

RUDOLF VON JHERING: OR LAW AS A MEANS TO AN END

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THE pioneer of the basic modern trends in jurisprudence was a German, Rudolf von Jhering. He might appropriately be called the Mark Twain of German jurisprudence. Gifted with a rare sardonic humor, he led the revolt against philosophical abstraction and conceptualism in German jurisprudence and the glorification of logic as a juristic method, which enabled the jurists to disguise the law as a system of legal mathematics. It so happened that this attack upon logical method in the law hit the basic evil of all nineteenth-century jurisprudence. The controversy raged about logic, but the real issue was a new social gospel whose acceptance was being prevented by false logic. Socialism was in the air but the jurists remained oblivious even of the need for social legislation which would bring about a socialization of the civil law. They simply persisted in applying logically the basic postulates of the individualist philosophy which had become established with the rise of capitalism.

Jhering has been called the German Bentham, but the comparison is not apt for no other reason than that Jhering's creed was a social utilitarianism. He did not share Bentham's passion for codification, taking little or no interest in the drafting of the German Civil Code, which took place during his lifetime. Jhering was interested in function rather than formal definition. It seems strange that a social struggle should have been carried on in terms of a controversy over the place of logic in juristic method, but controversy in jurisprudence is always oblique. The first revival of commerce raised the issue of the reception of the Roman law because that system of law was far more advanced than Germanic law; the rise of capitalism was tied up with the movement for natural law, which afforded a means of rationalizing the Roman law; and it was to be expected that the demand for far-reaching social changes should lead to bitter discontent with a juristic method that was employed to give the basic institutions of the existing order an appearance of eternal and unalterable truth. Logic had always been the chief tool of jurisprudence from Gaius to Blackstone. It served well enough in periods of quietism, when there was no need to question the premises which underlay the logical deductions of the jurists. Logic, however, was bound to become the chief focus of attack in an age of rapid transition and change.

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The nineteenth century, which was a period of great scientific inventiveness, was rather paradoxically a period of comparative stagnation in the field of the civil law. The jurists were content with the rationalization of the basic legal principles of property and contract which had been accomplished in the name of "equity" in the countries of the common law, and in the name of "natural law" in the countries of the civil law. Such legal inventiveness as was manifested in the nineteenth century was in procedural law, and in the amelioration of the criminal law. Bentham, although a great procedural inventor, believed in the fundamental verities of Adam Smith, and therefore had no violent quarrel with the substantive principles of the common law. The movement for codification, which he stimulated, produced its greatest accomplishment in France when Napoleon caused to be drafted one civil code for all the provinces of France; but this *Code Napoléon* merely restated the precepts of natural law and the principles of customary law as they had been worked out by the great French legists of the sixteenth and seventeenth centuries. In the United States there had been produced the great original procedural invention, the device of judicial review, which was revolutionary in form, and had as great an effect upon the judicial systems of the country as the cotton gin and the automobile, but this effect was reactionary, and actually retarded the development of the substantive law. With a judicial oligarchy in control of legislation, the basic dogmas of property and contract remained unaltered far longer than elsewhere, and the system of laissez faire became the touchstone of the Constitution.

It is a rather singular irony that the juridical revolution should have occurred in Germany, which began the nineteenth century with the most backward legal system among the countries of Western Europe. The Industrial Revolution did not come to Germany until after the middle of the century but the juridical revolution occurred earlier there than in England, the United States, or France. History later repeated itself when Socialism was first realized in Russia, the land of the czars. The causes of the juridical revolution were the same as those of the industrial revolution in Germany, namely, political unification, and the application of the latest science. The *Code Napoléon*, which has been happily called the *code bourgeois*—so well is it adapted to the needs of the middle-class estate—was proclaimed in 1804, but the German Civil Code did not go into effect until January 1, 1900. Germany had the advantage of the latest juridical machinery even as it had the advantage of the latest industrial machinery. All the juristic discoveries of the nineteenth century seem to have been "made in Germany." But it is no exaggeration to say that through most

of the nineteenth century Germany could boast the greatest jurists and the worst legal system of any country in Europe. Such men as Friedrich Karl von Savigny and Theodor Mommsen, the great Romanists, and Bernhard Windscheid, the master of the pandects, as well as Otto von Gierke, Karl Friedrich Eichhorn, Georg Ludwig von Maurer, and Rudolf Sohm, the leading Germanists, who indefatigably investigated the origins of Germanic law, all achieved international reputations. But these jurists were interested only in legal history or the philosophy of law. They paid little or no attention to the needs of practical jurisprudence, which they left entirely in the not too capable hands of the practitioners. Since political unification is the first prerequisite of any effectively functioning legal system, the task of the jurists would perhaps have been hopeless. They sought fame therefore in purely scientific labors.

