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Some German Definitions of Law and Legal Philosophy from Kant to Kelsen

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SOME GERMAN DEFINITIONS OF LAW AND LEGAL PHILOSOPHY FROM KANT TO KELSEN

IN the evolution of a particularly problematic legal term within a particular age and civilization, the legal philosopher possesses an important clue to the legal mind of this period. Neither the philosopher, nor the jurist, nor the historian can ever hope for a complete understanding of a foreign legal civilization which to a great extent belongs to the past; partial understanding he can reasonably expect, however, if he undertakes to sift out certain key terms in order to determine their meaning in relation to other less problematic terms.[1]

According to Kant the concept of law and right is something derived exclusively from pure reason. "The jurist has to discover the true sources of all that can be called

[1] This paper does not attempt to furnish a complete list of all the definitions of law and legal philosophy which have been proposed by the very prolific German writers on philosophy and jurisprudence during the nineteenth and early part of the twentieth centuries. Those who are looking for a more exhaustive treatment of this subject may consult the many brilliant writings of Dean Roscoe Pound which in their thoroughness and completeness are without parallel. The present author merely proposes to cite some rather significant statements, and to add the definitions of those authors who are primarily speculative philosophers rather than practical jurists. It cannot be denied, however, that many of the primarily philosophical definitions of law and legal philosophy have had a great influence on leading jurists. Thus, for instance, the revival of the so-called late "historical school of jurisprudence" in Germany is due to the works of Dilthey rather than to a renaissance of Savigny's ideas.

law and right exclusively in pure reason. And in doing so he lays the foundation of a possible positive legal order." [2] Law and right as such "are the sum total of those conditions by which the free moral will of one person can be reconciled with the free moral will of another person according to a universal law of moral freedom." [3] The "strict law" is "the possibility of a reciprocal and universal external coercion which coincides with the free moral will of every person according to universally valid laws." [4] The basic or natural (innate) right of man is man's "freedom and independence of the arbitrary will of another." [5] "Legal coercion is nothing else than the enforced removal of an obstacle arbitrarily restricting the free exercise of man's moral freedom." This removal, however, must be "consistent with the freedom of every other person according to a universal law of freedom." [6] All legal duties and, hence, all rights, are grounded in practical reason.[7] Law and morals or, as Kant puts it, "legality" and "morality" have to be distinguished: "Every command which declares a certain conduct to be a duty and at the same time considers this duty the sole motive of our conduct, is a moral command. That command, however, which also admits other motives — such as external compulsion — is a legal command." [8] "The mere coincidence . . . of external conduct and law — the mere external compliance with the law — without taking into account the inner motive, is called legality; the coincidence of conduct and law in which the idea of normal duty . . . constitutes the compelling motive, is called morality." [9] All purely "legal

2 *Metaphysische Anfangsgründe der Rechtslehre,* p. 31 (in: vol. VII, edit. Cassirer) (1797).

3 *Ibid.,* p. 31. Compare also Reike, *Lose Blätter aus Kants Nachlass,* vol. I, part 18, p. 47.

4 *Ibid.,* p. 33.

5 *Ibid.,* p. 39.

6 *Ibid.,* p. 32.

7 *Ibid.,* p. 18 ff.; p. 21.

8 *Ibid.,* p. 19.

9 *Ibid.,* p. 19.

duties are external duties." [10] "Law and morals have certain duties in common, but not the manner in which these duties are compelling." [11] The moral command to consider also the merely legal duties as moral duties turns all legal duties into moral duties, or to be more exact, into "indirect-ethical duties." [12]

Under the influence of Kant is also Bouterwek who declares that pure reason constitutes the source of all that is law and right.[13] Likewise influenced by Kant is A. Feuerbach's statement that "natural law is the systematic science of the rights of man given to us by pure reason and perceived by us through pure reason." [14] Natural law itself "is a problem of scientific philosophy," [15] divorced from morals by its particular subject. Law and right constitute something given by and anchored in pure reason, [16] or to be more specific, it originates with practico-juridical reason.[17] Law itself might, be defined as "the possibility and permissibility of external compulsion by pure reason," as "the permissibility of compulsion determined by pure reason for the sake of the moral law." [18] Law is, in the final analysis, "the possibility and permissibility of enforcing a conduct through which no other rational individual is being treated as an arbitrary means to arbitrary ends." [19]

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10 *Ibid.*, p. 19.

