

## JURISPRUDENCE IN GERMANY.

The Library of Congress is now undertaking the publication of a series of guides to foreign law. One of the objects of the enterprise is to acquaint the practitioner and the legislator with the legal institutions of foreign countries. Another of its objects is to show the evolution and present development of juristic thought abroad, and the extent to which a virile philosophy of law and a sound conception of the relation between law and social science have succeeded in creating a jurisprudence which has proved far more efficient than the common law in responding to the needs of present day life.

In no country has this development of legal science been more fruitful than in Germany, where modern research has intensified the truth of Sheldon Amos' remark, made forty years ago:

"The prospects of the science of jurisprudence \* \* \* will depend largely upon a greater familiarity than has hitherto been encouraged in legal education with the vast and invaluable juridical literature of Germany. \* \* \* Modern jurisprudence is emphatically a German creation."<sup>1</sup>

To no country are these practical results of a sound legal philosophy more important than to the United States, where the judicial interpretation of current economic and social legislation, by outworn rules of the common law, has awakened thoughtful men to the realization that that system has largely become sterile and no longer responsive to the needs of present day society.<sup>2</sup>

It was Savigny who stated that in legal science all results depend upon the possession of legal principles, and it was precisely on this fact that the greatness of the Roman jurists was based. Theory and practice were combined in the administration of justice. Savigny also pointed out the double danger to which the study of law is exposed: on the one hand, the danger of soaring through theory into the empty abstractions of a fancied law of nature; on the other hand, that of sinking through practice into a soulless, unsatisfying handicraft.

The classical German philosophy of the first half of the nineteenth century proved susceptible to the first danger. The failure to draw a clear line between law and morality was a prominent

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<sup>1</sup>A systematic view of the science of jurisprudence, 505 (London, Longmans, Green, 1872).

<sup>2</sup>See Roscoe Pound's illuminating remarks in his article on "Mechanical jurisprudence," 8 COLUMBIA LAW REVIEW 614.

defect in the legal thinking of the philosophers of that school.<sup>3</sup> They were disciples of a period in which men conceived that by dialectics and deductions from controlling conceptions they could construe the whole content of knowledge.<sup>4</sup>

Much of the common law, in its archaisms and anomalies, and especially in its failure to rise to social and political emergencies, has proved its susceptibility to the second danger. An outworn individualistic conception of law and the absence of any legal philosophy are the responsible causes for this weakness. The common law, by safeguarding the rights of the individual at a period when class pressure in the rest of the world practically effaced the individual from the sphere of subjective legal rights, did, at one time, eminently justify the encomiums heaped upon it. But it has not kept pace with the changes in political and industrial conditions. In many respects, as Pound has well expressed it, the common law has become academic, because derived by deduction from historical premises which have lost their value, and hence much of their meaning for the society of to-day. By its exaggerated respect for the rights of the individual at the expense of the needs of society, by its continued application of archaic rules to modern economic conditions, it has on many occasions proved a serious obstacle to social progress and has contributed not a little to the growing disrespect for law. Only the doctrine of the police power, developed practically in the last generation, has rescued society from absolute thralldom to individual rights. The traditional attitude of the common law to legislation in general, judicial theories as to what constitutes class legislation, such doctrines as the assumption of risk and contributory negligence, the right to pursue a lawful calling, the liberty of contract, the retributive theory as a basis of the legal treatment of crime—all these justify the charge of sterility and emphasize the necessity for a change in our conception of law and its relation to life.<sup>5</sup>

Coke admired the common law for its certainty, because

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<sup>3</sup>J. F. Dillon, *Laws and jurisprudence of England and America*, 7, 8 (Boston, Little Brown and Co., 1894).

<sup>4</sup>Roscoe Pound in 8 *COLUMBIA LAW REVIEW* 608.

<sup>5</sup>There is an abundant literature on these defects of our common law. They are perhaps best expressed in the articles of Roscoe Pound, the most important of which are the following: "Do we need a philosophy of law," 5 *COLUMBIA LAW REVIEW* (1905) 339-53. "Need of a sociological jurisprudence," 19 *Green Bag* (1907) 607-15. "Common law and legislation," 21 *Harv. L. Rev.* (1908) 383-407. "Mechanical jurisprudence," 8 *COLUMBIA LAW REVIEW* (1908) 605-23. "Law in books and law in action," 44 *Am. Law Rev.* (1910) 12-36. "Puritanism and the common law," 45 *Am. Law Rev.* (1911) 811-29.

derived from actually decided cases, and disparaged the civil law for its uncertainty, as evidenced in the disputations of legal scholars. The appropriateness of this characterization of the two great systems of law has, in the course of time, become almost reversed in applicability. The thousands of decided cases since Coke's day, "the tangled mass of irreconcilable contrarities" has, as Bryce puts it,<sup>6</sup> created the two great defects of case-law, uncertainty and an utter lack of system, which have in turn been imparted to the whole structure of Anglo-American law. Pollock's characterization of English law as "chaos, tempered by Fisher's Digest"<sup>7</sup> is, with aggravated reason, applicable to this country; American case-law as a whole may not unfairly be described as chaos, tempered by the digests of enterprising publishing companies. Finding the law has to a great extent become a mechanical process, in which legal thinking is reduced to a minimum and in which catchwords have replaced legal principles.

Maitland expressed his appreciation of the unsatisfactory state of English law in these words:

"But turn from laws to law. Turn from bits of our legal system to the system as a whole. Do we often think of it? Do we often ask ourselves whether it compares well with its neighbors and rivals, whether it is in all respects rational, coherent, modern, worthy of our country and our century? I fear that we do not."<sup>8</sup>

What then can we say of our fifty sovereign jurisdictions, our mass of conflicting decisions, our multiplicity of legal rules applied to a similar state of facts? In England, Bryce tells us, the efforts at codification were given up in despair.<sup>9</sup> In this country, we have been more courageous; the project of the American *Corpus Juris* has enlisted much popular support.<sup>10</sup> Any attempt to lead us out of our "judicial detritus" will be greeted with favor. And yet one of our foremost jurists, Wigmore, has expressed grave and pertinent doubts as to its timeliness, its soundness, and its feasibility. As a profession, American lawyers are almost wholly untrained in that technique of legal science which must precede any attempt at systematic statement of the law. Our law has

<sup>6</sup>James Bryce, *Studies in history and jurisprudence*, (Oxford, 1901) ii 291.