The scientific cultivation of jurisprudence, in the historical as well as the philosophical fields, is a characteristic of the maturity of law. The arts of jurisprudence are not cultivated by people in primitive or archaic civilizations; there are no jurists; and the needs of practice are all-absorbing and sufficient. The first phase of juridical philosophy had been represented by natural law speculations in ancient Greece and Rome as well as in the Europe of the sixteenth and seventeenth centuries. But it was in the nineteenth century that philosophies of law were elaborated in all their infinite variety. Juristic philosophy even became an independent branch of philosophy. The connection between the maturity of law and the development of the philosophy of law is manifest particularly in England precisely because England has never been the home of abstract philosophy. Yet in the first half of the nineteenth century the English produced a juristic philosopher in the person of John Austin, the founder of the so-called analytical school of jurisprudence. Austin, a middle-class liberal, who resigned an army commission to study legal philosophy in Germany, represented a reaction against natural law ideas. He attempted to separate the law from moral philosophy, and to found a positive science of law, based upon the precepts of the existing system of English law. He regarded law as the command of the sovereign; in broader terms, law consisted of those rules that had the forceful backing of politically organized society. In Austin is manifest the beatitude of the common law; analytical jurisprudence is simply the rationalization of the established order, regarded as eminently satisfactory. The flirtation with German juristic philosophy had apparently done Austin no harm. He merely restated in more abstract philosophical terms the theme of Blackstone.

But during the same period in Germany there reigned triumphant the

“historical” school of jurisprudence founded by that German aristocrat, Friedrich Carl von Savigny. The very fact that he had deigned to enter upon an academic career as a teacher of Roman law was regarded as an act of unparalleled grace. Savigny conducted monumental researches into the history of Roman law, but even in this activity he had an unfortunate effect upon practice, for he tended to elevate the ancient Roman law as the “pure” law as against the law of the pandects, the *usus modernus pandectarum*, the modified Roman law which had actually obtained in the German states since the general reception of Roman law in the fifteenth century. But far more mischievous in its effect was the philosophy of history which was espoused by Savigny, and became the accepted doctrine of the historical school. Representing the political reaction in Germany, which had so firmly entrenched absolutism in all the Germanies that it could not be broken even by the revolution of 1848, Savigny taught that a nation’s law, like its language and other cultural attributes, was an unconscious emanation of the *Volksgeist*, the “genius” of its people. Customary law was therefore law par excellence—the chief source of law. For this reason, Savigny opposed codification for Germany, and in a celebrated pamphlet, *Vom Beruf Unserer Zeit für Gesetzgebung und Rechtswissenschaft* (On the Vocation of Our Times for Legislation and Jurisprudence), denounced the creators of the *Code Napoléon* as “miserable dillitanti.” He thus opposed not only the revolutionary doctrine of natural law but positive legislation. It might be supposed that he would have been nonplused by the fact that the *Volksgeist* in Germany had manifested itself in the reception of the alien Roman law, but he simply invented the fiction that in mature systems of jurisprudence the learned jurists act as the representatives of the *Volksgeist*. In fact, however, the historical school could not reconcile the contradiction between the reception and the theory that the origin of law was to be found in the folk-spirit. There should be recalled Karl Marx’s jibe at Savigny, which was that he became so absorbed in the sources of the law that he became oblivious of the main stream.

The “historical” school was misnamed, for it really was a philosophical school. The reaction to the historical school, which began even during Savigny’s ascendancy, did not give a more realistic basis to German jurisprudence. The opposing school, correctly called the “philosophical” school, took its inspiration, of course, from Hegel, who was only another reactionary with a profound belief in absolute monarchy. Hegel regarded the state as the essence of freedom and reason but the state was represented by the monarch. He perceived in law the evolution of the idea of free-

dom, and in the freedom of the will the essence of individual freedom. Apparently he was not bothered very much by the obvious facts that at least the German states were not the embodiments of liberty and that the science of the law had always been overshadowed by restraint. In Germany it was not usually regarded as a legitimate objection to a philosophy that it was nonsense. As Heinrich Heine said, Britain ruled the seas, France the land, while Germany ruled the clouds. The most dire consequence of Hegel's emphasis upon the freedom of the individual will was that it led to a "will jurisprudence." The jurists, instead of considering social and practical requirements, thought in terms of individual intention and the realization of the individual will in the construction of legal transactions, and in terms of legal powers rather than legal duties. In the mature Roman law and common law, the lawyers also made much of "intention," but they never quite carried the business to the same degree of absurdity. The "civil" law, which is often called private law, is always the preserve of the individual, but "will jurisprudence" reflected as never before the freedom of contract which the jurists had made omnipotent.

The other main opponents of Savigny were the "Germanists," whose master was Otto von Gierke. The Germanists really believed in the *Volksgeist*, and were rarely, if ever, outdone by the Romanists in the ardors of historical research, but they were alienated by Savigny's predilection for the pure Roman law and his slighting of the Germanic elements in practice, which really represented whatever adaptations had been made to current needs. The Germanists undoubtedly conducted valuable researches into the origins of German law, but their efforts to re-establish the more Gothic and quaint legal elements of the German past were only another phase of romanticism. The mature Roman law was of course a far better basis for a modern jurisprudence than the medieval *Sachsenspiegel* or the *Schwabenspiegel*, the two great monuments of archaic German law. But the question was not whether either Romanistic or Germanistic elements were to be preferred but whether given legal institutions met contemporary needs. The endless squabbles between the Romanists and the Germanists were an important factor in postponing the adoption of a German Civil Code.