11 *Ibid.*, p. 20, p. 21. Kant means here that moral duties are subject to moral self-compulsion (autonomous duties), while legal duties are subject to external compulsion or coercion (heteronomous duties).

12 *Ibid.*, p. 21. Under the immediate influence of Kant were the following writers on jurisprudence. Mellin, *Grundlegung zur Metaphysik der Rechte* (1796); Hufeland, *Lehrsätze des Naturrechts* (1790); Hofbauer, *Untersuchungen über die wichtigsten Gegenstände des Naturrechts* (1795); Bendavid, *Versuch einer Rechtslehre* (1802); Schmalz, *Recht der Natur* (1795); Krug, *Dikäologie oder philosophische Rechtslehre* (1817); Mass, *Grundlage des Naturrechts* (1808); Heydenreich, *Naturrecht* (1795); *Tieftrunk, Naturrecht* (1797); Jacob, *Naturrecht* (1795).

13 *Lehrbuch der philosophischen Wissenschaften* (1806), vol. II, p. 193. Compare also *Abriss der philosophischen Rechtslehre* (1798).

14 *Kritik des natürlichen Rechts*, p. 31 (1796).

15 *Ibid.*, p. 34.

16 *Ibid.*, p. 241.

17 *Ibid.*, p. 244.

18 *Ibid.*, p. 259.

19 *Ibid.*, p. 295.

J. G. Fichte, who draws a sharp distinction between the moral and the legal order, nevertheless subordinates the latter under the former. The concept of law and right is basically rooted in the very essence of reason.[20] The fundamental and inalienable rights of every individual are his rational and moral claims to freedom. These rights, however, become truly operative and effective only within the framework of an enforced legal order established by society. A jural relation is a relation of mutual restraint, a definition which logically flows from the concept of a morally free individual. The nature of this relation "can be deduced from the pure form or reason of the moral and rational 'self' as such," [21] without taking special recourse to any particular moral consideration.[22] Hence the law has nothing to do with man's moral will; it merely entitles man to exercise his rights, but does not compel him to do so.[23] Law and right are the prerequisite of a community of free human beings.[24] Pure reason demands absolute freedom, while the idea of a community of free human beings requires restriction of this same freedom.[25] Law is possible only within a community of individuals, and only in form of positive enactments.[26] All true law and right are natural law, and hence rational law.[27] This is the fundamental principle of law and right: "I must in all cases recognize the free being outside of me as such, that is to say, I must limit my freedom to the possibility of his freedom." [28] The end of law is "the foundation of law and, hence, the criterion of law and right." [29] The just legal order, which serves the preservation of law and right, rests upon the common consensus of all individual

20 *Gesammelte Werke* (edit. Medicus), vol. III, p. 8 ff.
21 *Ibid.*, vol. III, p. 53.
22 *Ibid.*, vol. III, p. 55.
23 *Ibid.*, vol. III, p. 54.
24 *Ibid.*, vol. III, p. 89.
25 *Ibid.*, vol. III, p. 92 ff.
26 *Ibid.*, vol. III, p. 148.
27 *Nachgelassene Werke*, vol. II, p. 493 ff.
28 *Gesammelte Werke*, vol. III, p. 52.
29 *Nachgelassene Werke*, vol. II, p. 529.

free will. Schelling observes that "the first rise of law and right is not the result of blind chance, but one of a natural necessity which . . . compelled man, without his being fully aware of it, to establish a stable legal order." [30] Eschenmayer, who is strongly under the influence of Fichte, defines law as that "principle of reason which has been transferred from the domain of reason into the province of the will." [31]

