

FRIENDSHIPS IN THE LAW

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If there had ever been a cross word at the Tulane Law School, one of the clues might well have been "In Ferd you have one" (*anagram*, 6 letters). Friends were certainly of vital importance in Ferd Stone's life; he lived for them, and it was through them that he had much of his special effect on the law and its study, at home and abroad. The comparative lawyer needs friends abroad. They are not just a pleasure but a necessity, for while the municipal jurist can sit solitary at his modem or even read a book, the only way to learn the secret impetus of a foreign legal system is by friendly talk with its adepts: conferences are good, but conversations are better. Ferd followed Dr. Johnson's advice about keeping his friendship in constant repair¹ and, like Falstaff with wit,² was not only a friend himself but a cause of friendship in others. Since I myself owe so much to friendships which Ferd promoted, as well as to friendship with himself, it seemed right to reflect on friendships in the law.

Montaigne and La Boétie

We can start at the Parlement de Bordeaux in 1557. Two lawyers there formed an intimate and harmonious friendship, which has resonated ever since. Etienne de la Boétie died in 1563, and Michel de Montaigne, three years his junior, never ceased grieving for him: "Since the time I lost him . . . I doe but languish, I doe but sorrow: and even these pleasures, all things present me with, in stead of yeelding me comfort, doe but redouble the grieffe of his losse."³ Montaigne retired to his enchanting castle, placed an inscription to his friend in its tower-library and there wrote those marvellous *Essais* which, along with the graceful poetry of Ronsard and the ejaculatory

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1. J. BOSWELL, *LIFE OF JOHNSON* 214 (R.W. Chapman ed. 1953).

2. "I am not only witty in myself, but the cause that wit is in other men." Shakespeare, *Henry IV, Part II*, ii.7. Dr. Johnson picked this up in saying of Foote "He is not only dull himself, but the cause of dullness in others." J. Boswell, *supra* n. 1, at 1205.

3. 1 MONTAIGNE, *ESSAYS* 207 (J. Florio, Trans., Everyman ed., 1910). Florio's translation into perfect Elizabethan prose was published just in time for use by Shakespeare. The *ESSAYS*, accepted in Rome in 1581, were placed on the Index in 1676.

effusions of Rabelais, are the glory of the sixteenth century in French literature. He would doubtless be gratified that those responsible for the streets of modern Paris have kept the names of Montaigne and La Boétie close together, probably indifferent that this should be in the chic eight arrondissement, but certainly surprised that his own name be remembered in an Avenue while La Boétie rates only a street, for in their day it was La Boétie who was much the better known and more admired. Montaigne admired his friend as much as he loved him, and says, most movingly, "If a man urge me to tell wherefore I loved him, I feele it cannot be expressed, but by answering; Because it was he, because it was my selfe."⁴

Montaigne's tutor spoke nothing but Latin to him from the age of three, so it is hardly surprising that in his Essay on Friendship he cites *De Amicitia*, the piece which Cicero addressed to his dear Atticus in the very year of Caesar's assassination, a crisis which was to result in Cicero's own death at the instigation of the future Emperor Augustus. The fruit of Cicero's friendship with Atticus is with us yet, in the form of a grand legacy of 426 letters,⁵ and if Cicero himself was more of an orator than a jurist, he cast *De Amicitia* in the form of a conversation between the greatest of the early Roman lawyers, Quintus Mucius Scaevola (some of whose words, by then five centuries old, were to be preserved for us in Justinian's *Digest*⁶) and Caius Laelius, the great friend of Publius Scipio Aemilianus, who saved Rome from barbarism by destroying Carthage and from parochialism by importing Greek culture, the taste for which was doubtless implanted by his tutor, the historian Polybius, retained by his adoptive father, the conqueror of Macedon.

After citing Cicero, Montaigne gives us a rather surprising quotation from Aristotle: "perfect lawgivers have had more regardfull care of friendship than of justice."⁷ His point is that concord is of the first importance for the city-state, and that amity is its base. "And if men are friends, there is no need of justice between them; whereas merely to be just is not enough: a feeling of friendship is also necessary."⁸ This contrast between warm friendship and cold justice suggests a story in Plutarch (some of whose writing was translated by

4. 1 MONTAIGNE, *supra* n. 3, at 201; the relationship between Montaigne and La Boétie has been likened to that between Hamlet and Horatio: E. DOWDEN, MONTAIGNE 89 (1895).

5. CICERO'S LETTERS TO ATTICUS (7 vols., 1965-1970), admirably edited by D.R. Shackleton Bailey.

6. D.41.1.64; D.43.20.8; D.50.16.241; D.50.17.73.

7. 1 MONTAIGNE, *supra* n. 3, at 196.

8. ARISTOTLE, THE NICOMACHEAN ETHICS 452 (VIII.1.4) (H. Rackham ed. 1926).

La Boétie) about Aristides the Just. During an ostracism--that characteristic device in Athens for defusing political discord (stasis) by banishing the politician who got the most votes--an illiterate voter (it was, after all, a democracy) asked a bystander, whom he did not recognize as Aristides, to write the name of his candidate for banishment on his potsherd for him. His nominee was Aristides himself, who, being Just, did as he was asked and wrote down his own name. Then he asked the voter what wrong Aristides had ever done him. "None whatever", replied the honest citizen, "indeed I don't even know the fellow, but I simply can't bear hearing him called "the Just" the whole time."⁹ And banished he was. As Aristotle says, being Just just isn't enough.

According to one of Montaigne's favorite books, the *Lives and Opinions of the Philosophers* of Diogenes Laertius¹⁰ (of whom nothing is known for sure, but who probably compiled this eclectic, unoriginal and unreliable work in the early third century), Aristotle wrote one book on Friendship as well as four on Justice (a "book" in those days being a unit of length rather than a separate work, and of course a scroll rather than a number of pages bound on one side).¹¹ The connection between justice and friendship, or rather between injustice and false friendship, must have been in Aristotle's capacious, if uncharming, mind when his beloved master Plato deprived him of the presidency of the Academy and gave it to his nephew Speusippus instead--an early example of the philosophy of nepotism;¹² not that this did Aristotle any lasting harm, for he went to Macedonia to tutor the princely Alexander, whose conquests of the physical world were to match, in éclat if not in duration, the intellectual triumphs of his teacher, and vindicate his saying, if Diogenes is right to report that he said it, that "The roots of education are bitter, but the fruit is sweet",¹³ a view of which modern educationists, ever keen to sweeten the roots even at the cost of embittering the fruit, might take note. But Diogenes's ascriptions are not really trustworthy. Can Aristotle really have said, when asked "What is a friend?" that it was "A single soul dwelling in two bodies"?¹⁴

9. 2 PLUTARCH'S LIVES 235 (B. Perrin ed. 1914) (Aristides VII. 5-7).

10. 1 DIOGENES LAERTIUS, LIVES OF THE GREAT PHILOSOPHERS 465 (V.22) (R.D. Hicks ed. 1925).

11. See L. REYNOLDS & N. WILSON, SCRIBES AND SCHOLARS 34-36 (3d ed. 1991). Thus when Justinian told Tribonian that the *Digest* was to be in fifty books, Tribonian knew how long it was to be.

12. *The Life of Aristotle* in G. ANSCOMBE & P. GEACH, THREE PHILOSOPHERS 3-4 (1967), less racy than that of Diogenes, is more reliable.

13. 1 DIOGENES LAERTIUS, *supra* n. 10, at 461 (V.18).

14. *Id.* at 463 (V.19).

Domat and Pascal

In the seventeenth century the idea that friendship is of value to the state--but of course it is now the nation-state rather than the city-state--is taken up in a large way by Jean Domat. Domat is one of the great figures of French legal history¹⁵--greater than Pothier, according to Portalis¹⁶--and his very special friend and fellow-Auvergnat was Blaise Pascal, one of the greatest figures of all intellectual history. We cannot expect a mere lawyer, even one as remarkable as Domat, to arouse widespread interest--certainly nothing to compare with Molière, three years his senior, or even Cyrano de Bergerac, three years older still--but Pascal has fascinated the modern world, by exemplifying the tension between scientist and saint, and housing in his stricken body the spiritual strife of reason and faith. We recall his marvellous saying: "Le coeur a ses raisons que la raison ne connaît point",¹⁷ and it was he, of course, who saw man as a reed, but a thinking reed¹⁸ that would be wise to bet on the existence of God since that way he couldn't lose,¹⁹ who was able to picture Aristotle laughing with his friends(!),²⁰ and who echoed Montaigne's concern at the fact that justice depended on where you were²¹--a concern shared by natural lawyers and their epigoni, the human rights brigade. He had a strong sense of the contingent in the sublunary sphere, and his famous remark that the history of the world would have been different if Cleopatra's nose had been any shorter²² has given the title to a marvellous example of modern juristic writing, on the rules of causation.²³ Though immensely clever, Pascal was not very learned, preferring mathematics to Latin (though he wrote his mathematics in Latin, as Newton a little later wrote his). Montaigne, however, was one of his favourite authors, along with Epictetus (rather an incongruous pair, the servile neo-Stoic and the renaissance pyrrhonist, both aces, of course, but aces

15. B. BAUDELLOT, *JEAN DOMAT* (1938).

16. S C. SAINTE-BEUVE, *L'HISTOIRE DE PORT-ROYAL* 523 n. 2 (6th ed. 1901).

17. B. PASCAL, *PENSÉES* NO. 277 (L. Brunschwig ed. 1904).

18. *Id.*, no. 347.

19. *Id.*, no. 233.

20. *Id.*, no. 331.

21. *Id.*, no. 294, from 2 MONTAIGNE, *supra* n. 3, at 297.

22. *Id.*, no. 162; compare 3 Montaigne, *supra* n. 3, at 34: "Your fantazie cannot by wish or imagination, remove one point of them, but the whole order of things must reverse what is past, and what is to come."