<sup>7</sup>F. Pollock, *Essays in jurisprudence and ethics*, 238 (London, Macmillan, 1882).

<sup>8</sup>Frederic W. Maitland, *Collected papers*, edited by H. A. L. Fisher, (Cambridge University Press, 1911) iii. 474-5.

<sup>9</sup>James Bryce, *op. cit.* ii 291. A brief history of the attempts at codification in England may be found in Ilbert's "Legislative methods and forms," (Oxford, 1901) 127-29.

<sup>10</sup>22 Green Bag 59.

grown up so rapidly and so heterogeneously that it is almost impossible now, in many of its branches, to find any thread of legal principle.

To return to Coke's disparagement of the civil law; what, we may ask, has been the fruit of the years of disputation of continental jurists? It is this: they have helped to work out a scientific body of law, a system of principles supported by a sound philosophy, which, as exemplified in the German Civil Code, has awakened the admiration of the civilized world. They have brought to active realization Holme's declaration that the true science of the law consists mainly in the establishment of its postulates from within, upon accurately measured social desires, instead of tradition. Recent legal developments in Japan and Switzerland indicate that the German code has replaced the Code Napoleon as the prototype of modern civil codes. Maitland in the introduction to his translation of Gierke's *Political theories of the middle age*<sup>11</sup> says of the German Civil Code that "it is the most carefully considered statement of a nation's laws that the world has ever seen." German codification exemplifies a power of legal expression with which Bryce credits the Roman jurists—

"the power of so framing general rules as to make them the expression of legal principles, and working out their details so as to keep the details in harmony with the principles."<sup>12</sup>

In this process of legal development, legal thinkers have exercised a profound influence. The application of the historical and comparative method of jurisprudence in Germany has created a school of jurists who have helped to make law an effective handmaid in the development of social and political science.

A general acquaintance with the development of German juristic thought and legal philosophy is perhaps best to be gained by a discussion of the most important literature and its contribution to the general movement. To this end we shall undertake a rapid survey of the important literature on encyclopedia of law and on philosophy of law.

#### A. *Encyclopedia of law.*

Legal encyclopedia or juristic survey is the term used by Germans to describe one particular class among those works which the Anglo-American lawyer knows under the title "General Jurisprudence." By legal encyclopedia they mean, to borrow Arndt's definition,

<sup>11</sup>(Cambridge, University Press, 1900). Introduction, xvii.

<sup>12</sup>James Bryce, *op. cit.* ii, 210.

“a scientific and systematic outline or general view of the whole province of jurisprudence, together with the data of that science; its purpose is to determine the compass and limits of jurisprudence, its relations to other sciences, its internal divisions, and the mutual relations of its constituent parts.”

It is a classification of the law into legal pigeonholes, emphasizing their inter-relation. It is the first step in the training of the German law student; with us, when not omitted entirely, it is the last.<sup>13</sup>

One of the most important of this class of works has recently been made available to us in an English translation. This is Gareis' *Introduction to the science of law (Encyklopädie und Methodologie der Rechtswissenschaft)*. It has been incorporated into the Modern Legal Philosophy Series as its first volume. The importance of the work to the American lawyer can not be overemphasized, and as an introduction to general jurisprudence and particularly to German law it is of much value.<sup>14</sup> Two other works of this type must be noted. One was written by the well-known Adolph Merkel,<sup>15</sup> formerly professor at Strassburg, and the other by Arndts,<sup>16</sup> the eleventh edition of which, edited by Edwin Grueber, appeared in 1908.

The more recent works on legal encyclopaedia, while in part preserving the abstract philosophical background, are nevertheless more closely related to the provisions of the German Civil Code and to modern law in general. This was less true of the earlier works on the subject. They retained their philosophic atmosphere throughout, and except for such portions as dealt with the topics for legal study, or methodology, indulged in not a little speculation. This is true of Puchta's (1798-1846) *Outlines of jurisprudence as the science of right*, which was translated into English by W. Hastie in his *Outlines of the science of jurisprudence*.<sup>17</sup> Puchta

<sup>13</sup>Professor Munroe Smith's article in the Columbia University Quarterly (1902) 138-44, is of interest in this connection.

<sup>14</sup>Karl Gareis, *Introduction to the science of law* \* \* \* tr. from the 3d. rev. ed. of the German by Albert Kocourek \* \* \* with an introduction by Roscoe Pound \* \* \* (Boston, The Boston Book Co., 1911). *Encyklopädie und Methodologie der Rechtswissenschaft (Einleitung in die Rechtswissenschaft)* 3. neu durchgearbeitete Aufl. (Giessen, E. Roth, 1905). On the subject of Gareis' *Science of law*, see an article by Arthur W. Spencer, 23 Green Bag 191-96.

<sup>15</sup>*Juristische encyklopädie*. 3. neu durchgesehene Aufl. (Hrsg. von Dr. Rudolf Merkel \* \* \* Berlin, J. Guttentag, 1904; 4th ed. 1909).

<sup>16</sup>*Juristische Encyklopädie und Methologie*, (11th ed. by Erwin Grueber, Stuttgart u. Berlin, J. G. Cotta, 1908).