The condition of German jurisprudence had been aggravated not only by its contact with German philosophy since the days of Emmanuel Kant but by the habits and traditions of German university life. The undue emphasis upon academic rank, which could be achieved only by contributions to scholarship, led to an endless production of doctoral dissertations and treatises whose ostensible purpose was the increase of juristic knowl-

edge but whose actual purpose was only academic advancement. The passages in the *corpus iuris* of Justinian had been the subjects of learned commentaries for centuries, and originality could rarely, if ever, be achieved except by absurdity. Moreover, unlike the case in England and America, the bar and the judiciary were rigidly separated corps, and the fructification of scholarship by men with experience in practice rarely occurred. Until about the middle of the nineteenth century the medieval practice of submitting questions of law to a member of the university faculties had not disappeared, but such submissions were usually only another opportunity for the academic airing of a favorite juristic theory. The atmosphere, social and political, of the typical German university town, usually located in a provincial center, was, too, not calculated to stimulate bold and independent thinking.

Rudolf Jhering was not an iconoclast born. Although he had the right temperament, it did not reveal itself publicly in the first two decades of his career. Born at Aurich in East Frisia on August 22, 1818, he came of a family that boasted a long line of jurists and civil servants. His great-great-grandfather was Herman Conring, one of the few German realists who had pioneered in economics as well as political science and had left his mark in ridiculing the Holy Roman Empire. Jhering had the conventional education of his time. He left the gymnasium at the age of eighteen and studied at Heidelberg, Munich, Göttingen, and Berlin. His intention at first was to enter the civil service, but the government of his native town in its infinite wisdom refused him a post because his brother was already in the civil service. Saved for jurisprudence, he thereupon entered upon the teaching of Roman law. The first five years of his academic career were spent successively at Basel, Rostock, and Kiel, but it was not until he reached Giessen in 1852 that he settled down for more than a decade and a half of teaching and the composition of the work which he then believed would be his magnum opus, the *Geist des Römischen Rechts auf den verschiedenen Stufen seiner Entwicklung* (The Spirit of the Roman Law in the Various Stages of Its Development), which appeared in four volumes from 1852 to 1865 and was translated into the principal European languages. His growing fame brought Jhering a call in 1867 to teach at the University of Vienna, where he achieved great success, but he remained there only until 1872. He found the Austrian capital highly stimulating but also very distracting. Having already projected a new magnum opus, he gladly accepted a call to Göttingen. He taught and worked there during the rest of his life.

There was little in the life and labors of Jhering in his early days at

Giessen that betrayed the philosophy of his later years. In a sense an adherent of the historical school, he criticized the theories of Savigny but without striking a true note of revolt. He rejected the narrow nationalism of Savigny, and emphasized at least the universal character of the later Roman law. He declared that the historical school debased legal science to the plane of territorial jurisprudence, and made the scientific boundaries coincide in jurisprudence with the political. He perceived in the reception the working of a process of international legal exchange. "To prevent reception from without and to condemn the organism to development from within outward is to kill it" he said. "That sort of development begins with the corpse." He appreciated the contradiction between the reception of Roman law and the workings of the folk-spirit, and pointed to the "singular irony of scientific fate that a thought that should have brought death to the Roman law was invoked to save its life." Ostensibly a historian of Roman law, he was really bent on a search for its permanent usable elements. He even formulated a slogan to express this objective: "Through the Roman law, but beyond it."

Such, too, was the purpose and philosophy of the *Geist*. It was to be a study, as much anthropological as legal, first, of the specifically national ideas which were revealed in the oldest Roman law, the *ius civile*, which was the exclusive possession of Romans, and then of the career of Roman jurisprudence as a universal system, when it had become the *ius gentium*, the law of Roman and foreigner alike. Although he published no less than four volumes of the *Geist*, Jhering never got beyond the analysis of the general characteristics of the specific Roman system, which was pushed only to the point of completing the discussion of the general conception of a right in Roman law. Jhering in these days spoke of the "higher" or "productive" jurisprudence as the cause to which he had devoted his life. But in attempting to rediscover the "spirit" of the Roman law in the various stages of its development, he was as much a dogmatist as Savigny. He was attempting by a process of mere introspection and psychological interpretation to develop the peculiar nature of Roman legal concepts and ideas. In Roman law he discovered the conceptions of liberty and equality as national concepts, and in the methodology of the Roman jurists he perceived a unique contribution to the science of law. If he had known more English law, he would have discovered the folly of this enterprise much sooner than he did, for the same values were to be discovered in the history of the common law at an analogous level of development. The "spirit" of the common law was in fact the same as the "spirit" of the Roman law. Characteristic ideas and institutions are to be dis-

covered in primitive, archaic, and mature law, but they are determined, not by national elements, but by social and economic needs that are pretty much universal in the same phase of the historical evolution of a legal system.