23. J. Esmein, *Le Nez de Cléopâtre ou les Affres de la Causalité* D. 1964.Chron. 205.

of very different suits).²⁴ Indeed, Sainte-Beuve describes Montaigne as the fox in Pascal's tunic, gnawing with his doubts and scepticism at Pascal's rigorous and laconic spiritual commitment.²⁵

In matters of belief, so much more obsessive then than now, when secular well-being is rated above eventual salvation and politics has to that extent ousted religion, Pascal and Domat were close. It is true that by their day the bloody Wars of Religion, from which Montaigne had stood aloof, though he witnessed their outbreak and lived through the Massacre of St. Bartholomew, had come to an end on the accession of Henry of Navarre, the Protestant who adopted Catholicism and procured tolerance for the Huguenots by enacting the Edict of Nantes, but tensions remained acute during the seventy-year reign of his grandson Louis XIV. The tensions existed not only between the Protestants and the Catholics, but also between the Catholics characterised by devout and puritanical independence, the Jansenists of Port-Royal, and those of a laxer, more flexible and submissive nature, represented by the Jesuits, who had been unwisely recalled from banishment by Henry, and now had the ear of the King because it was to their ear that he confessed his royal sins. We are more familiar with Protestant Puritans than these Catholic Puritans, who shared many of their characteristics and were no more popular with the secular authorities. Louis XIV extinguished the Protestants by revoking the Edict of Nantes at the behest of one of his mistresses, and subsequently shut up the dissident Puritan Catholics by closing the Jansenist headquarters, Port-Royal, of which Pascal was a member and Domat an adherent. With the Jesuits Domat was in frequent dispute. One dispute concerned Pascal. Domat had been at his death-bed, aged 39, and when the priest who had administered the last rites asserted that Pascal had at the end abjured his Jansenist views, Domat had to give him the *démenti*.²⁶ Domat actively, but ineffectually, opposed the establishment of the Jesuits in his home-town of Clermont-Ferrand,²⁷ he refused to allow any of his thirteen children to be educated by

24. See B. PASCAL, *Entretien avec M. de Saci*, in *OEUVRES COMPLETES* 291 (L. Lafuma ed. 1963). Sainte-Beuve gives a stunningly intelligent and elegant portrayal of Pascal's relationship with Epictetus and Montaigne (the pillar of stone and the pillar of mist: see R. SAYCE, *THE ESSAYS OF MONTAIGNE* 202 (1972)), 2 C. SAINTE-BEUVE, *PORT ROYAL* 382-399 (6th ed. 1901), and for this he deserves our appreciation even more than for writing about Portalis (5 *CAUSERIES DU LUNDI* 441 (1852)) or even for cuckolding Victor Hugo.

25. 2 SAINTE-BEUVE, *supra* n. 24, at 397. Pascal's response to Montaigne's concern with self-portrayal was to say (shout, scream?) "Le Moi est haïssable" (B. PASCAL, *supra* n. 17, no. 455).

26. BAUDELLOT, *supra* n. 15, at 199.

27. *Id.* at 200.

them,²⁸ and he used his legal position to have a Jesuit priest prosecuted for preaching the infallibility of the Pope,²⁹ whose shortcomings Domat expressed in his exclamation "Am I not to have the consolation of seeing a Christian on the throne of St. Peter?"

Domat and Pascal were not just fellow Auvergnats and fellow-believers: both sons of lawyers, they went to the same school in Paris, the Collège de Clermont, now the great Lycée Louis le Grand, close to the rue Domat and the Law Faculty, the rue Pascal being a little to the South, where Port-Royal used to be. After school, Domat participated in Pascal's experiments on air pressure, which involved climbing the Puy de Dôme, the volcanic mountain just west of Clermont. Pascal left Domat one quarter of the royalties payable on the vehicles he designed for the Paris transport system,³⁰ but unlike Montaigne, says little of friendship, and nothing really edifying. The fragment which says "*Je n'ai point d'amis*"³¹ may be explained away, but there is unquestionably something displeasing in the instruction he wrote to himself, found on a scrap of paper in his bed, not to let people love him because, given his impending death, there would be no future in it.³²

Domat, by contrast, gives friendship a special place in the Plan of Society at the beginning of his great *Les Loix Civiles dans leur Ordre Naturel* (1689).³³ In this work Domat, true to his time and place, sought to make an orderly system out of the chaos of Roman law as it is transmitted to us in the *Digest* and *Code* of Justinian (though as nothing to the chaos in which Pascal left his *Pensées*). He succeeded: Boileau said of him that he restored reason to jurisprudence, and Victor Cousin described his work as the "preface to the Code Napoléon."³⁴ The work was extremely successful, and justified the pension Louis XIV gave him in order to enable him to complete it,³⁵ though Domat remained puzzled that pagan Romans should have been such good lawyers when, after all, they did not recognize God, the Summum Bonum to which the first law required one to aspire, mutual love. "Friendships", he said, ". . . are . . . Sources of an infinite number of Good Offices and Services, . . . and . . . contribute a thousand ways to

28. PASCAL, *supra* n. 24, at 654.

29. BAUDELLOT, *supra* n. 15, at 204.

30. *Id.* at 33.

31. B. PASCAL, *supra* n. 17, no. 154; in no. 101 he observes that there wouldn't be four friends in the world if people knew what others said of them behind their backs.

32. B. PASCAL, *PENSÉES* NO. 832 (J. Chevalier ed. 1936).

33. J. DOMAT, *THE CIVIL LAW IN ITS NATURAL ORDER* (trans. W. Strahan, 1722).

34. VIOLLET, *HISTORIE DU DROIT CIVIL FRANÇAIS* 222 (2d ed. 1893).

35. BAUDELLOT, *supra* n. 15, at 187.

the Order and Uses of Society . . ."36 For Domat friendship was not the cause but the result of Engagements; its distinguishing characteristic was that one was free both to enter and to break it (for while the duty to love one's neighbour was invariable, even if he hated you, friendship was marked by reciprocal affection, altruistic in seeking the Summum Bonum, not interested in personal advantage, even of a moral variety). Its terminability distinguished it from marriage, its reciprocity from parenthood, its voluntary nature from fraternity. Domat does not discuss how the law should react to the incidents of friendship, for "seeing this is not a matter treated of in the Civil Laws, it is not proper to enter upon the detail of the particular Rules of the Duties of Friends."³⁷ One commentator is surprised that Domat should mention friendship at all when he is not going to discuss it in detail,³⁸ and it is true that the passage in question sits ill with what has been described as the "cold and geometrical construction" of Domat's system.³⁹ But the suggestion that Domat was just aping Cicero is unpersuasive in the highest degree.⁴⁰ One who himself drew a portrait of Pascal and then pasted it into his working copy of Gothofredus's *Corpus Juris* (Gothofredus being the first scholar so to name the legislation of Justinian) is much more likely to have been affected, in Pascal's phrase, by the reasons of the heart which reason does not know.⁴¹ One is reminded of Montaigne writing in his library under the inscription to La Boétie.

Boswell and Johnson

The friendship in the eighteenth century between James Boswell, the rakish Scots lawyer, and Samuel Johnson, *the* Englishman of letters, has given us one of the most entertaining books in the world, published exactly two hundred years ago, and one, indeed two, of the best biographies in English.⁴² Boswell is perhaps

36. 1 DOMAT, *supra* n. 33, at xvii.

37. *Ibid.*

38. BAUDELLOT, *supra* n. 15, at 85.

39. VIOLLET, *supra* n. 34, at 22.

40. BAUDELLOT, *supra* n. 15, at 86.

41. *Id.* at 38; the portrait is reproduced as the frontispiece to PASCAL, *OEUVRES COMPLETES*, *supra* n. 24.

42. J. BOSWELL, *LIFE OF JOHNSON* (R.W. Chapman ed. 1904, 1953); W. JACKSON BATE, *SAMUEL JOHNSON* (1978). JOHN WAIN, *SAMUEL JOHNSON* (1974) is also to be recommended. Johnson outdoes our generation in all it most prides itself on: not only was he a talk-show in himself, but his piece on the Falkland Islands demonstrates the trumpery quality of current journalism: see *Thoughts on the Late Transactions respecting Falkland's Islands*, in 5 S. JOHNSON, *WORKS* 392-426 (R. Lynam ed. 1825).

vulnerable to Domat's disapproval of friendships tinct with interest, but Johnson is not, unless joint relief from shared melancholia constitute personal advantage. How charming the story is of Johnson, already over forty, being roused from sleep at three o'clock one morning--he slept poorly--by a pair of young companions who besought his company for further carousal, and shouting down to them "What, is it you, ye dogs? I'll have a frisk with you."⁴³ He not only accompanied Boswell on a long voyage through the Highlands and Islands of Scotland,⁴⁴ a perilous trip for one of his years, but much earlier, in 1763, went to Harwich to see the young Boswell off to Holland to train as a lawyer, as so many Scots did in those days.⁴⁵ While at Utrecht, Boswell tried to put his life in order and, just as Domat had drawn up a Plan of Society, Boswell drew up an Inviolable Plan for himself: "For some past years you have been idle, dissipated, absurd and unhappy." (Boswell addressed himself in the second person). But Johnson had had a very beneficial effect: "The Rambler showed you that vacuity, gloom and fretfulness were the causes of your woe . . . He furnished you with principles of philosophy and piety to support the soul at all times. You returned to Utrecht determined. You studied with diligence."⁴⁶ And so, up to a point, he did, but whereas his father, the dour Judge Lord Auchinleck, wrote him, "It will be an entertainment to compare the two laws of Scotland and of Rome",⁴⁷ the son found other matters more entertaining, and despite his intention of "piously preparing for immortal felicity"⁴⁸ (trust Boswell to have grand aims!), he was subject to constant backsliding. He did, however, become a lawyer, and did quite well, if not as well as he madly hoped.

Though not himself a lawyer, Johnson helped Boswell with some of his cases. What Boswell didn't know was that Johnson also helped Robert Chambers to write the law lectures which Chambers had to give as successor, only twenty-five years old, to William Blackstone in the Vinerian Chair at Oxford.⁴⁹ The lectures were published in full

43. W. BATE, *supra* n. 42, at 346; J. BOSWELL, *supra* n. 42, at 176.

44. S. JOHNSON, A JOURNEY TO THE WESTERN ISLANDS OF SCOTLAND (M. Lascelles ed. 1971); R.W. Chapman (ed.), JOHNSON'S JOURNEY TO THE WESTERN ISLANDS OF SCOTLAND and BOSWELL'S JOURNAL OF A TOUR OF THE HEBRIDES WITH SAMUEL JOHNSON LL.D. (1924, 1931).

45. F.A. Pottle (ed.), BOSWELL IN HOLLAND 1763-1764 at 2 (1952).

46. *Id.* at 375.

47. *Id.* at 63.

48. *Id.* at 377.