<sup>17</sup>An introduction to the systematic study of law. Translated and edited from the *Juristic Encyclopedias* of Puchta, Friedländer, Falck and Ahrens. (Edinburgh, T. & T. Clark, 1887).

found his philosophical elements in the speculation of Schelling; in legal method and thought, he is prominently identified with the historical school of Savigny. A brief extract from Friedländer's *System of jurisprudence* constitutes part two of Hastie's translation. Friedländer, when he published his *Juristic encyclopedia*, in 1847, was a lecturer at the University of Heidelberg. In philosophy, he was a Neo-Hegelian. Part five of Hastie's book is likewise a translation from Friedländer's *Juristic encyclopedia* and is of historical importance, in that it is concerned with the history of legal encyclopedia as the systematic science of jurisprudence. The introduction (pp. 9-22) of Korkunov's *General theory of law* (Hastie's translation) contains an interesting account of the nature, history and literature of legal encyclopedia.

A work of much value as a philosophical introduction to the study of law is the celebrated Professor Kohler's *Einführung in die Rechtswissenschaft*.<sup>18</sup> An article under the same title by Professor Grueber of Munich appears as the first contribution in Birkmeyer's *Encyklopädie der Rechtswissenschaft* (*infra*). The same author in 1908 published an independent work on the subject, largely a reprint of his article.<sup>19</sup> Dr. Spiegel's *Beiträge zur Kritik und Methodik der Rechtswissenschaft*<sup>20</sup> also merits our attention.

The term *Encyklopädie der Rechtswissenschaft* has been used to describe a type of work which has grown out of the more general use of that term. While still retaining its character as a survey of the whole field of law, Holtzendorff's *Encyklopädie der Rechtswissenschaft*<sup>21</sup> consists of some twenty independent articles, by leading authorities in Germany, covering the different branches of law. They are divided into four broad divisions: (1) philosophy of law; (2) civil law, including commercial law and procedure; (3) criminal law; (4) public law. The sixth edition of this well-known work, edited by Professor Kohler, was published in 1904. The fifth edition, published in 1890, contains articles by contributors in part other than those found in the sixth edition, and has therefore some independent value. Another notable work of the type of Holtzendorff is that edited by Dr. Karl Birkmeyer of

<sup>18</sup>(3d ed. Leipzig, A. Deichert, 1908).

<sup>19</sup>Erwin Grueber, *Einführung in die Rechtswissenschaft*. (Berlin, O. Häring, 1908).

<sup>20</sup>(Leipzig, Duncker & Humblot, 1909.)

<sup>21</sup>(6th ed. by Joseph Kohler, Berlin, Duncker & Humblot, 1904.) See the extensive article by Professor Erwin Grueber, 1 *Law Q. Rev.* 62-79 (1885), in which the contents of the fourth edition of this work are discussed.

Munich,<sup>22</sup> the leader of the classical school in criminal law. It consists of fourteen articles by leading authorities on different branches of law.

An important collection of monographs by the leading publicists of Germany appears as one of the volumes in the *Kultur der Gegenwart*, under the title *Systematische Rechtswissenschaft*.<sup>23</sup> The second part of Holtzendorff's *Encyklopädie* was formerly called *Rechtslexikon*, and presented in alphabetical arrangement a synopsis of German law. For this purpose it is now largely antiquated, but its bibliographies are still useful. The last edition appeared in 1875.

### B. Philosophy of Law.

Works on the philosophy of law (*Rechtsphilosophie*) take up the philosophical foundations of the legal order, legal systems, institutions and doctrines, and the philosophical and ethical bases of particular branches of the law. Works on the general theory of law (*Allgemeine Rechtslehre*) treat of general conceptions of law or of a legal system. The division between the works on *Rechtsphilosophie* and *Rechtslehre* is often vague.

A class of work which also presents a scientific analysis of fundamental legal conceptions is the Introductory or General Part of works on *Pandektenrecht* or modern Roman law. These works take up the details of a complete legal system.

Jurists have been arranged in schools or groups according to their methods, or according to their fundamental conceptions of law, in its origin, nature or purpose. Classifications, however, are by no means rigid, and the lines between the schools are often very indistinct.

Jurists, moreover, are frequently identified with certain leaders in juristic thought, whose doctrines they tend to follow or approach. The theories of these early leaders have now been largely abandoned, but to adopt Sheldon Amos' characterization, they have "stamped their personality, their nomenclature, their ethical tone, and their methods of philosophical analysis so ineffaceably upon the science of jurisprudence," that a survey of German legal philosophy can not omit these master works.

<sup>22</sup>Encyklopädie der Rechtswissenschaft. (Berlin, O. Häring, 1904).

<sup>23</sup>Systematische Rechtswissenschaft von Stammler, Sohm, Gareis, Ehrenberg, Bar, Seuffert, Liszt, Laband, Anschütz. Part of Die Kultur der Gegenwart, edited by P. Hinneberg. Part II, section VIII. (Leipzig, Teubner, 1906).

Method is an essential characteristic of every science. Methods applied to legal science have gained recognition as they have proved of practical utility in producing a symmetrical system of law suitable to the needs of the people whose social relations it has to regulate. The four methods principally employed in legal science have been the metaphysical, or *a priori*, the historical, the analytical, and the comparative, each of which has had illustrious representatives.

The metaphysical method, adopted by what was probably the largest class of the philosophical jurists, investigates the abstract ideas of right and law in their relation to morality, freedom, and the human will. Law becomes the expression of an idea. In the hands of certain of its exponents, this method gave new life to the school of natural law which regarded divine law as superior to human law, the law of man being simply a part of a larger scheme of the universe. In the hands of others, it helped to supplant the law-of-nature school.

The reaction against this latter school by the historical school helped to produce a new theory of law. The historical jurist sees in law a product of time and unconscious evolution; a rule of human action becomes the result of human experience. The reaction against the divine authority of law in favor of a constituted authority produced what has been called the positive school of thought, represented by Hobbes in England in political philosophy, and by Thibaut in Germany as a practical dogmatist in law. The opposition in England of the historical to the positive school finds a counterpart in Germany in the controversy between Savigny and Thibaut, to which conflict we shall recur later.