The letters of Jhering's Giessen period reveal doubts of the value of his own labors, intimations of the wasteland of German jurisprudence, and humorous touches of despair. Writing to Gerber, he once observed: "There prevailed not so long ago in the natural sciences a method of investigation that bore the strongest resemblance to present methods in jurisprudence—the study of nature from the pages of Ulpian and Paulus." Occasionally he expressed a positive distaste for everything that even smacked of jurisprudence. He rejoiced that in Windscheid he had found a friend "who does not regard every word of a Roman jurist as gospel." "My life," he once confided to him, "is a rather unvarying and monotonous idyll that is bound up with the sections of Puchta's compendium on the pandects; the only change is that every day is devoted to different sections." Jhering used Puchta's book as a text, and had even dedicated the first volume of his *Geist* to Savigny's pathetic disciple. A year later, he also confessed that "there lives in my consciousness a demoniac force that cannot be satisfied with the quietude of conventional life, that yearns for adventures and extravagances of all sorts." With humorous despair, he observed that the *Geist* was "a book for educated laymen (for which reason many uneducated jurists do not read it)." Jhering must have felt particularly neglected when he once complained bitterly that the correspondence of scholars was inspired only by books, and that it was necessary to write a whole volume to get a single letter.

Jhering's break with the historical school and his abandonment of conceptual jurisprudence began about 1860, on the eve of the German struggle for national unification. A decade later he was an open and avowed champion of a new juristic method. The forces that produced the new Germany made it possible for him to develop the natural bent of his temperament, but the transition was cautious and slow. The sober professor could not become the satirist overnight. His interest in politics had never been strong. There is no evidence that he had participated in the events of 1848, or that he had been stirred by the revolutionary fervor of this stirring year although he was then a young man of thirty.

The war of 1866 against Austria at first distressed Jhering greatly. The basic tenet of his later philosophy was that law was a method of reconciling conflicting interests, rather than a process of determining abstract rights, and the conflict with Austria was an object lesson in the importance

of interests. He wrote at the time to his friend Windscheid: "What a conflict between the feeling of right and of interests. My feeling of right aligns me on the side of Austria. I condemn the criminal sport of Bismarck that plays with everything that can be called justice and truth. And yet I shudder at the thought that justice may triumph!" But the professor of jurisprudence rapidly overcame his scruples, when right was overcome by might. He became a slavish admirer of Bismarck for the rest of his long life. "I bow," he said, "before the genius of a Bismarck who has delivered a masterstroke of political combination and energy unique in history. . . . I would not have believed nine weeks ago that I would be writing a dithyramb about Bismarck."

Jhering's attack on the vagaries of conceptual jurisprudence began with a series of six *Confidential Letters*, which were published anonymously from 1860 to 1866 in a German legal periodical. Of all his writings they are the most reminiscent of Mark Twain. Their anonymity doubtless explains the completeness with which Jhering yielded to his penchant for hilarious satire. He did everything possible to make it difficult to detect the secret of their authorship. Thus he even made himself the butt of his own satire. He complained that a series of letters had never before been devoted to jurisprudence. The only subject of belletristic endeavor in jurisprudence had been books devoted to the "spirit" of this or that system of jurisprudence. There had been "spirits" of Roman law and of Prussian law, and he expected the publication of a spirit of Hessian law, and the like. He had dedicated his *Geist* to Puchta, the faithful disciple of Savigny. Puchta now became his *bête noire* even as Blackstone had been Bentham's.

Fifty years before his time, pretended Jhering, "civilistic construction" had been unknown. But now a civilist and construction were as inseparable as a lady and crinoline. The civilistic homunculus, the concept, mating with his like, became productive, and begot children. The jurists analyzed the nature of obligations; and the more complex variety of obligations in the Roman law gave them more headaches than the theologians derived from the concept of the trinity. Between various types of obligations there was supposed to be all the difference between animals on two and four legs although the distinctions were of no practical importance. The jurists debated, for instance, whether an obligation was to be conceived as a right to an action, *in* an action, or *over* an action. They dwelt especially upon the mysteries of juristic personality. Succession to property was defined as a right to the personality of the dead—the juristic version of the reincarnation of souls, the juristic proof of the immortality

of the soul. The juristic personality was no more received by the grave than the soul. Again, construe the juristic nature of theatre-going, and you will discover that the ticket entitles you to enter the theatre only as a representative of an abstract juristic personality. By way of reaction to juristic personality one jurist had, however, conceived of freedom as the right of property in the human body. Freedom of speech would thus be a derivative of the individual's right of property in his means of speech—the freedom of the tongue. When you scratched yourself you only exercised a property right.

The second of the confidential letters dealt especially with the concept of *hereditas* or heirship in Roman law which presented great complexities because the Roman heir was regarded as a universal successor who inherited not only the property but the personality of the deceased. Jhering felt that unless he solved this riddle he would be cast into the abyss, like one who could not solve the riddle of the sphynx. Jhering pretended that he awoke in a cold sweat in the middle of the night, feeling that he had grasped the nature of *hereditas*. When the doctors were called in they diagnosed his condition as a case of brain fever, never suspecting that it was actually a case of juristic delirium. When he finally read one history of the Roman law of inheritance, he felt like a man who had thrown away a lottery ticket that had won.

The third and fourth letters were primarily devoted to the divorce between theory and practice which had become a prime characteristic of Jhering's generation. He pictured the theoreticians as the makers of the sword of justice which they had sharpened so fine that it could split hairs, and developed the theme that while a barber did not go to a razor maker as a preliminary to learning the art of barbering, a practicing lawyer was required to undergo a period of training with theoreticians. He gave numerous examples of the differences in approach between theoretical and practical jurisprudence but none perhaps so amusing as the discussion of the case of the peasant who was forcibly evicted by a rascally neighbor after he had taken possession of his absent brother's property. He lost the law suit although he had clearly been in possession, because he could not prove that in holding the property he had had the requisite *animus domini*, i.e., the intention of exercising dominion, as required by Savigny's theory of possession.