49. W. BATE, *supra* n. 42, at 418. On Chambers and Johnson, see A. McNAIR, DR. JOHNSON AND THE LAW 16-17 (1948).

only a few years ago.⁵⁰ Chambers himself was not a Scot, but at school in Newcastle he made friends with two remarkable lawyers, the brothers Scott, better known to posterity as Lord Eldon and Lord Stowell, the leading equity and admiralty lawyers of their day. Indeed, Eldon acted as Chambers's stand-in for the three years during which the Vinerian Chair was kept for him while he tested the climate in India, where he had been appointed to the newly formed Supreme Court of Bengal,⁵¹ and Stowell accompanied Johnson on to Edinburgh to meet Boswell for the trip to the Highlands after dropping Chambers at Newcastle.⁵² The *Dictionary of National Biography* says of Chambers, "Wherever he went, he found friends",⁵³ and notes that this was incomprehensible to Dr. Johnson's friend Mrs. Thrale, the wife and widow of the brewer at the auction of whose property Dr. Johnson is alleged to have said "We are not here to sell a parcel of boilers and vats, but the potentiality of growing rich, beyond the dreams of avarice."⁵⁴ How marvellous Augustan speech and prose could be! But it was not always solemn. Dr. Johnson once happened upon Chambers throwing snails into his neighbour's garden and upbraided him for this unneighbourly conduct. Chambers explained that the neighbour was a dissenter. Replied Johnson, the Tory, "Oh, if so, toss away, Chambers, toss away!"⁵⁵

One of the friends of Robert Chambers in India was Sir William Jones, who while an undergraduate was also Tutor to the son of the first Lord Spencer (of whom Princess Diana is the direct descendant). Jones was already a member of Johnson's Literary Club, admitted the same day as Garrick, Johnson's actor school-friend whose death, Johnson said, "eclipsed the gaiety of nations and impoverished the public stock of harmless pleasure".⁵⁶ He was an excellent linguist, who came to know thirteen languages thoroughly and twenty-eight quite well, and his first three publications were in French, the first a translation from the Persian at the instance of the King of Denmark. When he became a lawyer and then Judge of the High Court of Calcutta, he decided to become the Justinian of India and embarked upon a codification of all the native law, Hindu and Mohammedan. Death prevented him, and Chambers wrote his epitaph in the chapel of

50. A Course of Lectures on the English Law Delivered at the University of Oxford 1767-1773 by Sir Robert Chambers, Second Vinerian Professor of English Law, and Composed in Association with Samuel Johnson (T.M. Curley ed. 1987).

51. 10 DICTIONARY OF NATIONAL BIOGRAPHY 22-3 (1887).

52. W. BATE, *supra* n. 42, at 463.

53. 10 DICTIONARY OF NATIONAL BIOGRAPHY 22 (1887).

54. BOSWELL, *supra* n. 42, at 1132 (6 April 1781).

55. J.C. BAILEY, DR. JOHNSON AND HIS CIRCLE 177 (1913).

56. J. BOSWELL, *supra* n. 42, at 58; Johnson lightly repelled Boswell's pert criticism of his expression: *id.* at 1021.

University College, Oxford.⁵⁷ Before going to die in India, as so many altruistic imperialists did, Jones had written an *Essay on Bailments*, which was quite successful in England and had a tremendous éclat in the United States, where Justice Story said of its author that if he had written nothing else "he would have left a name unrivalled in the common law for philosophic accuracy, elegant learning and finished analysis"⁵⁸, doubtless the very qualities which explain its relative lack of success in Britain, unless it was the author's opposition to the American War which made him unpopular with the authorities who had, as ever, the power of appointment and disappointment.

Holmes and Laski

Recent years have perhaps been less rich in friendships, but one could not write of friendships in the law without saying something of the relationship between Oliver Wendell Holmes, Jr. and Harold Laski. It was remarkable in its nature--they were very different in their age and styles, Olympian and organ-grinder's monkey--and in its product, for the *Letters*⁵⁹ make splendid reading, not far short in pleasurable interest from Boswell's *Johnson*. As to the warmth of the friendship, we need only quote Holmes's letter when Laski was leaving for England a few years after they met: "But oh, my dear lad, I shall miss you sadly. There is no other man I should miss so much. Your intellectual companionship, your suggestiveness, your encouragement and affection have enriched life to me very greatly." Ten years later he wrote: "You are the best correspondent I ever had."⁶⁰ And as to Laski's side, his biographer has said "No one who knew Laski well could fail to realise that there was in his feeling about Holmes a quality that tinged none of his other relationships".⁶¹

Those other relationships were very numerous. Some of the great men we have mentioned would doubt the possibility of having a true and deep friendship with more than one person--Dr. Johnson quotes Diogenes Laertius: "an old Greek said 'He that has *friends* has

57. 30 DICTIONARY OF NATIONAL BIOGRAPHY 174-177 (1892); there is a new life of "Indianus Jones": G. CANNON, *THE LIFE AND MIND OF ORIENTAL JONES* (1991).

58. 6 NORTH AMERICAN REVIEW 46-47 (1817), cited in 30 DICTIONARY OF NATIONAL BIOGRAPHY 175 (1892).

59. HOLMES-LASKI LETTERS (M. Howe ed. 1953).

60. *Id.* at 256, 1272.

61. K. MARTIN, *infra* n. 66, at 44.

no friend"⁶²--and though Laski is not beyond suspicion of promiscuity of affection, even of affecting affection, it would be unduly harsh to say that he was as much a name-catcher as he certainly was a name-dropper, or an opportunist in personal affairs. He *used* Holmes not at all, apart from asking for a testimonial towards a temporary job in Cambridge, England,⁶³ and Cosgrove may go too far in saying that Laski "made the most of the American connections he had established to enhance his own scholarly standing . . ." ⁶⁴

Laski is not perhaps very well remembered today in the United States--not too many will have read the *Congressional Record*⁶⁵ in which he was twice excoriated towards the end of his life--so it may be worth saying something of him.⁶⁶ Son of the leader of Manchester Jewry, himself in *Who's Who?* as well as a familiar of, and host to, Winston Churchill, young Laski was an outstanding pupil at Manchester Grammar School, and went on to Oxford, where his Tutor was Ernest Barker, a distinguished political scientist. He soon met and married (in Scotland, where parental consent was not required) a eugenicist called Frida, and while this was to prove a highly satisfactory step in the long term, in the short term it was disastrous, for it provoked a fearful family breach. Disowned by his father, Harold left with Frida for Canada and took a job at McGill. It was there that Felix Frankfurter recruited him for Harvard, where he served as Tutor and Instructor in History from 1916 till 1920. It was in the Law School, however, that his heart really lay. He took some classes there and not only acted as Book Editor for volumes 31 and 32 of the *Law Review* but also had a couple of articles published in it.⁶⁷ Just as he never lost an American accent,⁶⁸ he never disclaimed the profound impression that legal education *à la* Harvard had made on him; it stimulated him to cause Lord Sankey, the Labour Lord Chancellor, to

62. J. BOSWELL, *supra* n. 42, at 946; DIOGENES LAERTIUS, *supra* n. 10, at 464 (V.1.21).

63. HOLMES-LASKI LETTERS, *supra* n. 59, at 437.

64. R. COSGROVE, *OUR LADY THE COMMON LAW* 254 (1987).

65. *Congressional Record*; H. Repts. 24.1.1941 (Thomas, N.J.); 6.2.1946 (Woodruff, Mich.); K. Martin, *infra* n. 66, at 196.

66. See KINGSLEY MARTIN, *HAROLD LASKI (1893-1950), A BIOGRAPHICAL MEMOIR* (1953). Kingsley Martin was for long the influential editor of *The New Statesman*, now defunct.

67. *The Personality of Associations*, 29 HARV. L. REV. 561 (1917), published before his arrival; *The Early History of the Corporation in England*, 30 HARV. L. REV. 561 (1917); *The Responsibility of the State in England*, 32 HARV. L. REV. 447 (1919), along with Notes on MM. Duguitt and Hauriou. See Z. Chafee, *Harold Laski and the Harvard Law Review*, 63 HARV. L. REV. 1398 (1950).

68. KINGSLEY MARTIN, *supra* n. 66, at 59.

set up a Committee on Legal Education under Lord Atkin in 1932,⁶⁹ and, less successfully, to promote the appointment to the bench of an academic comparative lawyer.⁷⁰

For the rest of his life he taught at the London School of Economics, with frequent visits to the United States. There is no possible doubt about the impact of his teaching, for his intellectual flamboyance, his bubbling talk, with its vast range of allusion, and his inexhaustible readiness to do things for people gave him the greatest appeal. He was always busy, almost, one might unkindly say, a busybody, advising, cajoling, promoting, especially when Labour was in power, when he got very close to Ministers. He became Chairman of the Labour Party in 1945, and indefatigably promoted its left wing. He died in 1950.

His major writings are *The Grammar of Politics* (1925) and *American Democracy* (1948). Beginning as a pluralist, he ended as a committed Marxist, a change he attested in 1938.⁷¹ This was after the death of Holmes, who had gently written to him in 1930: ". . . little things once in a while make one wonder if your sympathies are taking a more extreme turn as time goes on."⁷² To give an indication of Laski's eventual beliefs, and to counter the view now being sedulously spread about that the Labour Party in England has never aimed at anything worse than the caring welfare state, it is worth quoting the Foreword to Laski's reappraisal of the *Communist Manifesto*, which was published "for the Labour Party" while that party was in power after the War, to celebrate the centenary of that stirring document.⁷³ As Chairman of the Labour Party, Laski was well placed to evaluate the destructive achievements of that Government.

Abolition of private property in land has long been a demand of the Labour movement. A heavy progressive income tax is being enforced by the present Labour Government as a means of achieving social justice. We have gone far towards abolition of the right of inheritance by our heavy death duties. Centralization of credit in the hands of the State is partially attained in the

69. Report of the Legal Education Committee (Cmd. 4463, 1934). Laski characteristically appended a separate Memorandum, saying of the United States that "our own progress in legal matters is likely to be measured in no small degree by our ability to discover and use the results of their experiments." *Id.* at 17.

70. The academic lawyer was H.C. Gutteridge. See A.W.B. Simpson (ed.), *BIOGRAPHICAL DICTIONARY OF THE COMMON LAW* 303 (1984).

71. KINGSLEY MARTIN, *supra* n. 66, at 74.

72. HOLMES-LASKI LETTERS, *supra* n. 59, at 1265.

73. H.J. Laski (ed.), *COMMUNIST MANIFESTO - SOCIALIST LANDMARK* (1948).

Bank of England Act and other measures. We have largely nationalized the means of communication while extending public ownership of the factories and instruments of production . . . Who, remembering that these were demands of the *Manifesto*, can doubt our common inspiration?⁷⁴

His less violent political views, or perhaps his readiness to express them, had already got him into serious trouble in Boston in 1919 when he addressed the wives of striking policemen.⁷⁵ That the *bien-pensants* should be shocked was one thing, but when his own students vilified him in *The Lampoon* he was deeply hurt.⁷⁶ He seems always to have been surprised by the violence of the reactions he quite foreseeably aroused, but there is something charming about his readiness to speak out. Not all were charmed, however; and Prime Minister Attlee once wrote him a severe letter, ending with the phrase "A period of silence on your part would be welcome."⁷⁷ Even his very supportive biographer says of his conversations, which were famous, that "he seemed to do most of the talking and very little of the listening."⁷⁸ This of course made him an excellent correspondent, as did his habit of improving the shining hour by lightly gilding the lily of truth.⁷⁹

Both parties naturally had other correspondents. Laski's friendship with Frankfurter, qualified only by differences over Zionism and the conduct of the Second World War, was highly productive of letters; Laski wrote to him just before he died ". . . it does not seem a generation since I rather timidly knocked at your door in the Law School and walked into the second most precious experience it has ever been my lot to have", and received a touching reply.⁸⁰ With Frankfurter Laski seems to have been more candid concerning his political views than with Holmes. Holmes's correspondence with Pollock, stretching over sixty years (1872-1932), is another compelling collection of letters. Pollock was not at all the sort of person to be captivated by Laski⁸¹ (least of all by Laski's naming his daughter after Pollock's great friend Maitland), so he was probably not best pleased to be told by Holmes that, "I have the greatest pleasure in his

74. *Id.* at 7.