The analytical method starts from the concrete, from actually existing legal data, defines the terms, classifies them, and explains their connotation and interrelation. The analytical school, essentially of English origin, first became important in Germany with Binding's *Die Normen und ihre Übertretung* (1872).<sup>24</sup> It considers law as the product of a conscious or determinate human will. The modern development of this method and its application to current social problems is identified with the name of Jhering. Jhering represents a re-action against the historical school of Savigny. While continuing to regard law as a historical phenomenon, Jhering denies that it is an unconscious growth; on the contrary, he asserts that it is and always has been *made*, and that

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<sup>24</sup>(Leipzig, Engelmann, 1872-77; 2nd ed. 1890).

means of serving human ends are discovered and fashioned consciously into laws. He agrees with the English analytic school in emphasizing the possibility of enforcement as an essential characteristic of law.

The comparative method is concerned with space, as the historical is with time. It collects and examines the doctrines, rules and notions which are found in every developed legal system, notes their agreements and differences, and thereby seeks to construct a system of law. While this method has produced no distinct theory of law, it has come into prominence through the works of Dahn, Post and Kohler, in which comparative ethnology and anthropology are considered as important bases of jurisprudence.

The leading representative of the metaphysical group was the great philosopher Kant (1724-1804). With Kant, jurisprudence for the first time fell into the hands of the metaphysicians, and this union of law and metaphysics characterized a considerable portion of the German legal philosophy of the early nineteenth century. Kant's philosophy of law is contained in his work *Die Metaphysik der Sitten*,<sup>25</sup> published in 1797 as the first part of his *Metaphysic of morals*, the sequel and completion of his *Foundation for a metaphysic of morals*.<sup>26</sup> We possess an English translation of the work by W. Hastie.<sup>27</sup>

The important legal philosophers of the early nineteenth century who have themselves become leaders of juristic thought—Fichte, Schelling, Hegel, Krause—made the Kantian philosophy the starting point of their individual efforts.

Fichte's (1762-1814) most prominent work in law is his *Grundlage des Naturrechts*.<sup>28</sup> The book was translated into English in 1869.<sup>29</sup> The philosophical principles underlying modern social legislation in Germany may be said to have been first expressed in the works of Fichte. Schelling (1775-1854) is perhaps best known through his disciple Stahl (1802-1861), generally con-

<sup>25</sup>Erster teil. Metaphysische Anfangsgründe der Rechtslehre. (Königsberg, 1797).

<sup>26</sup>I. Kant, Grundlegung zur Metaphysik der Sitten. Translated by Willich (1798), Semple (1836) and Abbott (1873).

<sup>27</sup>W. Hastie, Kant's Philosophy of Law. An exposition of the fundamental principles of jurisprudence as the science of right by Immanuel Kant. Translated from the German by W. Hastie. (Edinburgh, T. & T. Clark, 1887).

<sup>28</sup>J. G. Fichte, Grundlage des Naturrechts nach Principien der Wissenschaftslehre. (Jena und Leipzig, C. E. Gabler, 1796-97, 2d ed.).

<sup>29</sup>The science of rights. Translated from the German by A. E. Kroeger. (Philadelphia, Lippincott, 1869).

sidered the leading representative of the theological school in legal philosophy.<sup>30</sup>

Hegel's (1770-1831) great work is his *Grundlinien der Philosophie des Rechts*, which has been translated into English by Professor Dyde.<sup>31</sup> The work first appeared in 1821 and in 1833 was edited by Gans (second edition, 1840). In 1902 an edition by Bolland was published in Leyden. The well-known editor of the *Encyclopädie u. der Phänomenologie*, George Lasson, has just brought out a new edition,<sup>32</sup> in which he has carefully edited the text, and supplied a valuable introduction and copious notes. Professor Kohler, the most prominent Neo-Hegelian, took occasion, on the appearance of this work, to write an article on Hegel's legal philosophy. It may be found in the October, 1911, number of the *Archiv für Rechts- und Wirtschaftsphilosophie*. The Hegelian philosophy considers law the expression of the culture of a people in the form of principles, for the government of men's external relations with one another. To quote Korkunov, Hegel's disciples have sought to present the different systems of positive law as a dialectic development of the general idea of liberty. An outline in English of Hegel's legal philosophy is given in Dr. James Hutchinson Stirling's *Lectures on the philosophy of law*.<sup>33</sup> The lectures of W. G. Miller delivered at the University of Glasgow, adopt in general the Hegelian standpoint.<sup>34</sup>

Krause (1781-1832) is now recognized as the definite founder of the organic and positive school of natural law, and brings to its fullest effect the philosophy of Kant. His two most prominent works are his *Grundlage des Naturrechts*,<sup>35</sup> and his *Abriss des Systems der Rechtsphilosophie*.<sup>36</sup> The leading representative of the Krause school was the celebrated Ahrens (1808-1874), whose *Cours de droit naturel*<sup>37</sup> has an international reputation. The only

<sup>30</sup>F. J. Stahl, *Die Philosophie des Rechts*, (4th ed. Heidelberg, 1870).

<sup>31</sup>Translated by Professor Dyde as "Philosophy of right." (London, Bell, 1896).

<sup>32</sup>G. W. F. Hegel, *Grundlinien der Philosophie des Rechts*. Mit der von Gans redigierten Zusätzen aus Hegel's Vorlesungen neu hrsg. von Georg Lasson. (Leipzig, F. Meiner, 1911).

<sup>33</sup>(London, 1873).

<sup>34</sup>Lectures on the philosophy of law. (London, C. Griffin, 1884).

<sup>35</sup>C. Chr. Krause, *Grundlage des Naturrechts oder Rechtsphilosophie Grundriss des Ideals des Rechts*. (1803).

<sup>36</sup>*Abriss des Systems der Rechtsphilosophie oder des Naturrechts*. (1825) (System der Rechtsphilosophie, Leipzig, 1873).