The fifth letter was an imaginary address on a juristic museum of objective and subjective law, and the sixth and final letter commented on the frightful flood of juristic literature which was produced by the *privat Dozenten* who aspired to become professors. It was the rule in Roman law that only those could inherit who had children, i.e., *liberi*. Punning on the

Latin word, Jhering remarked: "The significance possessed in Rome by bodily fruitfulness is possessed among us by spiritual fruitfulness; without *liberi*, no inheritance was the rule there, without *libri* no professorship is the rule here." Jhering suggested the advisability of giving aspirants the *ius scribendi*, which would entitle them to professorships if they published no books.

Jhering's first public attack on German jurisprudence was his little book *Der Kampf um's Recht* (The Struggle for Law, 1872), which had its origin in a lecture he delivered to the bar association in Vienna, but it caused a far greater stir than any of his other works. It was translated into every European language, and even into Japanese. Paradoxical in form and content, almost as continuously epigrammatic as Oscar Wilde, it created furious discussion and controversy. To the more obtuse of Jhering's critics, it seemed only to have been written in praise of litigiousness. The story has even been circulated that *The Struggle for Law* was inspired by Jhering's loss of no less than three suits involving his landlord in Giessen. It has also been surmised that the book's philosophy was a reaction against the famed *Gemütlichkeit* of the Viennese character. But presumably every philosophy has a personal background. Actually the *Kampf* was a bridge between Jhering's two major works and two major periods of activity. It was an attack on the historical school at the same time that it anticipated Jhering's future theory that the law was not a system of abstract rights but a method of reconciling conflicting interests.

The basic idea of the *Kampf* was that the origin of law is to be found in social struggles. The concept of struggle is in law what the concept of labor is in political economy.

The end of the law is peace [proclaimed Jhering]. The life of the law is a struggle—a struggle of nations, of the state power, of classes, of individuals. . . . The means to that end is war. . . . Peace without strife, and enjoyment without work, belong to the days of Paradise. . . . For the law is Saturn devouring his own children. The law can renew its youth only by breaking with its own past. . . . The birth of law like that of men has been uniformly attended by the violent throes of childbirth. . . . A principle of law won without toil is on the level with the children brought by the stork: what the stork has brought the fox or the vulture can take away again.

But if the life of the law is a struggle, it can endure only if the individual is ever ready and vigilant to defend his rights. He must not be materialistically minded, and think only of the profit and loss in litigation. He must think of the sacred rights of personality, and the welfare of society, for upon this will depend the extent to which legal rights are asserted and observed. Most persuasively Jhering urges every individual to the struggle for law.

Property is but the periphery of my person extended to things . . . the battle for one's legal rights is the poetry of character. . . . If I were called upon to pass judgment upon the practical importance of the two principles: "Do no injustice," and: "Suffer no injustice," I would say that the first rule was: "Suffer no injustice," and the second: "Do none!" . . . Every man is a born battler for the law in the interest of society. . . . The battler for constitutional law and the law of nations is none other than the battler for private law. . . . What is sowed in private law is reaped in public law and the law of nations. . . . Every despotism has begun with attacks on private law, with the violation of the legal rights of the individual. . . .

Jhering undoubtedly said much also that merely glorified the litigious individual. He praised the traveling Englishman who would not allow himself to be cheated even of a shilling. "I recollect," he also wrote, "having heard of a judge who, when the amount of the object in litigation was small, in order to be relieved of the burden of the trial, offered to pay the plaintiff out of his own pocket, and who was greatly offended when the offer was refused." But nothing in the *Kampf* aroused so much controversy as Jhering's eloquent defense of Shylock, and his denunciation of those machinations by which he was cheated of his pound of flesh. Shylock was right to say: "I crave the law." It was absurd to cheat him by sophistry of a legal right which was admitted to be his.

The concept of the law as a social struggle was, of course, the direct antithesis of the philosophy of the historical school, and the *Kampf* contains in passing some of Jhering's best barbs against its exponents, as for instance when he observed that in the theory of the historical school the Roman law of debtor slavery grew in the same way as "the grammatical rule that *cum* governs the ablative." However, the polemic against the historical school was incidental; Jhering was rather outlining a positive new philosophy, which would supersede it. Those who saw in the *Kampf* only the glorification of litigiousness were significantly the reactionaries who wondered where all this talk about the rights of the personality would lead. Doubtless to law reform: In czarist Russia, the *Kampf* became indeed a sort of revolutionary handbook. But here and there even the bourgeois thrilled to Jhering's eloquent insistence upon the rights of personality. In fact Jhering did not summon every individual to perpetual litigiousness. He contemplated only that every individual would defend the basic moral conditions of his existence. Thus the officer would defend his honor, the peasant his land, the merchant his credit. In a sense Jhering merely reaffirmed Aaron Burr's famous dictum that law is that which is boldly asserted and plausibly maintained.