75. KINGSLEY MARTIN, *supra* n. 66, at 38.

76. *Id.* at 40-41.

77. *Id.* at 182.

78. *Id.* at 225.

79. *Id.* at 51.

80. *Id.* at 272-273.

81. For the facts on Pollock, see A.W.B. Simpson (ed.), *supra* n. 70, at 421-

conversation as he is a portent of knowledge though still very young".⁸² Nevertheless it was not nice of Pollock to write of Laski to Holmes as he did: Holmes's early inquiry whether Pollock knew anything of Laski met with no response;⁸³ when Pollock reported on reading a book by Laski, Holmes had to correct his misconceptions about Laski's background;⁸⁴ but then an event occurred which permitted Pollock to pounce. Sir Sankaran Nair, a wealthy Indian, had asserted in writing that General Sir Michael O'Dwyer, then Lieutenant-Governor of the Punjab, was responsible for the excesses of the Amritsar massacre (made familiar to recent film-goers by *Gandhi*). The General sued for libel, and Laski was one of the jurymen. Not being a qualified lawyer, he was not disqualified as a juror--surely a matter of regret to everyone involved. According to Pollock there was some evidence at the trial of excessive violence at Amritsar(!) but none whatever as to the plaintiff's responsibility for it. In his letter to Holmes he proceeded: "Verdict--for the plaintiff--one jurymen dissenting. That jurymen was, if you please, Harold Laski. People here say he is a Communist, which I can hardly believe considering his historical learning. But anyhow I don't understand in what school he learnt to give a verdict against the evidence."⁸⁵ Holmes parried the blow, observing that Laski had not written to him about the case since its early stages [surely an odd fact in itself, especially as Holmes had asked Laski how it turned out,⁸⁶ and Laski had written to Frankfurter about it?⁸⁷] and discounting the imputation of Communism. Years later Pollock manifested his acidulated nature once again. In order to mark Holmes's eighty-ninth birthday Laski had published a laudatory, perhaps rather adulatory piece in *Harper's*. Pollock wrote to Holmes, asking if Holmes didn't feel a bit like the Carpenter in Lewis Carroll's poem: "The Carpenter said nothing but 'The butter's spread too thick.'"⁸⁸ One can understand also Holmes's reply, that he was "so touched and moved by the note of affection and made so shy by the praise that I hardly like to speak about it and could not criticize."⁸⁹

Laski's conduct in the O'Dwyer trial is characteristic. He brazenly tells Holmes "I have spent hours in the box trying to explain to the others why hearsay evidence is not admissible, but utterly in vain"⁹⁰ and "I am having the happiest of times in making the judge

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82. KINGSLEY MARTIN, *supra* n. 66, at 223.
 83. 1 POLLOCK-HOLMES LETTERS 238 (M. Howe ed. 1942).
 84. 2 Pollock-Holmes Letters 21-22.
 85. *Id.* at 141.
 86. HOLMES-LASKI LETTERS, *supra* n. 59, at 625.
 87. KINGSLEY MARTIN, *supra* n. 66, at 64.
 88. 2 POLLOCK-HOLMES LETTERS 260.
 89. *Ibid.*
 90. KINGSLEY MARTIN, *supra* n. 66, at 63-64.

pronounce *dicta* on cases that have long interested and puzzled me."⁹¹ The jury, as we know, were unpersuaded by his arguments, but it is surprising that Mr. Justice McCardie was not infuriated by his behaviour. This says something about both the pertness and the charm of Laski who said he was impressed by the conduct of the trial: "Rhetoric, bullying, insinuation are reduced to their minimum."⁹² His view was very different years later when he himself was plaintiff in a libel suit against a provincial newspaper which in a report of a pre-election meeting said that he had advocated violent revolution.⁹³ Laski lost. The jury found that the newspaper had given a fair and accurate report of what he had said, and he was extremely hurt, not least by the success with which Sir Patrick Hastings Q.C. had very unfairly trawled his voluminous writings for inconsistencies. He was also put to great expense--the costs were £13,000--but well-wishers, many in the United States, contributed enough to see him through.⁹⁴ Whether this support was forthcoming despite or rather because of the pillorying he had received in Congress and elsewhere it is more difficult to say. Both his disturbance at the public reception of his views and the fact that he received so much tangible support from those who knew him personally--President Roosevelt wrote him a warm letter shortly before the President's death⁹⁵--go far to vindicate the conclusion of his biographer, Kingsley Martin, ". . . that the clue to Harold's strength and weakness lay in his desire to love and be loved."⁹⁶

Of the friendships we have glanced at, those between Montaigne and La Boétie and between Domat and Pascal were between men of like age and stamp. That between Johnson and Boswell resembled the relationship between Laski and Holmes in that they were of very different ages and character, and that the almost invariable esteem in which Johnson and Holmes have been held is not matched by similar admiration accorded to Boswell or Laski--not that Johnson was a lion in his lifetime, like Holmes; indeed, he was rather a bear. The first to praise Boswell (apart from himself) was Thomas Carlyle, in an essay on Johnson which, according to Laski, was "superior to anything else in the language on him"⁹⁷. Carlyle writes so well and

91. HOLMES-LASKI LETTERS, *supra* n. 59, at 616-621.

92. *Id.* at 613.

93. See H.J. LASKI, *On Being a Plaintiff*, printed in KINGSLEY MARTIN, *supra* n. 66, at 274-277 and *My Day in Court*, in M. Rubinstein (ed.), WICKED, WICKED LIBELS 168 (1972); and KINGSLEY MARTIN, *supra* n. 66, at 175-179.

94. KINGSLEY MARTIN, *supra* n. 66, at 178.

95. *Id.* at 166.

96. *Id.* at 269-270.

97. HOLMES-LASKI LETTERS, *supra* n. 59, at 539.

movingly that one is bound to agree with Laski's "One simply can't read him without a stir and a throb."⁹⁸ Carlyle's praise is tempered:

How the great old Samuel, consuming daily his own bitter unalleviable allotment of misery and toil, shows beside the poor flimsy little soul of young Boswell; one day flaunting in the ring of vanity, tarrying by the wine-cup and crying, Aha, the wine is red; the next day deploring his down-pressed night-shaded, quite poor estate, and thinking it unkind that the whole moving of the Universe should go on, while *his* digestive-apparatus had stopped.⁹⁹

The contrast between "rough Samuel and sleek, wheedling James"¹⁰⁰ is powerfully drawn. Of Boswell "he was vain, heedless, a babler; had much of the sycophant, alternating with the braggadocio, curiously spiced with an all-pervading dash of the coxcomb . . . lived no day of his life without doing and saying more than one pretentious ineptitude."¹⁰¹ This is harsh. But wait! "That Boswell was a hunter after spiritual Notabilities, that he loved such, and longed, and even crept and crawled to be near them . . . that he did all this, and could not help doing it, we account" [and here is the marvellous interrupted cadence] "a very singular merit. The man, once for all, had an 'open sense,' an open loving heart, which so few have; where Excellence existed, he was compelled to acknowledge it; was drawn towards it, and . . . if not as superior, if not as equal, then as inferior and lackey, better so than not at all."¹⁰²

Not only, according to Carlyle, does this atone for Boswell's gross and manifest defects of character and conduct, but it is all the more meritorious in that Boswell had to overcome his social superiority in order to pay such productive court to one who, as his father said, "kept a school and called it an academy."¹⁰³ This is generous as well as perceptive of Carlyle, born quite close to Boswell in terms of geography, so very far below him in terms of class and status. And he sums up: "His sneaking sycophancies, his greediness and forwardness, whatever was bestial and earthy in him, are so many blemishes . . . Towards Johnson, however, his feeling was not

98. *Id.* at 925.

99. T. CARLYLE, *Boswell's Life of Johnson* in 4 T. CARLYLE, CRITICAL AND MISCELLANEOUS ESSAYS 67, at 121 (1869).

100. *Id.* at 82.

101. *Id.* at 73.

102. *Id.* at 74.

103. *Ibid.*

Sycophancy, which is the lowest, but Reverence, which is the highest of human feelings."¹⁰⁴

Laski loved reading Boswell but would have disavowed any likeness. He would have been largely right to do so, though Boswell is unquestionably the more interesting character. Laski could not stop saying how much pleasure he got from Boswell ("Joy unutterable")¹⁰⁵ though Holmes had earlier admitted that his sister called him Boreswell and that he himself did not regard Boswell as a standby.¹⁰⁶ Indeed, Holmes preferred reading Mrs. Piozzi (Mrs. Thrale, the brewer's widow) while accepting of Johnson that "There was something beautiful in the old man, of course."¹⁰⁷ One can see how Holmes might not care for the certitudes of Johnson, while Laski, even less attuned to the substance of Johnson's political views, would be attracted by his assurance and lack of scepticism.

Of Johnson and Boswell we have the talk; of Holmes and Laski, though they loved talking, only letters. Yet the letters are as lively as the talk, and make as admirable reading. They are mainly about books--books read, books (and opinions) being written, books bought and given. Laski was a serendipitous haunter of second-hand bookshops. Now Laski writes that he has bought a copy of *Contre-un* by La Boétie¹⁰⁸, now that a stranger in a Paris café has admired his copy of a rare book on Montaigne.¹⁰⁹ Laski buys a first edition of Pascal's *Pensées* for ninepence and sells it (he modestly boasts) for eight pounds¹¹⁰, and reads a life of Domat, fuelling his interest in Port-Royal¹¹¹, which Holmes by no means shared.¹¹² Their respective attitudes to Montaigne and Pascal are illuminating. Holmes far prefers the former¹¹³, and when Laski allows that "Montaigne is quite tip-top, the most companionable of people",¹¹⁴ Holmes replies that Montaigne seems to him much more than companionable¹¹⁵, and says "He knew

104. *Id.* at 79-81.

105. HOLMES-LASKI LETTERS, *supra* n. 59, at 907.

106. *Id.* at 38.

107. *Id.* at 1269, 803.

108. *Id.* at 428. "a discourse he entitled *Voluntary Servitude*, but those who have not known him have since very properly rebaptized the same *The Against-One*." 1 MONTAIGNE, *supra* n. 3, at 196.

109. HOLMES-LASKI LETTERS, *supra* n. 59, at 1422.

110. *Id.* at 1120.

111. *Id.* at 962.

112. *Id.* at 753, 757.

113. *Id.* at 586, 645.

114. *Id.* at 639.