Hegel conceived law as the objective form, as well as the product of the dialectical evolution and unfolding, of the Idea of right and just. It is, in the final analysis, the product of the "universal spirit" (*Gesamtgeist*). A truly philosophical science of law has the "Idea of law and right" for its foremost object.[32] Law is an attempt to "comprehend the State and the legal order as being something eminently rational." [33] Law signifies "the existence of being in general — the existence of a free will." It is "freedom conceived as an Idea," [34] the "existential reality of freedom in the external world." [35] Law is founded on the Idea of the morally free and individual human personality. "The law of nature . . . is the rational acknowledgment of external compulsion and the application or realization of this compulsion." [36] Law, according to its Idea, on the other hand, signifies the unfolding and realization of the Idea of freedom within society. Crime is the negation of law and right through an act of an arbitrarily violent and evil will; punishment the negation of this negation or the sanction and reprisal for a crime and, hence, the "right of the criminal." [37] According to Lasson, law and legal philosophy are "the science of what is right and just, since that which is right and just is imminent

30 *System des transzendentalen Idealismus*, p. 408 (1800).

31 *Psychologie*, p. 384 (1817).

32 *Grundlinien der Philosophie des Rechts*, par. 1 (1821).

33 *Ibid.*, foreword, p. 18.

34 *Ibid.*, p. 63.

35 *Enzyklopädie der philosophischen Wissenchaften*, par. 496 (1817).

36 *Ibid.*, p. 502.

37 *Ibid.*, p. 499.

to law." [38] Legal philosophy properly so-called is part and parcel of ethics. Its foremost task is to comprehend "the existing laws in terms of their inner or rational correlation." [39] The fundamental principles of law and justice are the following: "1. The first and most basic principle of law and right provides that every person should hold every good which he has acquired without being hindered by the acts of any other person; 2. That for every value transferred, one should receive in return an equal value; 3. Every produced value belongs to the producer; 4. Every destroyed good is to be destroyed to the destroyer, and if the destroyed good belongs to another person, the destroyer should suffer a substraction from his own good until the injured person is compensated for his injury by an equivalent value." [40] "The rule backed by force first awakens us to the actuality of law. A rule which does not possess the guarantee found in compulsion cannot be called law." [41]

To Krause legal philosophy is "the understanding of law and state on the basis of pure reason, as eternal truths." [42] Law and right signify "the whole of the conditions of rational determination which are to be realized through freedom." [43] Law in its higher meaning is "a state of harmony and soundness of all things in their relationship to one another and to God." [44] It is "the universal and essential form of the various relationships of all beings to all beings, according to which within a community of all beings each individual being in its own nature as well as the harmony of each individual being to all other beings becomes real and

38 *System der Rechtsphilosophie,* p. 259 (1882). Similar ideas are to be found in E. v. Hartmann, *Die Phänomenologie des sittlichen Bewusstseins,* p. 407 (1879).

39 Lasson, *op. cit.,* p. 1.

40 *Ibid.,* par. 24.

41 *Ibid.,* p. 207. Other "early Hegelians" were: Michelet (*Naturrecht,* 1866); Zoepfel (*Vorlesungen über Rechtsphilosophie,* 1879); *Rosenkranz* (*System der Wissenschaft,* 1866-1868, particularly par. 724 ff., 761 ff., 780 ff.); Besser (*System des Naturrechts,* 1830).

42 *Abriss des Systems der Rechtsphilosophie,* p. 1 (1828).

43 *Ibid.,* p. 7.

44 *Urbild der Menschheit,* 3rd edit., p. 56 (1811).