The essence of Jhering's final philosophy of law was expressed in *Der Zweck im Recht*, the first volume of which appeared in 1872. The first vol-

ume of this magnum opus of his later years has been translated into English under the title *Law as a Means to an End*. Jurisprudence itself has been only a succession of slogans, and the English title is perhaps a better slogan than the German original. The impulse of the book derived, of course, from the unhealthy state of German jurisprudence, but Jhering was the typical German professor at least to the extent of evolving his extremely practical theory from a purely philosophical conception. He prided himself indeed on being something of a philosopher, although the professional German philosophers have never conceded the validity of his claim.

Jhering's fundamental philosophy is based upon a theory of psychological causation. The physical world was entirely subject to the laws of cause and effect. In the animal world some actions were wholly automatic and involuntary. *Homo sapiens* in the discharge of his natural functions was subject to the same law as the animal kingdom but the operations of his mind were not involuntary. On the contrary, they were always guided by some concept of purpose. But, said Jhering, "You might as well hope to move a loaded wagon from its place by means of a lecture on the theory of motion as the human will by means of the categorical imperative. . . . The real force which moves the human will is interest." Thus "interest is an indispensable condition of every action," and "purpose is the creator of the entire law. Since human life and social life are synonymous, the entire scheme of the law may be stated in the proposition: 'I exist for myself, the world exists for me, I exist for the world.' "

The law was not a system for delimiting abstract rights but a system of reconciling conflicting interests. Legal concepts had within themselves no productive power, and they were not in themselves eternal. The jurists must cease acting as if the legislators themselves must respect the juristic concept. One legal principle could not be derived from another by a process of logical deduction. The idea of analysis and combination of legal principles, which jurisprudence had borrowed from mathematics, was a false dogma. The world of legal concepts was not self-contained. Society would not wait for the jurist to "construe" its needs. Facts must not be stretched upon the Procrustian bed of legal concepts. Legal principles could not be extended merely by a process of analogy; they did not contain in themselves the correct solutions for every legal controversy. A case, for instance, could not be decided merely by determining whether a particular transaction fell into the category of "contracts," "sale," or "lease." The judge was not an automaton who pronounced his judgments merely on the basis of pre-established legal principles. Justice itself was only

a changing idea of proportionality. Constructive jurisprudence was barren and bankrupt, and must be replaced by a system of social mechanics.

Man was an egoist but he was capable of altruism. The levers which society employed to overcome his egoism were reward and coercion. "Law," Jhering said, "is not the highest thing in the world, not an end in itself, but it is merely a means to an end, the final end being the existence of society." He saw "law evolving as the politics of force," "as the intelligent policy of power," "as the union of the intelligent and farsighted against the nearsighted." He realized that "public spirit within the system of egoism is a phenomenon just as strange as a flower on a bare rock," and it is for this reason doubtless that he placed the chief emphasis on coercion. But coercion was redeemed by the fact that "the right to coerce forms the absolute monopoly of the state." "Individual, association, state—such is," said Jhering, "the historical stepladder of social purposes."

The *Zweck* is devoted mostly to a discussion of the chief ends that should be served by law. Jhering saw the world of plenty that was already coming into existence. "A poor man today," he said, "is served for a few pennies by more people in all parts of the earth than Croesus could conjure if he had wished to empty all his treasure chambers." But, while he had a good deal of sympathy with socialism, the philosophy he preached was not outright socialism but rather "the socialization of law," a slogan that has been as powerful in modern jurisprudence as the slogan "law as a means to an end" itself. In Germany, social reforms were introduced by Emperor Wilhelm himself upon the advice of his idol Bismarck (perhaps the first National Socialist), and Jhering saw nothing incongruous even between socialism and monarchy. He described the Manchester economic and political philosophy of preventing the interference of one individual with the freedom of another as a method of preventing the wild beasts in the zoo from tearing each other to pieces. He was eloquent in his denunciation of the abuses of capitalism. "Unlimited freedom of trade," he said, "is a license for extortion, a letter of marque for robbers and pirates with the right of holding up all who fall into their hands—woe to the victim! That the wolves cry for freedom is easy to understand. But when the sheep, as has often been the case in this question, join in the cry, they only show thereby that they are sheep." He also declared: "In my eyes there is no error more serious than the idea that a contract as such, as long as its content is not illegal or immoral, has a just claim upon the protection of the law." The evils of modern corporate enterprise were already apparent enough to arouse him to vehement protest. "Under the eyes of our law-

givers," he observed, "the joint stock companies have been transformed into organized agencies of robbery and deceit, whose secret history covers more baseness, dishonor, villainy than many a penitentiary, except that the thieves, robbers, and swindlers, instead of lying in irons, are bedded in gold." Nobody realized better than he the emptiness of legal equality. "Equality," he said, "may be as much as anything else equality of misery." He was also unique among German jurists of the time in his concern over civil liberties and constitutional limitations. As a German, the American ideas of judicial review were alien to him but he did preach a doctrine of "auto-limitation" in the relation of the state to the individual; which was later to be erected into a system by another German jurist, Georg Jellinek.