<sup>37</sup>Heinrich Ahrens, *Cours de droit naturel ou de philosophie du droit*, (8th ed. Leipzig, Brockhaus, 1892; 6th German ed. Vienna, 1870; English translation, Boston, 1880, Miller's bibliography).

English work which displays sympathy for the principles of Krause and his school of natural rights is Professor Lorimer's *Institutes of law*.<sup>38</sup> Pollock in his *Essays in jurisprudence and ethics*, gives considerable space to Lorimer's work and the theory.<sup>39</sup>

The various schools of juristic thought have been in frequent opposition, and the history of legal development in Germany is closely identified with their controversies. The nineteenth century opened with the reaction by the historical school, resurrected and rehabilitated by Hugo (1764-1844), against the school of natural law. The first effective challenge of this revived school was extended by Savigny, its most illustrious representative, in his intellectual contest with the practical dogmatic school of Thibaut. Savigny also opposed his historical method to the abstract metaphysical speculations of the contemporary Hegelians. After the controversies of Thibaut and Savigny on the possibility and utility of codification had been forgotten in the great constructive work of codification and law reform which began with the Bills of Exchange Act (*Wechselordnung*) of 1849, and which was continued in the Commercial Code of 1861 and later in the Imperial statutes of 1877, the arena was cleared for the struggle between the Germanists and the Romanists. While not strictly a conflict between philosophical conceptions or jurisprudence, the contest may nevertheless be considered an effort of the then newly arising analytical school, by its critical methods, to overthrow the dominant Romanism in German law. These controversies having now largely subsided with the enactment of the Civil Code, the social conditions of the present day have given rise to a new school which Roscoe Pound calls a socio-philosophical or sociological school. This sociological school of juristic thought combines within it the methods of the historical, analytical, and revived philosophical schools.

The substance of the struggle between the historical and dogmatic non-historical schools, whose champions at the height of the controversy were Savigny and Thibaut, is exemplified by two small works, the one by Savigny (1779-1860), his celebrated *Of the vocation of our age for legislation and jurisprudence*, first written in 1814,<sup>40</sup> and the other by Thibaut, a pamphlet called *Über die Notwendigkeit eines allgemeinen bürgerlichen Rechts für*

<sup>38</sup>A treatise of the principles of jurisprudence as determined by nature. (2nd ed. Edinburgh, 1880).

<sup>39</sup>Pp. 19 *et seq.*

<sup>40</sup>English translation by Abraham Hayward from the 2d. ed. (1828).

*Deutschland*, published in 1814 with some other doctrinary monographs. Both works were due to a revival of German patriotism, caused by the Napoleonic wars. Thibaut urged his countrymen to promote German unity by codifying and unifying their laws. Savigny warned them against hastily and inconsiderately following French models. A short critique of the German historical school is presented in Korkunov's *General theory of law* (Hasting's translation).<sup>41</sup> The political and legal conditions upon which Thibaut based his advocacy of codification are also well stated. A list of the works of Hugo, the father of the historical school, and those of his great disciple, Haubold, are to be found in the *American Jurist*.<sup>42</sup> A valuable study of the life and influence of Savigny was written for the *Journal of the Society of Comparative Legislation*,<sup>43</sup> by J. E. G. DeMontmorency, this being one of a series entitled, "The great jurists of the world." Dr. W. Guthrie's excellent translation of the eighth volume of Savigny's *System des heutigen römischen Rechts*<sup>44</sup> is introduced by an admirable account of Savigny and his standpoint. This introduction also contains<sup>45</sup> in Savigny's own words, a refutation of the charge made against the historical school that its disciples sought to impose Roman law upon modern conditions in Germany.

In the latter part of the nineteenth century strict philosophy of law fell into disrepute, because of its mistaken identification with the metaphysical speculations of Kant and Hegel. Nevertheless such works as Lasson's *System der Rechtsphilosophie*,<sup>46</sup> and the works of Kohler indicate a distinct revival of the Hegelian school. Stammler, the most prominent Neo-Kantian of modern times, also shows the influence of the general philosophical awakening at the end of the nineteenth century. Jhering, Kohler and Stammler are the leaders of the modern sociological-philosophical school.

The differences between the various schools have called forth a number of excellent articles in English and American periodicals, to which it seems fitting to direct attention. By all means the most important of these are the two articles published by

<sup>41</sup>Pp. 118-122; in section 19, pp. 143-156 of that book, the doctrines of Hugo, Savigny and Puchta, the most typical representatives of the historical school, are set forth.

<sup>42</sup>Vol. 14, p. 48, and see footnote to p. 49.

<sup>43</sup>Number 23, November, 1910, pp. 32-54.

<sup>44</sup>A treatise on the conflict of laws. Translated, with notes, by William Guthrie (2nd ed. Edinburgh, T. & T. Clark, 1880).

<sup>45</sup>P. 13.

<sup>46</sup>(Berlin, 1882).

Roscoe Pound on the "scope and purpose of sociological jurisprudence."<sup>47</sup> It is a brilliant account of the origin, principles, development, and inter-relation of the various schools of juristic thought. The second of the articles devotes considerable space to the doctrines and influence of the greatest of the social utilitarians, Jhering and the leader of the modern Neo-Kantians, Stammler, to whose notable work we shall refer below. Professor Pound's forthcoming book *Sociological jurisprudence*, of which these articles are the substance, will unquestionably command widespread attention.

The different schools of jurisprudence, with emphasis on the sociological, were described by Professor Pound in his paper "A new school of jurists."<sup>48</sup> Gareis's *Science of law*,<sup>49</sup> presents a succinct outline of the various schools. The twelfth essay in Bryce's *Studies in history and jurisprudence*,<sup>50</sup> while not confined to Germany, discusses the principal methods of legal science, their application to the philosophy of law, and their theoretical and practical utility. The concluding pages of Munroe Smith's brilliant essay on *Jurisprudence*<sup>51</sup> take up the principal schools of juristic thought, their theories, and their methods.