115. *Id.* at 645.

all I know, bar later discoveries."¹¹⁶ "I sat reading him all day long. I am the richer for it and have had a lot of amusement."¹¹⁷ Laski returns to Montaigne, and ends up writing that "I know nothing so good for one's self-respect as a human being as the rereading of Montaigne and Bayle."¹¹⁸ Elsewhere he writes: ". . . there are few people with whom you (or I, for the matter of that) have such natural kinship as he."¹¹⁹

If Holmes helped Laski to Montaigne,¹²⁰ Holmes was more resistant to Laski's urgings of Pascal, though he diligently read him: he begins to appreciate him but the last half "simply bored me"¹²¹ and he found a good deal in the *Pensées* useless: "A few sublime passages make people forget the sophisticated or inadequate reasoning in a large part of the *Pensées*."¹²² Laski's attitude to Pascal seems ambiguous, possibly in deference to the judge's want of keenness. At one place Laski says he had taken a "deep draught of Pascal by whom I found myself singularly unmoved"¹²³, and again "Pascal I never liked"¹²⁴, yet elsewhere we find "I know nothing to touch Pascal",¹²⁵ and speaks of "my enthusiasm for Pascal":¹²⁶ "All other psychology seems petty and mean before the almost feverish insight of that poor, tortured soul . . . Much the greatest Frenchman of the seventeenth century."¹²⁷ Outside his correspondence Laski writes of the *Pensées* that they are perhaps the most influential apologetic Christianity has known since the Reformation",¹²⁸ though he would be less concerned with the effect or cogency of Pascal's writing than by "that scepticism the agonizing results of which are written eternally in the passionate sentences of Pascal."¹²⁹

116. *Id.* at 503.

117. *Id.* at 495.

118. *Id.* at 1087.

119. *Id.* at 487.

120. *Id.* at 510.

121. *Id.* at 346.

122. *Id.* at 709, 587: ". . . while he knew one or two deep things [Pascal] didn't know as much about man or life or the rational use of thought as Montaigne."

123. *Id.* at 521.

124. *Id.* at 649.

125. *Id.* at 574.

126. *Id.* at 710.

127. *Id.* at 707.

128. *Id.* at 987.

129. H. LASKI, *THE RISE OF EUROPEAN LIBERALISM* 97, 126 (1936). One can only regret that Laski did not write the book he long planned on political thought in the seventeenth century.

Of course there is nothing wrong in tempering one's letters to the sensibilities of their addressees, provided one avoids hypocrisy and undue deference, even in the young towards his senior by far, but one does wonder whether Laski was not a little uncandid in his references to Karl Marx when he was writing to the Justice, who early displayed his distaste. For example, there was some discussion whether it was Marx or Proudhon who called the other a humbug, Proudhon being the Frenchman who familiarized us with the view that "Property is Theft"¹³⁰ (a formula which, according to Marx, had been promulgated by Brissac before 1789),¹³¹ and illustrated the relationship of ownership and possession in a disagreeably piquant manner by saying that while the husband is owner, the lover is possessor.¹³² Holmes thought it was Proudhon who called the other a humbug, Laski knew it was Marx, yet he thanked Holmes for the correction(!), and said nothing when Holmes repeated his error years later.¹³³ Holmes said of Marx that *Capital* is "open to articulate demonstration of his fallacies"¹³⁴, and later that it "showed chasms of unconscious errors and sophistries that might be conscious."¹³⁵ Laski parries: "As to Marx, I wouldn't say *vox et praeterea nihil* as you seem inclined to do", but continues that "like so many Jews, he is never absolutely first-hand either in thought or research."¹³⁶ When Laski is preparing a Fabian pamphlet and public lecture on Marx, he allows that "I find toying with his books very interesting"¹³⁷ but "with less and less admiration as I go on"¹³⁸. "Really I loathe the fellow even while I recognize his powers"¹³⁹ and he boasts that his paper "confuted that ungenial soul"¹⁴⁰, so that Holmes can write "I am glad that you can bore a gimlet hole in Marx, as I think him a humbug (I mean in his reasoning)."¹⁴¹ It is, of course, quite possible to dislike a person whose work affects one profoundly, but can Laski really have disliked Pascal and Marx as much as he says in his letter to Holmes? Their desperate certitudes cannot have failed to appeal to him, though he was doubtless glad to be spared the anguish of the one and the heaviness of

130. In P. PROUDHON, QU'EST-CE QUE LA PROPRIÉTÉ? 1-2 (1849).

131. MARX-ENGELS CORRESPONDENCE 143 (S. Ryzanskaya ed., I. Lasker trans. 1975).

132. PROUDHON, *supra* n. 130, at 30.

133. HOLMES-LASKI LETTERS, *supra* n. 59, at 84-85, 375.

134. *Id.* at 161.

135. *Id.* at 1265.

136. *Id.* at 83.

137. *Id.* at 338.

138. *Id.* at 358.

139. *Id.* at 370.

140. *Id.* at 467.

141. *Id.* at 1000.

the other, and to enjoy the playful insensibility which made him so congenial a companion and correspondent.

Yet a glance at Marx's correspondence is enough to show anyone that he was utterly rebarbative as a person; there may be extenuations or even justifications, but they are called for. One is tempted to echo Portia about the limp suitor: "God made him, and therefore let him pass for a man."¹⁴² His letters are compounded of the dogmatic, the imperative, the depreciatory, full of heavy irony and vulgar abuse, reeking of conspiracy and paranoia, boastful and self-pitying in turns. Poor Engels, who had to put up with this. No wonder he is billed as the only lifelong friend Marx ever had, whether or not it is true that he carried his friendship beyond intellectual, moral and material support to the point of treating as his own the illegitimate son of Marx and the housemaid.¹⁴³ Yet he himself shared that obsession with current public affairs which trivializes human intercourse and is the especial bane of modern life. Holmes said he never read a newspaper,¹⁴⁴ but if he had, though he knew full well what was going on underneath, he would not have stripped every daily event of its specific quality and reduced it to a manifestation or instance of some imagined historical trend, process or law. Montaigne put his finger on it: "I ordinarily see, that men, in matters proposed them, doe more willingly ammuze and busie themselves in seeking out the reasons, than in searching out the trueth of them. They leave things, and runne to causes. Oh conceited discoursers!"¹⁴⁵ The dehumanizing effect of Marxism is manifest in its every aspect: one could almost speak of alienation, making everything seem inhuman. So although the Marx-Engels relationship was pregnant with consequence for millions, it will not serve to fill the gap in our little survey of lawyer-friends; and gap there certainly is, for we have skipped the nineteenth century and omitted Germany altogether. A much better candidate is the relationship between that very great lawyer, Friedrich Carl von Savigny (with whom Marx studied the *Digest* at the University of Berlin in 1836-1837)¹⁴⁶ and Jakob Grimm, the much-more-than-grammarians who produced a famous Law of his own.¹⁴⁷ Their correspondence

142. SHAKESPEARE, *THE MERCHANT OF VENICE* I.ii.

143. D. McLELLAN, *MARX* 18 (1975) asserts the fact; it is doubted and denied by T. CARVER, *FRIEDRICH ENGELS* 161-171 (1989).

144. A.W.B. Simpson, *supra* n. 70, at 254. Dr. Johnson may well have said to Mrs. Thrale "It is the good of public life that it supplies agreeable topics and general conversation", but others may think the specifics of gossip about individuals more entertaining and even informative.

145. 3 MONTAIGNE, *supra* n. 3, at 278.

146. T. ZIOLKOWSKI, *GERMAN ROMANTICISM AND ITS INSTITUTIONS* 114 (1990).

147. Grimm's Law as to "sound-shifts" is that as between the Greek and Gothic languages, unvoiced plosives become unvoiced fricatives, voiced plosives

"forms part of the great series of correspondences from Luther through Goethe and Bismarck to the present day."¹⁴⁸

Savigny and Grimm

Jakob Grimm, one of the brothers Grimm of the *Fairy Tales*, was born in Hanau, near Frankfurt, in 1785, the eldest of six surviving children who were left in poverty by the early death of their Protestant father, a local judge.¹⁴⁹ Through the help of an aunt with connections, Jakob was able to go up the road to Marburg to study Law. At Marburg he was entranced by the lectures of Savigny. "What can I say of Savigny's lectures but that they had the most profound effect on me and constituted the most decisive influence on my whole life and study?"¹⁵⁰ Teacher and pupil got on famously in the little University of only two hundred students, and it was in Savigny's rooms, not far above his own (Marburg is rather steep), that Jakob first saw such old German books as Bodmer's edition of the *Minnesinger*, and thus met the matter to which he was to apply the method he was learning from his teacher: "My lifetime of scholarship is due to the stimulus of this one man."¹⁵¹ When Savigny decided to go to Paris for his researches, he asked Grimm to come and help him. Grimm was thrilled. He went in February 1805 and left Paris in October just before the news of Trafalgar broke.

Savigny, descended from Huguenot émigrés, was born just five years before Grimm into circumstances which were socially grand

become unvoiced plosives and voiced aspirates become voiced plosives. The Law is unamended save for subsequent developments. The Law presupposed the discovery by Sir William Jones of the connection between Sanskrit and European languages (*see* text to n. 57 *supra*). *See* O. JESPERSEN, *LANGUAGE* 40-47 (1922).

148. W. Schoof (ed.), *BRIEFE DER BRÜDER GRIMM AN SAVIGNY* xii (1953) [hereinafter *GRIMM-SAVIGNY LETTERS*]. The letters from Savigny to the Grimms are printed in A. STOLL'S *LIFE OF SAVIGNY*, *infra* n. 152.

149. Grimm's brief Autobiography (to 1831) is printed in 1 J. GRIMM, *KLEINERE SCHRIFTEN* 1-24 (1864), and *reprinted*, along with autobiographical memoirs by brothers Wilhelm and Ludwig, in E. Volkmann (ed.), *ZWISCHEN ROMANTIK UND BIEDERMEIER* 21-87 (1970). In English there is a short appreciation by W.P. KER, *JACOB GRIMM* (Publications of the Philological Society, 1915), and a good full treatment in R. MICHAELIS-JENA, *THE BROTHERS GRIMM* (1970). There is a beautiful appraisal, with references, in F. WIEACKER, *PRIVATRIECHTSGESCHICHTE DER NEUZEIT* 405-406 (2d ed. 1967).

150. 1 J. GRIMM, *supra* n. 149, at 1, 6; Grimm's seat-ticket for Savigny's lectures is reproduced in R. MICHAELIS-JENA, *THE BROTHERS GRIMM* 33 (1970).