It is easy to probe the difficulties and limitations of Jhering's thought as a systematic philosopher, and there have been many critics of his ideas of purpose and interest. Jhering was a satirist, and, like all satirists, he took advantage of the traditional latitude and exaggerated the undoubted evils of his time. Logic does have a genuine place in juristic method, as in all the social sciences. The passion for "constructive jurisprudence" that was so characteristic of the German jurists had its origin in the need to systematise and unify the variations in the law of the *Pandects*, and so to create a system of German common law which should be a fitting substitute for a German civil code, which was then still lacking. There are also undoubtedly some rules of law that are purely formal in character, and must necessarily be arbitrary. Such rules may have a social purpose but the same social purpose could as readily be served by some other legal rule.

Indeed the fundamental difficulty of Jhering's philosophy is precisely that it provides no objective criteria for determining the purpose which the law is to serve, and for selecting the interests which the law is to protect. Law was undoubtedly a means to an end but what end? Who was to determine the end? The individual, the society, the personal ruler, the abstract state? When one end is assumed, is only a particular means to be allowed? In relation to the individual is egoism rather than altruism to be encouraged? When is the lever of reward superior to the lever of coercion? Jhering was always talking of the demands and needs of "life," and he tended to comprise in the law the whole of life. But the purposes of life are many and manifold, and Jhering provided no infallible guide through the maze of purposes. His thought was itself a struggle of contradictions between egoism and altruism, idealism and realism, Benthamism and social utilitarianism, individualism and socialism, nationalism and internationalism, lust for power and respect for law.

But the very fact that unlike other German philosophers Jhering never really built a system was the secret of his enormous influence. The relativism of his thought proved popular because it could serve to rally all the forces which were attacking the undoubted abuses of his age. Doubtless there had always been jurists who suspected that the law served some social purpose. The merit of Jhering was to put this thought in the very centre of jurisprudence and to employ all the resources of his wit and satire to keep it there. His ridicule of eternal legal concepts was no mere side play of a juristic philosopher. It reflected the socialist attack on property and the complications of modern industry which were putting the classic concepts of property to the test. Friedrich Nietzsche, a kindred spirit, read the *Zweck*, although his eyesight was failing, because he thought that Jhering was proclaiming new values. Jhering resembles Nietzsche also in the variety of his disciples who exceeded the fervor of the master. He has been responsible in one way or another for all the modern schools of jurisprudence not only in Europe but in America.

In Germany Jhering was responsible for the "free law" law school, whose exponents based themselves upon his attack on the formal and objective elements in the judicial process. If law was not created by a process of logical deduction, rules of law were themselves illusory and represented only a logical disguise of intuitive judgments. Why not, therefore, free the judge entirely from the trammels of the supposed rules of law, and allow him to base his judgments freely on his social intuitions? Ernst Fuchs, who may perhaps be regarded as the leader of the free law school, preached a sort of juridical *Kulturkampf* against "pandectology and cryptosociology," both of which terms he invented. Another disciple, Eugen Erlich, explored even more thoroughly than Jhering the place of logic in juristic method, and issued a call for the creation of a "living law." While Jhering was not the primary influence in the field of modern criminology, his ideas were in harmony with its emphasis upon the criminal rather than his crime, and he undoubtedly helped to create the criminological school of Franz Liszt, the representative of positivism in Germany. Along more conventional lines, Jhering's insistence upon the jurisprudence of interests led to greater attention in Germany to business usages, and to the case method of studying law. At the other extreme, he inspired even the Marxists, who made use of the jurisprudence of interests to contend that the function of law was to give effect to class interests. Jhering was like the sorcerer's apprentice who could not stop the magical process which he had initiated.

In France Jhering's influence was impeded by his idolatry of Bismarck

and his justification of the Franco-Prussian War. French jurists were accustomed to speak of German jurists in general and such jurists as Jhering in particular as "*jurisconsultes brutaux*," and to characterize their works as "*brigandages juridiques*." Yet, despite the fact that he was regarded as an apostle of imperialism and power politics, it is easy to perceive the relation of his thought to such a modern French juristic theory as the theory of the "institution" and "concrete order."

It was certainly no accident that Jhering also became a demigod in America on the other side of the Atlantic. There were strong similarities between legal conditions in Germany and the United States. Germany was revolting against the reception of the Roman law and was struggling to adapt it to the needs of a unified state. America, a federal union, was still in the toils of adapting the English common law to the needs of a democratic and increasingly industrialized nation. Germany had to overcome the extravagances of the historical school while America was still the home of the seventeenth and eighteenth century philosophy of natural rights thinly disguised as constitutionalism. There was thus a certain affinity between Friedrich Karl von Savigny and John Marshall and his judicial successors. America, too, was suffering from the tyranny of legal concepts. Constitutional problems involved vast social, political, and economic interests, but the method of reconciling them was to ignore realities, and to solve them in terms of abstract constitutional concepts such as "freedom of contract," "due process," and "interstate commerce" by a process of pseudological analysis. The revolt which was ultimately led by Justices Holmes and Brandeis owed much to the thought of Jhering. In fact the title of Brandeis' book, "Other People's Money," is a phrase which is to be found in *Law as a Means to an End*. Jhering's observations on freedom of contract and the evils of corporations had, too, an obvious bearing on the American constitutional scene.

