with the culturally formative memory of significant killings.³

We can identify many other such founding stories. Traditional Chinese law turned on a similar *Rechtsgeschichte*, the story of the defeat of Qin Legalism by Confucianism. This is another tale founded in the memory of outrage, this time the outrage of the disrespect for social and family hierarchies. This Confucian *Rechtsgeschichte* survived at the foundation of Chinese law for at least two millenia, and possibly into the present. There are less dramatic, and perhaps less compelling, versions of the pattern too: For example, in my own country today many people speak of the triumph, beginning with the election of Ronald Reagan, of the free market over the evils of state socialism. In the nineteenth century, of course, one spoke in the same way of the triumph of contract over status, and more broadly of the defeat of feudalism by revolution. Of course, a given legal order may rest on more than one such story: In American law, for example, we have not only the triumph of the market in 1980, but also the triumph over race slavery in 1865, and the triumph over tyranny in 1776. The stories, it should be noted, are not always stories of triumph. There are also tales of defeat – of the imposition of the Norman yoke, of the barbarization of pure Roman law, of the death of Ali. Not every legal order begins in victory, but very many of them indeed begin in some great clash of right and wrong.

These stories, to say it again, are not fables, in the narrow sense that they are not all entirely untrue. There really was a slaughter of the innocents in the 1940s, and contemporary Euro-

pean law really does turn on problems of human dignity. There really was a Qin dynasty, and traditional Chinese law really did turn on the conflict between Confucian and legalist values. Ronald Reagan was indeed elected, and market solutions really do dominate in contemporary American law. For that matter, there really were centuries of influential efforts to eliminate the effects of Normanization and barbarization on European law. But what matters most about the *Rechtsgeschichten* is not their truth. What matters most about them is their *meaning*, and in that respect they do indeed have a kinship with the world of fables.

For indeed, these *Rechtsgeschichten* must be understood as giving the law of a given society much of its meaning, much of its moral sense. That does not imply that these *Rechtsgeschichten* are enforced orthodoxies. The values they proclaim are never shared by every member of society: Thus there are plenty of Americans who reject market solutions, and (for better or for worse) plenty of German and French people who look upon European ideas of »human dignity« with suspicion and anger. For that matter, there were plenty of Chinese of the Qing who refused to take Confucian prescriptions seriously.⁴ And of course, Marx and many others rejected the legal faith of their age. Nevertheless, these *Rechtsgeschichten* are commonly heavy with moral meaning for every engaged member of any society. And to that extent, they tell us something of great significance: They do not tell us what a society *is*, but they do tell us what is *at stake*, what a society finds it worth fighting over. Law, to the extent it embodies these *Rechtsgeschichten*, is not the map of society. Nor is it the expression of a society's indefeasible basic principles. But it *is*, as it were, the text for debate in the public sphere: It poses critical value ques-

3 Cf. Violent origins: Walter Burkert, René Girard and Jonathan Z. Smith on Ritual Killing and Cultural Formation, ed. ROBERT G. HAMERTON-KELLY, Stanford University Press 1987.

4 KATHRYN BERNHARDT and PHILIP C. C. HUANG, *Civil Law in Qing and Republican China*, Stanford University Press 1994.

tions, upon which all authentically active members of a society must take some position.

These *Rechtsgeschichten* represent »history«, in the rich sense that »history« was understood in the hermeneutics of early twentieth century philosophers like Croce and Heidegger. As I hope we all remember, these men distinguished between what is »history« and what is merely »the past«: between *storia* and *cronaca*, as Croce had it,⁵ or between *Geschichte* and *Geschehen*, in the language of Heidegger. In their eyes, what made something history, what made it *storia*, what made it *Geschichte*, was that it had meaning – that it seemed to carry a message for us. The past, after all, is full of stuff – of the rubble of the things that happened to happen. History, in the fullest sense, is more than that: As Heidegger put it, history is »das im Miteinandersein ›vergangene‹ und zugleich ›überlieferte‹ und fortwirkende Geschehen«.⁶ History is the past infused with meaning for later generations. The ideas of early twentieth-century hermeneutics have little bearing on most of what philosophers of history do today. In fact, the approaches of a Croce or a Heidegger have been pretty vigorously rejected, even by such a sensitive philosopher as Arthur Danto.⁷ But for legal historians their arguments ought still to be full of life: *Rechtsgeschichten* are indeed about nothing other than trans-generational *meaning*.

These *Rechtsgeschichten* are the first and most natural territory of legal historians, and I think most legal historians with a feel for the grandeur of their subject sense that. Of course they adopt very different approaches. There are legal historians who take it upon themselves to create the dominant *Rechtsgeschichten* of their societies. We find such figures in the generation of Helmut Coing, for example, as we found them in the generation of Savigny. These are com-

monly the most eminent figures in the profession, and not infrequently the most resented. Conversely, there are legal historians who set about debunking the *Rechtsgeschichten* of their own societies, or of others.

But such are not the only tactics historians can adopt. We do not have to limit ourselves to either creating *Rechtsgeschichten* or debunking them. Fögen herself generally takes a different approach: Most of the time, she distances herself from the truth of her *Rechtsgeschichten*, in order to emphasize their meaning. That sort of history can be exceedingly revealing. We can indeed try to understand the institutions of the law in light of the prevailing historical narratives of their societies. In fact, we cannot avoid doing so. Is there any way to grasp American anti-discrimination law if we do not know the morally charged American history of race slavery? Can we fully understand the value structure of *bona fides* in Roman law if we neglect the moralized, and historicized, conception of *fides* more broadly in Roman society? Traditional Chinese law may not have remained wholly faithful to Confucian values, but it is surely impossible to make sense of it without remembering the vivid struggle over legalism. In short, we need these histories to make sense of the law, because history is a large part of what gives law its sense.

This too can give legal historians a feeling for their role in the world – and we ought to rejoice in having a role. At the same time, if we want to devote ourselves to these foundational *Rechtsgeschichten*, we should frankly admit that we will always have to face the fundamental tension in all hermeneutic approaches to history, the tension between truth and meaning. Of course we must maintain a commitment to truth, in the sense that our legal histories must be based on reliable evidence, correctly interpreted. At the

5 BENEDETTO CROCE, *Il Concetto della Storia*, ed. ALFREDO PARENTE, Bari: Laterza 1954, 124–131.

6 MARTIN HEIDEGGER, *Sein und Zeit*, 17th ed., Tübingen: Niemeyer 1993, 379.

7 ARTHUR DANTO, *Narration and Knowledge*, Columbia University Press 1985, 112–142.

same time, legal histories of any significance will always involve a process much more open-ended than the collection of evidence, and uncomfortably so. There will always be at least a little more to good history than getting the facts right. This is not an easy thing for most of us. After all, if we work hard enough, we are sure we can be right

about the *facts*. If we get the evidence right, nobody will ever have the pleasure of proving us wrong. But to claim to find the *meaning* of history is of course always to say something false ...

James Q. Whitman*

* Ford Foundation Professor of Comparative and Foreign Law, Yale Law School, New Haven, Conn.
james.whitman@yale.edu