effective." [45] The Idea of law and right is a divine or cosmic Idea (*göttliche Weltidee*).[46] Law and right express the organic unity and oneness not only of the single life of God which is determined by freedom, but also of the life of all rational human individuals.[47] It is, in other words, "the organic whole of the external conditions of life measured by reason." [48] Similar ideas are found in Roeder [49] and Ahrens who insists that law is "a principle . . . governing the exercise of liberty in the various relations of human existence." [50] "Legal philosophy or natural law is that type of science which deduces from the essence and ordination of man as well as that of human society the highest principle or Idea of law and right in order to develop a system of legal norms for the various provinces of private and public law." [51] "The universal concept of law and right cannot be deduced from experience. Law manifests itself in the conscious reasoning of man as a standard with the help of which we are capable of evaluating existing conditions and through which we are able to call for improvement." [52] The law is "a norm or standard which regulates the use of freedom by harmonizing this freedom with the general conditions of life and the general interests in goods." [53] It is "a rule or standard governing as a whole the conditions necessary for the attainment of whatever is good; it assures the well-being both of the individual and of society . . . " [54] Law, which must also be regarded as being a "supplement to morals," [55] is "the organic whole of those conditions which are determined by the activity of the will; these conditions are meant

45 *Ibid.*, p. 56.
46 *Ibid.*, p. 56.
47 *Abriss des Systems der Rechtsphilosophie*, p. 170 (1828)
48 *Ibid.*, p. 209.
49 *Grundzüge des natürlichen Rechts*, p. 3 (1846).
50 *Cours du droit naturel*, 8th edit., vol. I, p. 107 (1st edit. 1836).
51 *Naturrecht*, vol. I, p. 1 (1870-1871)
52 *Ibid.*, vol. I, p. 226.
53 *Ibid.*, vol. I, p. 228.
54 *Philosophische Einleitung*, in: Holtzendorff, *Enzyklopädie der Rechtswissenschaft*, 1st edit. (1870).
55 *Naturrecht*, p. 264.

to realize the total ordinations of human existence and the essential ends inherent in human existence." [56] It has for its basic end "the regulation and order . . . of all the reciprocal relations that exist among all the phases of life . . . for the purpose of realizing all rational ends." [57] The ultimate and highest purpose of the law is "the perfection of human personality and human solidarity." [58] According to Stahl legal philosophy is "the science of what is objectively right and just." [59] It "correlates law and state to the ultimate cause and final end of all existence." [60] Law is "the vital order of every people or community of peoples for the purpose of preserving God's universal order." [61] It is a "human or secular order, ordained by God's own command, and based upon divine authority, intended to serve the divine order." [62]

The so-called historical school of jurisprudence emphasized the historico-organic growth of law. Law and right, then, are but the organic evolution and product of the legal genius of a particular people. Thus Puchta insists that all law is originally historically developed and determined custom. "In virtue of his freedom man is the subject of law and right. His freedom is the foundation of law and right, and all real jural relations emanate from this freedom . . . In thus founding law and right upon the possibility of an act of the will, the essential principle of law and right is indicated as one of equality. Law and right imply the recognition of freedom as belonging equally to all men in so far as they are subject to the power of will. Law and right

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56 *Ibid.*, p. 264.

57 *Ibid.*, p. 278.

58 *Ibid.*, p. 278. Similar ideas are to be found in Herbart (*Analytische Beleuchtung des Naturrechts und der Moral*, 1836); Plank (*Katechismus des Rechts*, 1852).

59 *Philosophie des Rechts*, 3d edit., vol. I, p. 1 (1830-1837).

60 *Ibid.*, vol II, p. 3.

61 *Ibid.*, vol. I, p. 194.

62 *Ibid.*, vol. I, p. 194. Similar ideas are to be found in Chalibaeus (*System der spekulativen Ethik*, 1850); Lauer (*Philosophie des Rechts*, 1846); Walter (*Naturrecht und Politik*, 1862).

receive their materials and their contents from the [historically determined] impulse of man to refer to himself what exists outside of himself. The function of law and right, as manifested in the legal order, is to apply the principle of equality to the relations which arise from the operations of this impulse." [63] Law, hence, is "the recognition of the just freedom which manifests itself in the personal exertions of the will, and in man's influence upon objects." [64] Savigny holds that law is "an organic phenomenon of a given people." [65] "Man stands in the midst of the external world, and the most important element in his environment is his contact with those who are like him in their nature and destiny. If free beings are to co-exist in such a relation of contact, furthering rather than hindering each other in their development, invisible boundaries must be recognized within which the existence and activity of each individual gains a secure free opportunity. The rules whereby such boundaries are determined and through which this free opportunity is being secured, is the law." [66] Windscheid informs us that "the legal order, on the basis of a concrete situation of fact, puts forth a command, requiring conduct of a certain sort, and puts this command at the free disposition of the one for whose benefit it was issued. It leaves it to him whether or not he will make use of the command and in particular whether or not he will put into action the means afforded by the legal order against those who disobey it. His will is determining for the carrying out of the commands issued by the legal order. The legal order has made its commands his commands. What is law and right has become his right . . . A right, then, is a power or authority of the will conferred by the legal order." [67]