An article by Professor Pound<sup>52</sup> presents the attitude of the three principal schools, the analytic, the historical, and the modern sociological-philosophical school toward a certain phase of the contemporary movement for the reform of legal procedure in Germany—the function of the judge in the application of law (*Rechtsanwendung*). Dr. M. Rumpf, in a small work entitled *Gesetz und Richter*,<sup>53</sup> has made an excellent contribution to this much debated question of the proper function of the judge in the application of law, and the relation between legislation and judicial decision. The work has recently been translated into French. A book on the same subject by Brütt<sup>54</sup> has attracted some attention.

<sup>47</sup>Appearing in 24 Harv. L. Rev. 591-619 and 25 Harv. L. Rev. 140-168.

<sup>48</sup>Published in the University Studies of the University of Nebraska, Vol. 4, (July 1904) 249-266.

<sup>49</sup>Introduction, p. 12.

<sup>50</sup>Vol. 2, pp. 172-208 (Oxford, 1901).

<sup>51</sup>New York, Columbia University Press, 1908.

<sup>52</sup>Published in Vol. I of the Annual Bulletin of the Comparative Law Bureau.

<sup>53</sup>(Berlin, Liebmann, 1906).

<sup>54</sup>L. Brütt, *Die Kunst der Rechtsanwendung*. (Berlin, J. Guttentag, 1907).

In an article entitled "German historical school of jurisprudence," published in the *American Jurist*,<sup>55</sup> there appears a translation of the seventeenth chapter of Lerminier's great work *Introduction générale à l'histoire du droit*.<sup>56</sup> The article contains a learned discussion of the conflicting theories of Savigny and Thibaut, as portrayed in their works. In a similar article comparative of these two schools under the title "Schools of German jurists,"<sup>57</sup> the two great schools of Roman lawyers and their principal disciples are discussed, followed by a comparison of the respective schools of Savigny and Thibaut. A. H. Lefroy in an article entitled "Jurisprudence,"<sup>58</sup> distinguishes the English from the German historical school of jurisprudence, explaining that the former is scientific in origin and deals with the growth of juridical ideas within the legal system, whereas the latter is political in origin and deals with the developments of legal systems as a whole. His opinions are based on Pollock, Vinogradoff and Maine. In an article by Professor Ernst Freund,<sup>59</sup> under the title "Historical jurisprudence in Germany" there is a critical discussion of the spirit and work of the historical school of jurists in their struggle with the philosophical and the practical dogmatic schools. Professor Rudolph Leonhard, Kaiser Wilhelm exchange professor at Columbia University 1907-8, in an introductory address on the "Methods followed in Germany by the historical school of law"<sup>60</sup> examines with friendly criticism the methods of the historical school and lays emphasis on its achievements.<sup>61</sup>

The social conditions at the end of the nineteenth century and the demands of society for the effective administration of justice in the existing complex industrial organization helped to create a new group of jurists, the social utilitarians, who gave a new direction to the philosophy of law, turning from its nature to its purpose. Rudolph Jhering (1818-1892), the great Romanist, is the leader of this group, of which Berolzheimer and Sternberg are prominent repre-

<sup>55</sup>Vol. 14, pp. 43-62.

<sup>56</sup>(2nd ed. Paris, 1835).

<sup>57</sup>6 Monthly Law Magazine 77-98.

<sup>58</sup>Law Quarterly Review, (1911) pp. 180-186.

<sup>59</sup>5 Political Science Quarterly 468-486.

<sup>60</sup>7 COLUMBIA LAW REVIEW 573-581.

<sup>61</sup>A useful bibliography of the philosophy of law, divided by schools and periods, is printed as Appendix E (pp. 408-424) of W. G. Miller's *Lectures on the Philosophy of Law*. (London, Griffin, 1884) Professor Salmond's well-known work on *Jurisprudence* (London, Stevens & Haynes, 1907, 2nd ed.) contains in Appendix V a carefully selected bibliography.

sentatives. Jhering's views have exercised a permanent influence on the whole trend of modern juristic thought and conceptions of law, and jurists generally will agree with Roscoe Pound that his work is quite as epoch-making as that of Savigny. Jhering, analytically inclined, represents a violent reaction against the historical school. Instead of considering law the result of unconscious growth, like language, Jhering by his teleological method succeeded in showing that it is fashioned to meet human ends consciously. His is a jurisprudence in which legal precepts are created and tested by their results and practical application. Jhering was the pioneer in doing for Germany what is now most urgently needed in America: he substituted a jurisprudence of results (*Wirklichkeitsjurisprudenz*) for a jurisprudence of concepts (*Begriffsjurisprudenz*). He was the first to advance what is now the generally accepted theory that law is the means by which society recognizes and protects individual interests. It is not invoked by the individual *against* society, but is created *by* society to secure those individual interests which it recognizes. This social theory of law, and its practical effect in the interpretation of modern legislation has just begun its development. A discussion of the relation between the utilitarian school and those it has superseded may be found in Korkunov's *General theory of law*.<sup>62</sup>

Professor Munroe Smith in a series of articles appearing in the *Political Science Quarterly*,<sup>63</sup> under the title "Four German jurists," Bruns, Windscheid, von Jhering and Gneist, undertakes a critical study of the works and philosophy of these scholars and of their influence on the development of law.<sup>64</sup> Two other important articles in English on the teachings of Jhering have appeared in periodicals. Professor William Markby, in the *Law Magazine and Review*,<sup>65</sup> under the title "German jurists and Roman law," discusses Jhering's legal theories, particularly as he expounds them in his *Geist des römischen Rechts*.<sup>66</sup> In the same article he discussed to some extent Jhering's forceful little work, *Der Kampf ums Recht*,<sup>67</sup> which has been translated into almost every modern language and appears in a rather poor English translation, from the

<sup>62</sup>Pp. 104-115.

