Anthony Chase, *Law and History: The Evolution of the American Legal System* (New York: The New Press, 1997).

This is a very personal book, written with the grace and fervor that such efforts often summon from their authors. Anthony Chase, who teaches law at Nova Southeastern University, has brought to this book a wide range of reading but has chosen, as he admits freely, to follow the practice by which "Historians, without necessarily suppressing inconvenient facts, almost invariably treat their source material selectively and with a sense of proportion, however just or unjust. This book is no exception." (1) After invoking Sherlock Holmes (*The Sign of the Four*) in his opening epigram to explain his selectivity, Chase draws upon an impressive array of thinkers (and excludes an equal number) to produce what he unashamedly describes as "my outline of America legal history," a product on which his personal stamp is quite clear.

Undergirding Chase's work is a point that few legal historians would argue with; namely, the "conviction that law has responded in important ways to the unfolding economic history of the nation." (164) Indeed, many of us would go so far as to agree in principle that in looking at legal change we find "an enormous amount of extremely artful obfuscatory talk about rights, justice, and precedent, specifically employed in behalf of judicial decisions which dramatically readjusted common law doctrine to fit new economic realities." (164) Beyond this point, however, many historians will shy away from further agreement. Chase follows his Holmesian quotation from *The Sign of the Four* with a multilayered quadripartite model for American legal history. The book locates four wars as pivotal: the Revolutionary War, the Civil War, World War II, and Vietnam, each of which ushered in a new era. Further, we find four chronological "periods that organize this rendition of legal history": the first stretching to the Civil War (though this period "can, itself, be broken down into four parts" [57]), the second to the New Deal, while the third proceeds through Vietnam, with a final period reaching the present. The transition to this fourth phase, we are informed, also presents us with four possible turning points.

This Procrustean framework has provided the number four for other purposes as well. Thematically, the argument is based on "four 'topographic' or spatial models": "inside/outside," or the way that legal changes appear to lawyers as opposed to those outside the profession; "up/down," or the way legal institutions at the top reflect changes in an economic base; "left/right," which he sees as "that between liberal (left) and authoritarian (right) forms of capitalism"; and "north/south," between the capitalist North and a slave regime South. (2-3) Were this not enough, Chase relies heavily on the conceptual model of Douglas Dowd, whose own *U.S. Capitalist Development Since 1776* (1993) provides four phases of capitalist development. Of the only "three serious, scholarly overviews of American legal history" worth noting, (71) pride of place is given not to Lawrence M. Friedman's highly acclaimed *A*

History of American Law (2d. ed., 1985), but to Grant Gilmore's interpretive Storrs lectures, *The Ages of American Law* (1977). And for good reason, as we follow the sign of the four: only Gilmore "emphasizes periodization over detail and focuses primarily on the outlines of legal history." (72) Gilmore provides only three "ages" of American law, but he did not write until the end of Chase's third period, and a fourth might be inferred.

Periodization, then, drives this book. Although the division of historical development into more or less defined eras is often necessary and useful to comprehend the "broad-brush changes in law and society, over quite extended periods of time" (166) that Chase ambitiously engages, it comes with great perils. And this book reveals many of them. In the first place, the description of monolithic eras requires that vast generalizations lump together the messy details of human society into a coherence that did not exist. Some such generalizations work, but others do not; in providing one of the latter, Chase asserts, "Everyone understands the spirit of the law." (12) While such a statement may once have had scholarly adherents, poststructuralism has laid such a single-vision image to rest, and few scholars would attempt to ascribe a single perspective to any national population, especially that of the United States, and especially on a terrain as contested as that of the law.

Moreover, emphasizing the sharpness of historical transitions tends to privilege the people who make and the events that mark those shifts. At the very least it privileges elite-controlled events and diminishes the role of the ordinary men and women who produce change – even legal change. Chase has no place in his analysis, for example, for the people who make up juries and nullify the powers that be, and thus he explains the O.J. Simpson outcome simply: "law is whatever lawyers and judges say it is." (16) Besides his glaring neglect of racism as a factor in American legal development (slavery is, of course, primarily an economic matter in this model), Chase completely neglects the role of the masses as agents of change. He agrees with "writers who maintain that Marxism has a continuing roll [sic] to play in social and economic debate" (36), but his Marxism is a crude one: Northern troops, he suggests, went willingly by the hundreds of thousands to slaughter in the Civil War to establish the hegemony of the corporation. Agreeing with Barrington Moore, he tells us, any compromise that might have occurred to prevent the war could only have been imposed on Northern labourers and Western farmers, who would have submitted to a state capitalist order like that of Junker Prussia. Chase is proudly materialist, which perhaps explains the otherwise inexplicable neglect of Eugene Geneovese, whose blending of religion and Marxism in his history of slavery can not be quite so easily ignored. But a materialist perspective should not have omitted other influential figures, from the historical past as well as from the historiographical present. Had he given as much attention to Oliver Wendell Holmes – whose Social Darwinist materialism figured so prominently in the jurisprudence of a half century — as

to Sherlock Holmes, we would have a much fuller understanding of the evolution of American law.