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63 *Cursus der Institutionen,* vol. I, par 4 (1841).

64 *Ibid.,* vol. I, par. 6.

65 *System des heutigen römischen Rechts,* vol. I, p. 14 (1840).

66 *Ibid.,* vol. I, par. 6.

67 *Lehrbuch des Pandektenrechts,* vol. I, par. 37.

Arendts defines law and right as "an aggregate of rules which determine the essential relations of man living in a community." [68] "Law and right exist for the sake of liberty. Law has its basis in this, that men are beings endowed with a disposition to free exercise of their will. It exists to protect liberty in that it limits caprice and arbitrariness." [69] "Legal philosophy has for its subject the law, that is, an aggregate of standards which determine the reciprocal relationships of men living in a society." [70] According to Dahn the idea of law and right exists only within the various territorial and rational legal order of each individual people or nation.[71] Legal philosophy "is the science of the idea of law and right within the framework of history." [72] Hence its method is the historical method.[73] Law and right are not subservient to the moral ideal; [74] they emerge from the urge of the human spirit to discover universals, as well as from the necessity to unearth the principle of reason inherent in every particular.[75] "Law and right constitute . . . the rational order of peace (*Friedensordnung*) within a [historically given] community of men, an order, that is, which concerns itself with men's relations to one another as well as to goods." [76] Sohm, on the other hand, calls law "the sum total of moral rules which grant to persons living in a society a certain power over the external world." [77] And Merkel defines it as "the rule of conduct to which a society gives effect

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68 *Juristische Enzyklopädie,* par. 1 (1850).

69 *Ibid.,* p. 12.

70 *Ibid.,* p. 12.

71 *Rechtsphilosophische Studien,* p. 5 (1883). Compare also Dahn, *Die Vernunft im Recht* (1879).

72 *Rechtsphilosophische Studien,* p. 5.

73 *Ibid.,* p. 12.

74 *Ibid.,* p. 20.

75 *Ibid.,* p. 35.

76 *Ibid.,* p. 36. Similar ideas are to be found in Gierke, *Deutsches Genossenschaftsrecht,* vol. I, p. 125 ff. (1895).

77 *Institutionen des römischen Rechts,* par. 7 (1889).

in respect to the behavior of its subjects towards others and towards itself, as well as in respect to the forms of its activities." [78]

According to Schopenhauer "injustice" is primary to "justice." Injustice is "the invasion of the boundaries of the affirmative will of another." [79] Thus law signifies "the negation of injustice or lawlessness." [80] The "pure theory of law" is just "a chapter of general ethics." [81] Law and the legal order are the product of convention; they are meant to repel acts of injustice.[82] The purpose of law is "intimidation in order to prevent wrongful acts." [83] Law and justice, in the final analysis, "arise from a sensation of compassion." [84] The concepts of "injustice" (legal wrong) and justice as well as those of "injury" and non-injury — and repulsion of an injury is tantamount to non-injury [85] — are independent of all empirical enactment and, hence, logically precede the positive law.[86] From this it follows that there "is such a thing as an ethical theory of law or natural law, and that any pure theory of law is completely independent of all empirical or positive enactments." [87] The basic concepts of law and non-law (*Recht und Unrecht*) are the products of a synthesis of the empirical concept of injury and the rational principle that I may repel every form of arbitrary interference by another without committing myself an act of injustice.[88] "Legal philosophy is that part of general ethics which determines those acts which I cannot commit

78 In: Holtzendorff, *Enzyklopädie der Rechtswissenschaft*, 5th edit., p. 5 (1890).

79 *Die Welt als Wille und Vorstellung*, bk. IV, par. 62 (1819) (vol. I, p. 383 ff., edit. Frischeisen-Köhler).