<sup>63</sup>10 *Political Science Quarterly* 664-692 (1895); 11 *id.* 278-309 (1896); 12 *id.* 21-62 (1897); 16 *id.* 641-679 (1901).

<sup>64</sup>A list of their principal publications appears in 10 *Political Science Quarterly* 664-665.

<sup>65</sup>4th series, Vol. 3, pp. 389-412 (1878).

<sup>66</sup>(Leipzig, 1873, 6th ed. 1881 1907).

<sup>67</sup>(17th ed. Wien, Manz, 1910).

fifth German edition, by John J. Lalor.<sup>68</sup> This last mentioned work is also discussed in an article by Judge U. M. Rose, published in the *Southern Law Review*,<sup>69</sup> under the title "Controversies of modern continental jurists." The article contains an exposition of the general legal philosophy and doctrines of Jhering.

Jhering's leading work, with which his juristic thought is usually identified is his *Der Zweck im Recht* (Teleology of law).<sup>70</sup> This work is shortly to be translated under the title *Law as a means to an end* by Isaac Husik of the University of Pennsylvania, as one of the Modern Legal Philosophy Series, under the general editorship of a Committee of the Association of American Law Schools. The theories presented in this work constitute the basis for the discussion of Jhering in Pound's recent article and occupy a prominent place in Munroe Smith's article on "Four German jurists."<sup>71</sup>

Berolzheimer, while a Neo-Hegelian, may be identified with the juristic conceptions of Jhering. His most prominent contributions to literature are his five volumes on legal and social philosophy.<sup>72</sup> Part of his work, *Die Kulturstufe der Rechts und Wirtschaftsphilosophie*, is to be translated by Mrs. Joseph Jastrow as volume II of the Modern Legal Philosophy Series. This is to offer a comprehensive survey of the works of all the philosophers, from the beginning to the present time, in their treatment of legal theory. Berolzheimer's *Rechtsphilosophische Studien*<sup>73</sup> assured him a prominent place among present day scholars.

Jhering has exercised a strong influence on writers on the general theory of law, particularly as to the essential element of enforcement. Theodor Sternberg's *Allgemeine Rechtslehre*<sup>74</sup> is among the more important of the recent works on jurisprudence. Although a Russian work, we can not overlook Korkunov's *General theory of law*,<sup>75</sup> which has been made available to Anglo-American

<sup>68</sup>(Chicago, Callaghan & Co., 1879).

<sup>69</sup>N. S. Vol. 2, pp. 551-575 (1876).

<sup>70</sup>Rudolf Jhering (1st ed. 1877-83, 4th ed. Leipsig, Breitkopf and Härtel, 1904-05).

<sup>71</sup>*Supra*. Chap. XI (pp. 262-310) of Lightwoods's *Nature of positive law* (London, Macmillan, 1883) is entitled "Modern German schools of jurisprudence." It consists largely of a portrayal of Jhering's conceptions of law as opposed to those of Puchta and Savigny.

<sup>72</sup>Fritz Berolzheimer, *System der Rechts u. Wirtschaftsphilosophie*. (München, C. H. Beck, 1904-07).

<sup>73</sup>(München, C. H. Beck, 1904-07).

<sup>74</sup>(Leipzig, Göschen, 1904).

<sup>75</sup>N. M. Korkunov, *General Theory of Law*, English translation by W. G. Hastings. (Boston Book Co., Boston, 1909).

lawyers by the excellent translation of Professor Hastings. In its thorough grasp of legal concepts and its critical acumen, it is of primary importance in the study of German juristic thought. The work has been incorporated in the Modern Legal Philosophy Series as volume IV.<sup>76</sup>

The practical need for a new philosophical jurisprudence brought to the front a jurist whose work has placed him in the very front rank of modern scholars. This is Professor Rudolf Stammler of Halle, a Neo-Kantian. He represents a reaction against the historical school in his return to the philosophical method. His theory of the social in place of the old individualistic ideal as a criterion of justice is in reality a legal theory of social justice which meets the social problems of the century and interprets the social will. To quote Professor Pound, the whole science of jurisprudence has received a new standpoint. Kantorovicz, cited by Pound, states that it is Stammler's endeavor to find a method of "determining and directing the application of legal rules so that they shall have the quality of being objectively just." He reaches justice "through law" instead of "according to law."

All three of Stammler's leading works are of the utmost importance. For his philosophy of law his *Lehre vom dem richtigen Rechte*<sup>77</sup> is the most prominent. Under the title *The theory of justice* this work is to be translated into English in the Modern Legal Philosophy Series. His other important work *Wirtschaft und Recht*<sup>78</sup> is likewise an attempt to reach a theory of law and justice which shall fit current social problems. Stammler's latest work, *Theorie der Rechtswissenschaft*,<sup>79</sup> includes a complete system of his theory of jurisprudence. He deals with the concept, the validity, the categories, the method, the ideal, the technique, the practice and finally with the history of law. The book appeared too recently to receive the discriminating evaluation that it deserves.

The Neo-Hegelians, whose most prominent disciple is their leader Josef Kohler, have preserved and developed the historical method. They have sought to relate this method to the philosophy of law, to anthropology, to ethnology, and to economics. Kohler's

<sup>76</sup>Attention may be called to a recent work on the general theory of law by August Sturm. He calls it the "psychological basis of law." Its value is still uncertain. (*Die psychologische Grundlage des Rechts. Ein Beitrag zur allgemeinen Rechtslehre*, Hannover, Helwing, 1910).

<sup>77</sup>(Berlin, Guttentag, 1902-07).

<sup>78</sup>(2nd ed. Leipzig, Veit & Co., 1906).