Nevertheless, Chase's materialism quite properly attributes to changes in modes of production at the economic base of society the lurching changes in legal regimes that follow. Accepting, *arguendo*, the effective control of events by an (unidentified) elite, this model still requires that one must correctly identify the actual agents who instigate and solidify that revolutionary change. The type of changes one identifies necessarily dictate the type of change one wishes to prove. War, of course, serves this purpose, and Chase correctly shows how the cataclysms of war have swept aside old regimes and allowed new orders to emerge. But this produces two problems for Chase's analysis. In the first place, wars produce more than economic change. One might ask, therefore, why not choose the Korean War instead of Vietnam? Korea did, after all, usher in an era of fierce and repressive anticommunism that transformed American law and justified wholesale loss of civil liberties, just as it propelled the unquestioned ascendancy of corporate capitalism and the smashing of labour unionism. It also crystallized the race issue, marking the first time that African Americans fought alongside whites and inaugurating an era of struggle for racial justice.

Secondly, the use of wars to periodize history only answers half the question he poses about "creative destruction": wars only clear the field and cannot alone do the necessary additional work of legitimizing a new order. Intellectuals must provide the rationalization, as Chase readily admits. But intellectuals do not develop their theories suddenly — and even if they do receive an inspired insight, their announcement of social theory rarely comes as a surprise and must find receptive soil in which to thrive. Chase nevertheless follows Procrustes once again and provides the actual place and time of the momentous transformative event that begins his story — in Glasgow on the morning of Friday, December 24, 1762, "to be exact" (25), when Adam Smith began his lectures on jurisprudence and is said to have founded philosophical materialism as a basis of legal thinking.

Smith — along with Chase's interpretation — thus bears a heavy burden, that of launching the massive transformation toward philosophical materialism that led to Marx and all modern legal and political theory. This is a grave error. Chase has chosen Smith because we identify him with the laissez-faire basis of Classical economics, which dominates the rest of the book. But Smith (who, Chase notes, also divided history into four phases) was not delivering prescriptive lectures designed to convince the landed elite to foreswear mercantilism in favor of laissez-faire; rather, he was presenting a descriptive account of an economic order he had seen emerge and triumph over the course of many decades. Moreover, Classical economics and philosophical materialism are scarcely the same. Chase has omitted many giants of legal and economic thought from his survey of Western legal history, and not the least

among them is the man that Marx described as the real "father of us all" when talking about the origins of materialist political economy — Thomas Hobbes, another nonentity in Chase's book.

Omitting Hobbes reveals another pitfall of errant periodizing: it requires the neglect of all who do not fit within that period and forces one to identify someone else who better fits the needs of the interpretative model. But Hobbes does not fit the timing or the content of the model, and he is consigned to oblivion. So, too, is the statist Alexander Hamilton, whose central role as political founder, jurisprudent, and economist makes his omission startling – but entirely understandable given the model imposed here. For Chase, the American Revolution and the war that produced it led to the destruction of mercantilism and the triumph of laissez-faire; Hamilton's state-sponsored development muddies the waters of this onrushing stream.

This is, in short, a tendentious book, marred by its attempt to fit a complex story into a simple four-part disharmony. Chase uses the word "watershed," a term that historians — whether legal historians or economic historians — shun: to use a geological metaphor of this sort to establish a "Great Divide" (Chapter Three) denies even lingering continuity and does violence to the complexity and contingency of struggle. More of a long (219-page) and argumentative law-review article, *Law and History* has no index, and its 429 consecutively numbered footnotes (through four chapters, of course) dominate many a page (see, especially, 111-114, where five and a half lines of text are followed by footnote 206 stretching across three pages, or those pages that contain two lines of text and two *columns* of forty-nine lines of footnotes). Chase explains that the long footnotes allow him to abridge his argument, although the practice has not prevented him from including in the text many needless digressions in his history of American law, such as his discussion of Japanese neofeudal antifascism or a long discourse on German strict liability law. The index was omitted, we are told, "to prevent people from looking through the index to find their name and only reading the paragraph or two where they are mentioned." (8) Were an index included, however, it would have cheered those omitted by revealing just how much other pertinent scholarship and alternative interpretation — not to mention obvious examples that contradict the model — were excluded, too.

David Thomas Konig
Washington University in St. Louis