151. *Id.* at 6; *GRIMM-SAVIGNY LETTERS*, *supra* n. 148, at 4.

and materially easy, but he was orphaned at twelve, and was looked after by a friend of his father, von Neurath.¹⁵² This was at Wetzlar, between Frankfurt and Marburg, the home of the Reichskammergericht, where von Neurath was an assessor; this imperial court, founded in 1495 by the Emperor Maximilian, was to shut up shop in 1806 when Napoleon closed down the Holy Roman Empire--an event the news of which, Goethe recounts, caused less interest in the coach in which he was travelling than a recent quarrel between the postilion and a footman.¹⁵³ Savigny, thus exposed to the law in practice, went to the University of Marburg, where, after a short spell in Göttingen, he graduated with a doctoral dissertation, in Latin, on the concurrence of crime and delict in Roman Law.¹⁵⁴ His first lectures at Marburg, on Legal Method, were given as Privatdozent, not as official Professor, but he soon obtained a personal chair, and they were extremely popular, as we learn from Jakob's brother Wilhelm, who followed him to Marburg a year later. As to research, Savigny embarked on a book on *The Law of Possession* at the instigation of Weis, his favourite Professor.¹⁵⁵ This instantly made his name. John Austin described it as "of all books upon law, the most consummate and masterly."¹⁵⁶ Savigny then decided to apply himself to the history and development of law in Europe. For this, as a French admirer observed, "It is really incredible how many documents he had to collect, and the books he had to track down were even more arcane and inaccessible than the manuscripts themselves."¹⁵⁷ When the trunk containing the research materials he had so carefully collected was

152. The three-volume life by A. STOLL, *FREIDRICH KARL VON SAVIGNY* (1927-1939) was unavailable to me, but not the intelligent and enjoyable E. LABOULAYE, *ESSAI SUR LA VIE ET LES DOCTRINES DE FRÉDÉRIC CARL DE SAVIGNY* (1842). A collection of articles on Savigny can be found in 37 *AM. J. COMP. L.* 1-184 (1989) including S. Riesenfeld, *The Influence of German Legal Theory on American Law: The Heritage of Savigny and His Disciples*, *id.* at 1-7; M. Hoeflich, *Savigny and his Anglo-American Disciples*, *id.* at 17-37.

153. T. ZIOLKOWSKI, *supra* n. 146, at 77. Goethe spent the summer of 1772 at the court as Praktikant, and describes it in his autobiography, *DICHTUNG UND WAHRHEIT*: 16 J. GOETHE, *SÄMTLICHE WERKE* 559-565 (P. Sprengel ed. 1985).

154. Printed in 3 F. VON SAVIGNY, *VERMISCHTE SCHRIFTEN* 74-161 (1850).

155. F. VON SAVIGNY, *DAS RECHT DES BESITZES* (1803). Translated by Sir. Erskine Perry, Chief Justice of Bombay (6th ed. 1848) as a work "most valuable to Indian practitioners." Certainly more valuable was the work of Sir William Jones (*see text to note 58 supra*), but Perry does not refer to the work of his earlier colleague on the bench at Calcutta. Odd that Jones should not only lay the groundwork for Grimm's Law but anticipate the subject-matter of Savigny.

156. J. AUSTIN, *LECTURES ON JURISPRUDENCE* 53 (5th ed. 1885). Austin spent much time at Bonn, and his wife, who was entertained by the Savignys, was a talented translator from the German. R. MICHAELIS-JENA, *supra* n. 150, at 136.

157. E. Laboulaye, *supra* n. 152, at 59.

stolen from the back of his coach on the way to Paris, this was a blow which disturbed even Savigny's serene and tranquil temper.¹⁵⁸

Prior to this unfortunate journey Savigny had married Kunigunde von Brentano, sister of Clemens and of Bettina, who married Achim von Arnim. Clemens and Achim were brilliant and ardent young poets in Heidelberg who in 1805 produced the first volume of "one of the most momentous achievements of German Romanticism"¹⁵⁹, that collection of folk-songs called *Des Knaben Wunderhorn*, which was to evoke some of Gustav Mahler's least hysterical music (1892-1895); the second and third volumes were produced in conjunction with the Brothers Grimm, with meetings at their house.¹⁶⁰ Not the least of the great benefits Savigny conferred on the brothers was the entrée into this talented if mercurial circle. It was Clemens and Achim who urged the brothers to publish their collection of *Märchen*,¹⁶¹ and if Clemens was to be distanced by his marital problems, and the admirable Achim was to die quite young, Bettina was to prove a tireless promoter of the interests of the brothers Grimm, and to procure, through Savigny, their installation in Berlin in recognition of their remarkable achievements in law, language and literature.

After the stay in Paris, Savigny returned to Marburg for a spell. He declined the flattering calls to chairs in Heidelberg and Greifswald which resulted from the publication of *The Law of Possession*, but in 1808 he did go to Landshut in Bavaria, the new home of the University of Ingoldstadt. Two years later he was pressed by Wilhelm von Humboldt to come to Prussia, to Berlin, where a University was being founded to fill the gap made by the loss of Halle.¹⁶² He went to Berlin and stayed there for the rest of his life. His six-volume *History of Roman Law in the Middle Ages* appeared between 1815 to 1831, and

158. *Id.* at 26.

159. W. HARGREAVES-MAWDSLEY, *DICTIONARY OF EUROPEAN WRITERS* 91 (1950).

160. R. MICHAELIS-JENA, *supra* n. 150, at 47; GRIMM-SAVIGNY LETTERS, *supra* n. 148, at 33.

161. GRIMM-SAVIGNY LETTERS, *supra* n. 148, at 2; it was Arnim who found the Grimms a publisher: R. MICHAELIS-JENA, *supra* n. 150, at 51. Brentano and Arnim both wrote *Märchen* of their own, though Brentanos' were not published till after his death.

162. On the foundation of the University of Berlin, see T. ZIOLKOWSKI, *supra* n. 146, 286-308. Napoleon had suspended the University of Halle in 1806 and reassigned it to Westphalia in 1808: see T. ZIOLKOWSKI, *supra* n. 146, at 274-277. According to Savigny, Halle was one of the four distinguished universities in Germany along with Jena, Göttingen and Leipzig: see R. Wellek, *Ein unbekannter Artikel Savignys über die Deutschen Universitäten*, 51 *ZEITSCHRIFT DER SAVIGNY STIFTUNG* (Germ. Abt.) 529-537.

in 1850 Jakob Grimm was able to congratulate him on the appearance of the final volume of his magisterial *System of Contemporary Roman Law, "l'oeuvre la plus considerable que la science ait produite depuis Domat et Pothier."*¹⁶³ The (not very great) delay in completing this work was due to Savigny's having been appointed Minister of Justice (Revision of Legislation) in the Prussian Government, an appointment which Grimm publicly deplored,¹⁶⁴ just as he had privately expressed pleasure at Savigny's not being appointed at an earlier stage.¹⁶⁵ Grimm seems always to have resented the threat to Savigny's work, indeed to the work of all scholars, presented by occupation with public affairs; his own involuntary involvements were, as we shall see, distracting and disturbing.

Outside Germany Savigny is remembered for a much smaller piece he wrote in 1814, *Is the Time Ripe for Legislation and Legal Science?*, the answer being that for codification, at any rate, the time was anything but ripe.¹⁶⁶ This brilliant broadside, "one of the most crucial and representative statements of German Romantic ideology",¹⁶⁷ was in response to a piece by the very considerable jurist Thibaut of Heidelberg¹⁶⁸ calling for a pan-German Civil Code, itself a refutation of an article by one A.W. Rehberg, deploring the effect of the Code civil on the native law of the German states.¹⁶⁹ Savigny's rejection of the idea of codification for the time being was justified in the prevailing circumstances: Prussia was not going to disavow its

163. J. Grimm, *Das Wort des Besitzes*, in 1 J. GRIMM, *supra* n. 149, at 113, 117; five volumes had been published by 1842 when Laboulaye, from whom the quotation in the text is taken (*supra* n. 152, at 74) feared for its non-completion, but as vols. 6, 7 and 8 are dated 1846, 1848 and 1849, the fears seem to have been exaggerated.

164. *Id.* at 118.

165. "I am glad he didn't become Minister of Justice; as professor he is of much more use to himself and to the world." This was in 1825. In 1842 when Savigny had become Minister, Grimm criticised him for "preferring a dubious honour to a sure and lasting reputation." GRIMM-SAVIGNY LETTERS, *supra* n. 148, at 9.

166. VOM BERUF UNSRER ZEIT FÜR GESETZGEBUNG UND RECHTSWISSENSCHAFT (1814). Savigny sent copies to the Grimms. They responded fully: GRIMM-SAVIGNY LETTERS, *supra* n. 148, 126 ff., 140 ff.; there is a detailed appraisal of Jakob's response in U. WYSS, *DIE WILDE PHILOGIE* 60-75 (1979).

167. T. ZIOLKOWSKI, *supra* n. 146, at 84.

168. Thibaut was chosen by Goethe, who knew him at Jena, as teacher for his son; T. ZIOLKOWSKI, *supra* n. 146, at 98; Thibaut a distinguished musician, also taught Robert Schumann, who wrote to his mother: "Thibaut is a splendid, godlike man at whose house I enjoy my most delightful hours . . . You can scarcely imagine his wit, acuteness of perception, depth of feeling, pure artistic sense, kindness, tremendous eloquence, and breadth of outlook": R. SCHAUFFLER, *FLORESTAN* 35 (1945). See also 1 WOHLHAUPTER, *DICHTERJURISTEN* 120-166 (1953).

169. T. ZIOLKOWSKI, *supra* n. 146, at 82.

Code of 1794 and Austria was not about to commit infanticide on its own Code, only three years old, and this being so, codification would not unify Germany, but rather reflect in the legal system the political particularism which the Congress of Vienna, which Grimm attended, was in the process of reinstating. But the difference between Thibaut and Savigny went deeper.¹⁷⁰ Thibaut viewed law as a kind of juridical mathematics,¹⁷¹ whose merits were independent of time and place, whereas Savigny believed fervently that law was an organic production of society, not a deliberate production of the state--not a matter of the rational decision-making of individuals but of the feeling of the people. Legal science should, by tracking down the roots of existing legal institutions, comprehend their reality; once the law had been so understood in its social and historical context, legislation might have a role. Thus the present age had no vocation for legislation, but a real vocation, and need, for legal science. That is doubtless why, as one of the founder members of Prussia's premier University, he procured that the Prussian Code be not taught there.¹⁷²

There was a great debate on the issue. One Goenner in Munich attacked Savigny, saying, "Unfortunately Mr. von Savigny has no idea of legal science."¹⁷³ Savigny's response was justifiably disdainful,¹⁷⁴ and he got Wilhelm Grimm to write a further attack in the *Rheinische Merkur*.¹⁷⁵ John Austin, who, as we have seen, held Savigny in the highest esteem as a jurist, nevertheless called his codification piece a "specious but hollow treatise."¹⁷⁶ Indeed, once Savigny was promoted Minister for the Revision of Legislation, he came to see that the role of the state in law-making was perhaps greater than he had allowed, though in fact he had never said that codification was necessarily bad, only that there were times and times.¹⁷⁷

We left Grimm on the way back from Paris with Savigny. After attending the christening of Savigny's daughter, he rejoined his

170. *Id.* at 78-86; E. LABOULAYE, *supra* n. 152, 31-51; H. Hattenhauer (ed.), THIBAUT UND SAVIGNY: IHRE PROGRAMMATISCHE SCHRIFTEN (1973).