<sup>79</sup>(Halle, Waisenhaus, 1911).

most important contribution to the philosophy of law is his theory of the sociological interpretation and application of law. Contrary to Savigny's theory that law is an unconscious growth, Kohler holds that law is a product of the culture of a people in the past, and of the attempt to adjust it to the culture of the present, in which a conscious effort may be prominent. Scholars generally admit that Kohler is the most versatile if not the greatest of living jurists. Kohler's leading work in this branch of law is his *Lehrbuch der Rechtsphilosophie*.<sup>80</sup> Under the title *The Philosophy of law*, this book is being translated into English by Adalbert Albrecht, as one of the Modern Legal Philosophy Series. It is expected to appear very shortly. "The mission and objects of philosophy of law" is the title of an article by Professor Kohler which appeared in the *Illinois Law Review*.<sup>81</sup> It is a translation by Albert Kocourek of Chicago of an article which was first published in the *Archiv für Rechts- und Wirtschaftsphilosophie*. It is a concise statement of Kohler's philosophy. The translator's final note on the philosophy of law in America is trenchant.

The object of Rudolf Bierling's *Juristische Prinzipienlehre*,<sup>82</sup> a work begun almost twenty years ago and just completed, is to consider abstractly and present systematically the concepts and principles underlying positive law. The author considers law as having a formal nature, and thus differs essentially both from the old law-of-nature school and from the modern legal philosophy. An extensive review of the first volume by the late Professor E. Hölder of Leipzig is to be found in the *Kritische Vierteljahresschrift für Gesetzgebung*.<sup>83</sup> Besides reviewing volume one, he discusses the basic principles of the whole work and Bierling's legal philosophy.

A recent work by the octogenarian, Professor Ernst Immanuel Bekker, entitled *Grundbegriffe des Rechts und Missgriffe der Gesetzgebung*<sup>84</sup> deserves attention among works on this subject. It is a philosophic study of the basic principles of law from the point of view of the association or group as a subject of legal rights. A second volume is to contain a further discussion of the misconceptions and errors of legislation.

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<sup>80</sup>(Berlin & Leipzig, W. Rothschild, 1900).

<sup>81</sup>Vol. 5, pp. 423-440 (1911).

<sup>82</sup>(Leipzig, Mohr, 1894, 1898, 1905, 1911).

<sup>83</sup>Third series, Vol. 1 (37 of whole) pp. 1-52 (1895).

<sup>84</sup>(Berlin, Rothschild, 1910).

A periodical edited by Professors Kohler and Berolzheimer, dealing largely with the subject of legal philosophy, is the *Archiv für Rechts- und Wirtschaftsphilosophie*, which also discusses questions of legislation. It is now in its fourth year.

Reference has been made on several occasions to the translations of German works that are to appear in the Modern Legal Philosophy Series, edited by a committee of the Association of American Law Schools.<sup>85</sup> The series is also to include translations of other prominent works on the philosophy of law presenting the juristic thought of the most prominent Continental legal philosophers. The value of this work to the American lawyer can not be overestimated. The profession will recall the *Essays in Anglo-American legal history*, edited under the auspices of this same association. They are adding to their monumental labors by undertaking the publication of translations of the most important Continental works on legal history. For these meritorious enterprises, American legal scholarship owes to these committees, and especially to Professor Wigmore, one of their most active and inspiring members, a profound and lasting debt of gratitude.

This general survey of German contributions to jurisprudence

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<sup>85</sup>The Modern Legal Philosophy Series is to consist of the following volumes; volumes I and IV have already been published, and others will appear shortly:

I. The Science of Law, by Karl Gareis, Univ. of Munich. Trans. by A. Kocourek of Northwestern Univ.

II. The World's Legal Philosophies, by F. Berolzheimer of Berlin. Trans. by Mrs. J. Jastrow of Madison, Wis.

III. Comparative Legal Philosophy, in its Application to Legal Institutions, by Luigi Miraglia, of the Univ. of Naples. Trans. by J. Lisle of the Philadelphia bar.

IV. General Theory of Law, by N. M. Korkunov of the Univ. of St. Petersburg. Trans. by W. G. Hastings of the Univ. of Nebraska.

V. The Law as a Means to an End, by R. von Jhering of the Univ. of Berlin. Trans. by I. Husik of the Univ. of Pennsylvania.

VI. The Positive Philosophy of Law, by I. Vanni of the Univ. of Bologna. Trans. by J. Lisle of the Philadelphia bar.

VII. Modern French Legal Philosophy, by A. Fouillée, J. Charmont, L. Duguit and R. Demogue of the Universities of Paris, Montpellier, Bordeaux, and Lille. Trans. by J. Simpson of the New York bar.

VIII. The Theory of Justice, by Rudolf Stammler of the Univ. of Halle.

IX. Select Essays in Modern Legal Philosophy, by various authors.

X. The Formal Basis of Law, by G. Del Vecchio of the Univ. of Bologna. Trans. by J. Lisle of the Philadelphia bar.

XI. The Scientific Basis of Legal Justice.

XII. The Philosophy of Law, by J. Kohler of the Univ. of Berlin. Trans. by A. Albrecht of South Easton, Mass.

XIII. Philosophy in the Development of Law, by F. De Tourtoulon of the Univ. of Lausanne.

The editorial committee consists of Professors Wigmore, Lorenzen, Pound, Freund, Huberich and Kocourek. Boston Book Co. publishers.

and legal philosophy, if it has had no other practical utility, has at least served to show the important results which sound theories of law have achieved in Germany. It is hoped that the truth of Jhering's thesis that law is not wholly, nor even mainly, a national product, but that it has a universal character, has been demonstrated. Finally, the new direction which has been given in Germany to jurisprudence by the necessity for dealing effectively with the social and economic problems of that country should demonstrate to us, who are confronted with similar problems, the necessity of abandoning an outworn insular conception of law. These problems require a jurisprudence of vitality fashioned to meet social ends as a regulative agency in the adjustment of individual interests, and a legal philosophy which shall draw its force from Mr. Justice Holmes' "secret root" of the law—the conscious recognition of social utility.

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