The gradual emergence of a new constitutionalism was accompanied by the rise of an American school of sociological jurisprudence, of which Jhering may justly claim to be at least the godfather. The first leader of this sociological school, Dean Roscoe Pound of Harvard, spoke of the "law in action" in contrast to the "law in the books," of the law as a method of "social engineering," and of "the effective limits of legal action." He even wrote a book called "The Spirit of the Common Law" in an effort to discover the essential characteristics of the Anglo-American legal tradition. But, unlike Jhering, Dean Pound never freed himself of his preoccupation with legal concepts and techniques; and as his ideas grew increasingly conservative, a critical spirit swept American legal philos-

ophy, and a "realist" school was born. The "realists" do not always agree among themselves but generally speaking they are much closer to Jhering's later thought than Dean Pound. They have the same skeptical attitude toward the efficacy of legal rules and concepts and place the same emphasis upon purposeful legal activity of the judge and the jurist, and upon the administrative element in the American legal system. The whole modern American growth of administrative agencies, such as boards and commissions, from the Interstate Commerce Commission to the National Labor Relations Board, owes much to Jhering's gospel of purpose and interest. The influence of American constitutionalism had retarded the growth of administrative agencies, but they are a commonplace now in a highly industrialized America. Unlike the traditional courts, they exist to accomplish some particular social purpose, or correct some particular social abuse, but they are designed to fulfill their tasks without observing all the techniques and procedures of the conventional legal system. It is significant that one of the most brilliant of the realists, Jerome Frank, was formerly chairman of the Securities and Exchange Commission. Other leading realists are teachers of law such as Karl Llewellyn, Max Radin, and Hessel E. Yntema.

Jhering himself was not unaware of his influence in foreign lands. In a letter written on November 11, 1881, to his young friend Oskar Bülow, he noted the acclaim his *Zweck* had received in North America, and on another occasion in mentioning an honorary membership conferred upon him by the faculty of the University of Kazan, he remarked that his fame had apparently penetrated even to the Arctic. But he undoubtedly regarded as the greatest honor of his old age a visit which he was invited to pay to his idol Bismarck. He considered that he had already been privileged enough when Bismarck graciously accepted an honorary degree from the university faculty. But his joy knew no bounds when during his visit to Bismarck the latter addressed him as "colleague." The satirist was certainly dormant when in writing to Bismarck on September 15, 1888, he even attributed his legal ideas to him, and remarked that he had only carried out in jurisprudence the ideas expressed by his idol in politics.

On the second day of Christmas Jhering always wrote a letter of condolence to the wife of his friend Julius Glaser. In the letter of 1891 he wondered whether he would be alive to write the following year. But he had been ailing for some years, and, while he was in the midst of planning a trip to the Berchtesgaden region, he died suddenly on September 17, 1892, in his seventy-fourth year. Shortly before his death he had celebrated his fiftieth *Doktor-Jubiläum*.

In his declining years Jhering had amused himself by composing his most elaborate satire of constructive jurisprudence called "The Heaven of Juristic Concepts." He imagined that he had died and gone to the Heaven of Juristic Concepts. The theoretical jurists had a heaven separate and apart from the heaven of the practical jurists. The sun still shone in the heaven of the practitioners, which had even an atmosphere, but the heaven of juristic concepts was a cold, dark void in space. The sun was the source of all life but the concepts could not endure contact with life for they existed for themselves alone. Moreover the eyes of the theoretical jurists were accustomed to the dark like those of the owl of Minerva. In the heaven of juristic concepts are personified all the riddles of constructive jurisprudence. To make certain that he was free of earthly atmosphere Jhering had to undergo a quarantine before entering the Heaven of Juristic Concepts. There he found Puchta, who had been the first to enter. Savigny, who had never quite understood the art of construction, had had difficulty in securing admittance, but had finally succeeded on the strength of his work on the theory of possession and his *The Vocation of Our Time for Legislation and Jurisprudence*. Accompanied by a guide, Jhering made a tour of the heaven of juristic concepts, and discovered all sorts of marvelous machines and contrivances—a hair-splitting machine capable of splitting a hair into 999,999 accurate parts; a climbing pole so smooth that a ray of the sun could slide down it, and surmounted by three mastheads where juristic problems were placed that had to be brought down; a construction apparatus and a dialectic-hydraulic interpretation press with two pumps for infiltration and elimination; an excavation machine for digging deep into questions of law; and finally a giddy wall that rose to an immense height. Then Jhering and his guide toured the Academy of Legal History, where legal formulas and texts are restored and where sources were not only traced but invented, and the Hall of Concepts, which they entered not through a door but by butting their heads through the wall. In the Cerebrarium of the Hall of Concepts they find an anatomical-pathological cabinet of concepts. In the laboratory of the Cerebrarium was fashioned the brain-substance of the theoretical jurists, distinguished by the *mons idealis*, which enabled them to disregard practical consequences and to treat jurisprudence as a system of legal mathematics. It is impossible really to exhaust all the strange phenomena which existed in the Heaven of Juristic Concepts but Jhering awakened at last to find himself back on earth. It is certain, however, that when his death proved to be no dream, he entered rather the Heaven of Purpose and Interest, of Law as a Means to an End.