171. E. LABOULAYE, *supra* n. 152, at 39.

172. U. Wyss, *supra* n. 166, at 73.

173. GRIMM-SAVIGNY LETTERS, *supra* n. 148, at 202.

174. Laboulaye criticises the tone of this demolition, *supra* n. 152, at 52-53.

175. GRIMM-SAVIGNY LETTERS, *supra* n. 148, at 202; see 1 W. GRIMM, KLEINERE SCHRIFTEN 349-355 (1881).

176. J. AUSTIN, *supra* n. 156, at 667. This is understandable in one so close to Bentham; what is not quite comprehensible is how Austin could say that "Bentham belongs strictly to the historical school of jurisprudence" or that the historical school of Savigny would be better called "utilitarian". (*id.* at 679).

177. E. LABOULAYE, *supra* n. 152, at 69, instances Savigny's progression in publications on Roman law from the classical through the medieval to the contemporary.

own family in Kassel. Though he saw Savigny only twice in the following eight years, the relationship continued, for "our close friendship resulted in a continuous and unbroken correspondence."¹⁷⁸ Life was not easy for Grimm, who had to look after the family in very straitened circumstances. Failing to get the library position he coveted, he became secretary in the War College of Hesse, but when the French occupation took place, the job changed and he became heavily involved in billeting and provisioning the troops, so he gave it up. So horrid was the prospect of having to learn the French law which was threatening to oust the local law¹⁷⁹--Napoleon's Code civil was just four years old--that he writes to Savigny on 9 March 1807 that he is abandoning law for philology.¹⁸⁰ This was unwelcome to his friend, who feared that Grimm was becoming antisocial; it was also daring, given his reduced circumstances, since there was at the time no chair anywhere in Germany in German Language and Literature.¹⁸¹ The terms in which he wrote are pathological: "A certain stigma attaches to a person who gives up one branch of scholarship for another, as it were a religious conversion. But I do not mind that, since I am so insignificant, rather like a blind heathen that becomes a Lutheran one day and a methodist the next."¹⁸² But then things looked up. He became librarian at Wilhelmshöhe, on the outskirts of Kassel, under Jérôme, the youngest brother of Napoleon and King of the ephemeral Kingdom of Westphalia into which Grimm's beloved Hesse had been incorporated.¹⁸³ When the French departed after the Russian débacle and the battle of Leipzig, Jakob returned to Paris in order to recapt the books they had taken with them. He was to make two more trips for the same distasteful purpose, and finally had a quarrel with the librarian, who had the nerve to say: "Nous ne devons plus souffrir ce M. Grimm qui vient tous les jours travailler ici et qui nous enlève pourtant nos manuscrits" ["We can't put up with this Grimm fellow

178. 1 J. GRIMM, *supra* n. 147, at 8. We have 200 letters from the brothers Grimm to Savigny, *supra* n. 148. The charming quality of Grimm's letters may be tasted in A. Wiley (ed.), JOHN MITCHELL KEMBLE AND JAKOB GRIMM (1971); Kemble was a distinguished scholar of Anglo-Saxon and early English, editor of *Beowulf* (1833)(dedicated to the Grimms) and the *Codex Diplomaticus Aevi Saxonici* (1939-1848). Kemble's uncle was the actor who succeeded Dr. Johnson's Garrick and his aunt was Mrs. Siddons, to whom Johnson was most chivalrous (J. BOSWELL, *supra* n. 42, at 1251).

179. J. GRIMM, *supra* n. 149, at 9; J. GRIMM, *supra* n. 163, at 114.

180. GRIMM-SAVIGNY LETTERS, *supra* n. 148, at 28-30. On Grimm as a lawyer, see G. Dilcher, *Jacob Grimm als Jurist*, in D. Hennig & B. Lauer (ed.), *DIE BRÜDER GRIMM: DOKUMENTE IKRES LEBENS UND WIRKENS 25-41* (1985).

181. U. Wyss, *supra* n. 166, at 57.

182. *Id.* at 57.

183. "Le royaume de Westphalie fut le plus insolent défi de la conquête", E. LABOULAYE, *supra* n. 152, at 28.

any longer: he comes here to work every day and then goes off with our manuscripts."]¹⁸⁴

Conditions back at the Library in Kassel were not ideal, but there was time and energy left for his major undertakings, and he resisted repeated proposals of preferment from Savigny, that he come to Berlin or go to Bonn, preferring to stay quietly with his family and continue his work.¹⁸⁵ In 1828, however, conditions at the library had become intolerable and both brothers accepted an appointment under the hand of George IV of England as Professor and Librarian at Göttingen. After a slow start, this worked out quite well, but then in 1837, the centenary of the University's foundation by George II, they were involved in "The adventure which put the names of Jacob and Wilhelm Grimm in the public history of Germany and Europe--the protest of the seven professors of Göttingen against the tyranny of Ernest, King of Hanover",¹⁸⁶ fifth son of George III of England and no better as King of Hanover (since Victoria couldn't be Queen) than as Duke of Cumberland. Jakob was actually banished from Hanover, escorted to the frontier with Hesse by a group of supportive students and welcomed on the other side by a woman who said to her small child, "Shake the gentleman's hand, darling, he's a refugee."¹⁸⁷ Jakob now received a proposal that he go to Leipzig and embark on a Johnsonian enterprise, the Great German Dictionary, the *Deutsches Wörterbuch*; he refused to go to Saxony, but started on the Dictionary. In 1840 Savigny, prompted, perhaps pestered, by Bettina von Arnim, finally persuaded the brothers to accept appointment to chairs in Berlin, so Jakob was able to rejoin Savigny, in time to deliver a sweet-and-sour address on the fiftieth anniversary of Savigny's doctorate in Law.¹⁸⁸

Grimm chose to give this address a parodic title which deliberately illustrates the intellectual relationship between the two. If Savigny's great book was *Possession--The Law* Grimm called his address *Possession--The Word*. In it Grimm said "I am proud to be your pupil, though a pupil who remained unequal to the master and became entirely different from him in almost every respect."¹⁸⁹ Grimm's primary, or rather ultimate, concern was with language rather

184. J. GRIMM, *supra* n. 147, at 14.

185. GRIMM-SAVIGNY LETTERS, *supra* n. 148, at 137, 239.

186. W.P. KER, *supra* n. 178, at 10. On the affair, see F. WIEACKER, *supra* n. 149, at 405 n. 92, and J. Grimm, *Über meine Entlassung*, in 1 J. GRIMM, *KLEINERE SCHRIFTEN* 25-56 (1864); an English reaction is given in A. Wiley (ed.), *supra* n. 163, at 163-171.

187. E. MICHAELIS-JENA, *supra* n. 150, at 115.

188. J. Grimm, *Das Wort des Besitzes*, *supra* n. 163.

189. *Id.* at 114.

than law, as is reflected in one of his first contributions to Savigny's journal, the *Zeitschrift für Geschichtliche Rechtswissenschaft*, namely "Poetry in Law."¹⁹⁰ As has been said "It was Jacob Grimm's explicit intention--and his grand achievement--to apply to the study of medieval literature precisely the methods that Savigny had developed for the study of Roman law: essentially an intense analysis of the sources based on a thorough knowledge of the philosophical and historical circumstances and in a comparative context."¹⁹¹

Grimm's scholarly contributions fall into three main groups. First, there is his contribution to the collection and publication of the *Fairy Tales*.¹⁹² This was not designed as a children's book--what children's book contains a complete *apparatus criticus* of notes and explanations?--but as a record of the tales told by common people, especially in Hesse; and they are recorded rather than designed, though Wilhelm, who took over most of the work, did rather refine them. Indeed, the original artlessness of the presentation was strongly disapproved by Clemens Brentano, whose own *Märchen*, like those of friend Arnim, are distinctly artful, if not arty.¹⁹³ Only after a selection of the Grimms' tales had been translated into English (and illustrated by Cruikshank, taking time off from his pictorial libels of political characters)¹⁹⁴ was a children's version produced by the Grimms. Since then, their book had been one of the greatest successes in the history of publishing, and their achievement has been seen as raising amateur antiquarianism to a science of folklore. The second major contribution was in philology properly speaking: his *Deutsche Grammatik* of 1819-1837, dedicated to Savigny, is a work of extraordinary power and novelty, "even more important for German philology than Savigny's *Recht des Besizes* was for legal scholarship".¹⁹⁵ To cap this, Jakob produced his *History of the German Language* in 1848, when he was already working on the *Deutsches Wörterbuch*, though the Grimms managed only four of the

190. *Von der Poesie im Recht*, 2 ZEITSCHRIFT FÜR GESCHICHTLICHE RECHTSWISSENSCHAFT 25 (1816), reprinted in 6 J. GRIMM, KLEINERE SCHRIFTEN 153 (1882).

191. T. ZIOLKOWSKI, *supra* n. 146, at 106.

192. KINDER UND HAUSMÄRCHEN GESAMMELT DURCH DIE BRÜDER GRIMM (H. Rölleke ed., 1985). See L. Dégh, *Grimm's Household Tales and its Place in the Household*, 38 WESTERN FOLKLORE 83-103 (1979), reprinted in M. METZGER & K. MOMMSEN, FAIRY TALES AS WAYS OF KNOWING 54-74 (1981; no. 41 of Germanic Studies in America). See R. MICHAELIS-JENA, *supra* n. 150, at 47-62. See also R. MICHAELIS-JENA, *supra* n. 150, at 167-187.

193. R. MICHAELIS-JENA, *supra* n. 150, at 53.

194. GERMAN POPULAR STORIES (E. Taylor trans. 1823, 1826).

195. Grimm-Savigny Letters, *supra* n. 148, at 11; Savigny's appreciation was cordial: *id.* at 269.

sixteen volumes of that great dictionary of their lifetime.¹⁹⁶ (Dr. Johnson would have said that he did better; when Boswell said to him "You did not know what you were undertaking" Johnson replied "Yes, Sir, I knew very well what I was undertaking--and very well how to do it,--and have done it very well.")¹⁹⁷ The third area where Grimm contributed enormously was in his collection of old German legal material, his *Deutsche Rechtsaltertümer* (1828) and his *Weistümer* (1840-1869). There was also a book on *Deutsche Mythologie* (1835), some time after the brothers had jointly produced a collection of German sagas *Deutsche Sagen* (1816-1818). The works of the two brothers extend to 62 volumes.

It will be seen that little of this is Roman; indeed, it sometimes seems as if Grimm were Savigny's German shadow, even *Doppelgänger*. But this requires qualification. It is true that the *Zeitschrift der Savigny Stiftung* has distinct parts for Roman and for German Law, and that Romanists and Germanists later came to blows--the latter blaming the former for the cold individualism of the first draft of the Civil Code in 1887¹⁹⁸--but it is not true that Savigny was interested only in Roman law: "*On a souvent et justement reproché à l'école historique sa préférence pour le droit romain; mais de cette prédilection . . . il serait injuste de rendre M. de Savigny responsable, car peu de germanistes ont payé au droit national une offrande plus généreuse que la sienne.*"¹⁹⁹ [The Historical School has often been criticised, with some justice, for preferring Roman law, but it would be wrong to blame Savigny for this, since few Germanists have made such generous contributions to their national law.] But that Grimm turned fully to matters German is clear: when Savigny was thrilled by the discovery of the text of Gaius in Verona--and he was right to be thrilled, since not only did that discovery revolutionise the study of Roman law, but it was at his instance that Niebuhr, en route to be Ambassador in Rome, was looking for manuscripts in Verona at all²⁰⁰--Grimm, though ready to go to Verona if sent by Savigny (in fact Bethman-Hollweg was sent), was really more interested in the recent discovery of a further piece of the Gothic translation of the Bible by Ulfilas.²⁰¹ But if Grimm concentrated on language and Savigny on law, there was a close connection in their views on the development of

196. Completed only in 1960.

197. J. BOSWELL, *supra* n. 42, at 1034.

198. 1 K. ZWIGERT & H. KÖTZ, AN INTRODUCTION TO COMPARATIVE LAW 147-148 (T. Weir trans., 2nd ed. 1987).

199. E. LABOULAYE, *supra* n. 152, at 60.

200. *Id.* at 60-62; GRIMM-SAVIGNY LETTERS, *supra* n. 148, at 253-255.

201. GRIMM-SAVIGNY LETTERS, *supra* n. 148, at 262.

those two central institutions of human society.²⁰² The *Volksgesistlehre* was just as much at home with language as with law; indeed, today people would say much more so, because we have a view of law as instrumental, purely technical, whose national manifestations should be overcome in deference to greed and fear, as is occurring even now in Western Europe, at a time when countries to the East are, with equally unjustified hope, reasserting their group identities.

If the quality and quantity of the intellectual products of our two principals is beyond question, what of the quality of their friendship itself? Is it true, as Wilhelm wrote of Savigny to Bettina, "Our love for him is terra firma, ever fresh and green, solid underfoot".²⁰³ Well, it should have been, for one can see nothing in Savigny with regard to them but kindness, active kindness, and forbearance. Savigny was constantly on the look-out for chances of advancement for the Grimms, only to have his proposals regularly rejected. This is not to their discredit: if they wanted a quiet life in order to be able to work--and they certainly worked like demons in the quiet they achieved--no one can complain. But the objections they raised to the final suggestion, that they come to Berlin, when Savigny had had his wife actually visit them and provide a document signed by Eichhorn, made Savigny for once lose his temper; it is surprising that he did not do so earlier.²⁰⁴

When one reads the documents, one has to conclude that Jakob, rather more than Wilhelm, seems rather to have resented Savigny's status and career, and to have concealed this under a regret that the career was taking Savigny away from research. He had no sympathy with the constraints that Savigny's position--he was a member of the Prussian State Council from 1817, though Minister only from 1842--imposed on him. The causes of such breaches as occurred in their friendship were largely political, even though Grimm really seems to have had no firm political persuasions: of course, he would have liked to be liberal, but all his personal predilections were for the old order.²⁰⁵ A major crisis came in 1837 when he made his protest against the King of Hanover and was banished for it. The *casus belli* was that he refused to disavow his oath of allegiance to the constitution

202. Indeed, Meinecke observed that the greatest influence on Savigny's *Volksgesistlehre* was Grimm, his pupil! See Wyss, *supra* n. 166, at 77. There is a detailed analysis of their respective postures in F. WIEACKER, GRÜNDER UND BEWAHRER 144-161 (1959). The different disciplines could provide mutual support: when Savigny wrote to the Grimms about a problem in the manuscript transmission of the *Digest*, Wilhelm could reply with a very analogous difficulty regarding the *Nibelungenlied*. GRIMM-SAVIGNY LETTERS, *supra* n. 148, at 307.

203. GRIMM-SAVIGNY LETTERS, *supra* n. 148, at 7.

204. *Id.* at 406.

205. *Id.* at 279.

which the King had abolished, and seems to have done so on the ground that even if the constitution was not sacrosanct, his oath was inviolable.²⁰⁶ One can see that on such a matter two views might well be held without either being vulnerable to the charge of opportunism or weakness. Savigny clearly thought that Grimm had been manipulated, but though he was as nice as possible in his letters, Jakob kept insisting that Savigny at least privately endorse the wisdom and necessity of his action. This Savigny could not conscientiously do, and was therefore right not to do it. When he observed that it was dubious to encourage the public raising of subscriptions for the protesters, Grimm replied that if people wanted to give money, they should be allowed to, but he declined to cash the money order that Savigny sent him to alleviate his distress.²⁰⁷ Matters were mended, and Jakob was delighted when Savigny asked him to stand godfather to his sixth child.²⁰⁸ But then there was another difficulty. One Voss of Heidelberg made a public attack on Count Stolberg--it doesn't now matter why, but it had something to do with Catholicism, and while Savigny had had a Calvinist mother, he had been exposed to the devout Catholicism of the Brentano circle, whereas Jakob Grimm had never moved from his lower-than-Lutheran upbringing--and Jakob (unlike his brother) took the side of Voss. Despite Savigny's attempts to have the matter drop, Jakob kept grinding on about it, until Savigny wrote, "I don't want to quarrel--it's just that I love you too much to let him have you for an advocate."²⁰⁹ One really cannot say fairer than that to a friend. These matters, too, were healed. But even when the issue of coming to Berlin was coming to a head Jakob managed to make difficulties, as we have seen. Indeed, Jakob believed, quite contrary to the fact and even the appearances, that Savigny was blocking his promotion to Berlin, and was formally accused of injustice by a common friend.²¹⁰ When the brothers got to Berlin and had frequent intercourse with Savigny, things were better. If they were not entirely marvellous, this was because of Frau Savigny, who was clearly a bit of a snob, as had already been noted by Wilhelm in Frankfurt in 1821.²¹¹ In his celebratory speech Jakob makes a rather sour allusion to the grandeur of the Ministerial ménage, which can hardly have pleased the Minister, much less the Minister's wife.²¹² Yet the Minister's house was always

206. *Id.* at 387.

207. *Id.* at 393, 397.

208. *Id.* at 287.

209. *Id.* at 292, 289-295.

210. *Id.* at 7.

211. *Id.* at 302.

212. J. Grimm, *Das Wort des Besitzes*, *supra* n. 163, at 117-118. Savigny's manner was capable of attracting ridicule. That bitter-chocolate lyricist Heine, who had studied under Savigny in Berlin in 1821 (J. SAMMONS, HEINRICH HEINE 75 (1979)) made merciless mock of him ("that elegantly immaculate, fulsome troubadour of the

open to the Grimms, and we hear of a pleasant occasion on which all the grand guests whom Savigny had invited to dinner had been intercepted or waylaid by the King to go and listen to Liszt, and the Grimms and the Savignys were left by themselves to eat all the marvellous dishes prepared for the full gathering.²¹³ In a final rumpus, involving another member of the Göttingen Seven, one Hoffmann von Fallersleben, Jakob behaved properly, and dissociated himself from his erstwhile colleague, now dismissed from the University of Breslau in Silesia. Perhaps his years in Berlin had taught him that he couldn't continue to live as a naif and embarrass his best friend and supporter.²¹⁴

Jakob should have been all the readier to defer to Savigny in the matters where it was manifest that Savigny knew how to behave because Savigny had been so good not only to Jakob himself and to Wilhelm, who was more often able to take up invitations, but also to other members of the family, such as Ludwig, the artist, though not a very good one, and Ferdinand, who seems to have been good for nothing much, though not a good-for-nothing.²¹⁵ This would be especially welcome to Jakob, for, unlike most of our heroes, he was a family man through and through. This is so although he never married--Jakob's family were his siblings. Wilhelm did marry, but his wife, Dortchen, a neighbour's daughter, simply enriched the fraternity. The older brothers were never separated for long, and never without pain and unease, for Wilhelm's health frequently gave ground for concern. Yet Wilhelm was the more sociable of the two: Jakob would happily have laboured all day and all night, and resented any interruptions he could not ignore, whereas Wilhelm liked parties in the evenings and had a taste for music which his brother did not. They worked in adjacent studies and shared their library as they shared everything else, for they never divided their inheritance, such as it was, or kept their savings separate. For Montaigne, La Boétie certainly came first, though Montaigne got on perfectly well with his wife; Pascal clearly dominated Domat from the grave, though Domat had thirteen children of his own; Samuel Johnson was unquestionably the man in the life of Jamie Boswell; but we cannot say the same of Savigny and Jakob Grimm. In Jakob's life Wilhelm came first, and no one came close. At the end Wilhelm was the first to go, though not

Pandects"), and in his farrago *Die Bäder von Lucca* Savigny, mistaken for a woman, is engaged in a crazy quadrille with Thibaut of Heidelberg, Hugo of Göttingen and Gans of Berlin: 1 H. HEINE, *WERKE* 541 (Atkins ed. 1973); T. ZIOLKOWSKI, *supra* n. 146, at 114. Heine was drawn by Ludwig Grimm and entertained by his elder brothers: J. SAMMONS, *id.* at 133.

213. R. MICHAELIS-JENA, *supra* n. 150, at 136.

214. *Id.* at 142-143.

215. GRIMM-SAVIGNY LETTERS, *supra* n. 148, at 11.

before seeing his son Herman marry Bettina von Arnim's daughter: he died in 1859, when Jakob was 74. Six months later Jakob spoke in honor of his brother at the Akademie.²¹⁶ Savigny was doubtless there, just as Jakob was there when Savigny himself died a year later.²¹⁷ Dortchen continued to look after Jakob and even the death of his next brother, Ludwig, the artist, in the Spring of 1863 did not put an end to Jakob's labours--the habit of work has its advantages.²¹⁸ But his own death followed a few months later: and then only the work remained.

Envoi

Anthologies should have a theme but cannot carry an argument. All we have done is to look at a few relationships to which--to use a lawyer's expression--lawyers were parties, and show that they were good and rich. It may be helpful, once in a while, to emphasize the richness of human life, and to remind ourselves that *homo juridicus* need not always play the professional, but may sometimes be *amator* or *amicus*. Of this it wouldn't have been necessary to remind Ferd Stone. Those who remember him will know how strongly he would have endorsed the lines of Hilaire Belloc:

They say that in the unchanging place,
 Where all we loved is always dear,
 We meet our morning face to face
 And find at last our twentieth year . . .

They say (and I am glad they say)
 It is so; and it may be so;
 It may be just the other way,
 I cannot tell. But this I know:

From quiet homes and first beginning,
 Out to the undiscovered ends,
 There's nothing worth the wear of winning,
 But laughter and the love of friends.²¹⁹

216. J. Grimm, *Rede auf Wilhelm Grimm*, in 1 J. GRIMM, *KLEINERE SCHRIFTEN* 163-177 (1864).

217. Grimm-Savigny Letters, *supra* n. 148, at 11.

218. Jakob's last days are given by his nephew Herman in an appendix to the speech, *supra* n. 216, at 178-187.

219. H. BELLOC, *DEDICATORY ODE*, in *Verses* 55, 59 (1910).