80 *Ibid.*, p. 384.

81 *Ibid.*, p. 386.

82 *Ibid.*, p. 386 ff.

83 *Ibid.*, p. 392.

84 *Über das Fundament der Moral* (1841) par. 17 (vol. III, p. 359 ff. edit. Frischeisen-Köhler).

85 *Ibid.*, vol. III, p. 363.

86 *Ibid.*, vol. III, p. 364

87 *Ibid.*, vol. III, p. 364.

88 *Ibid.*, vol. III, p. 364.

unless I injure another and thus commit an act of injustice." [89] A legal duty constitutes "an act, the mere omission of which injures another.[90] Herbart deduces the concept of law and right from the practical idea which approves of volitional relationships. The Idea of law and right is founded upon "the disapproval of strife and conflict." [91] "Law and right signify the agreement of several wills which, in form of a rule, is meant to prevent strife and conflict." [92]

According to Trendelenburg law and right is "the sum total of those universal determinations of action through which . . . the ethical whole as well as its parts may not only be preserved but further developed." [93] Legal philosophy has always to distinguish between that which is conditionally just and that which "is absolutely and objectively (morally) just and thus is above all conditions." [94] Legal coercion or sanction "is the physical aspect of law and right." [95] It has always a moral end.[96] The legal order signifies "the fullest unfolding and realization of the whole of mankind in the individual form of peoples or nations." [97] I. H. Fichte, who is not to be confounded with J. G. Fichte, his father, defines the Idea of law and right as the "manifestation of the fundamental will of man (*menschlicher Grundwille*). "Every person within society has an equal claim to the complete unfolding and development of his innermost individuality." [98] Law and right are *a priori* concepts and, at the same time, something which unfolds itself in the course of history.[99] Harms tells us that legal philosophy is "the

89 *Ibid.*, vol. III, p. 364.
90 *Ibid.*, vol. III, p. 366.
91 *Gesammelte Werke* (edit. Hartenstein), vol. II, p. 366 ff.
92 *Ibid.*, vol. II, p. 367. Compare also vol. IV, p. 120. Similar ideas were expressed by Thilo, *Die theologische Rechts-und Staatslehre* (1861).
93 *Naturrecht auf dem Grunde der Ethik*, p. 76 (1860).
94 *Ibid.*, p. 83.
95 *Ibid.*, p. 90 ff.
96 *Ibid.*, p. 103 ff.
97 *Ibid.*, p. 284.
98 *System der Ethik*, vol. I, p. 18 ff., vol. II p. 475 ((1850-1853).
99 *Ibid.*, vol. I, p. 19.

science of the conditions and principles underlying an empirical understanding of law and right" (*empirische Rechtserkenntnis*).[100] According to the Catholic philosopher Cathrein "anything that corresponds to its norm or is as it ought to be," is lawful.[101] The end of law is "the free and independent existence of man as the subject of rights," [102] as well as the secure existence of society.[103] All law, at least indirectly, is derived from the divine will,[104] and as such signifies a vital part of the universal moral order.[105] The natural law constitutes the criterion, foundation, and limitation of all positive law.[106] Hertling insists that there is an absolute and absolutely compelling objective moral law which demands that man consciously realizes the divine plan of God. "Man has to fill that position which has been given to him within the divine plan." [107] "Good is whatever is in accord with the divine purposefulness; . . . evil whatever runs contrary to it." [108] Law and right can only be understood in the light of this purposefulness. All attempts to separate law from the moral order and to give to it an independent status are doomed to complete failure. The positive law has to be in accord with the moral law. The legal order is not an "emergency measure, the lesser evil." It is something "good and valuable." [109] But the positive law in itself is not the highest manifestation of the moral Idea,

100 *Begriff, Formen und Grundlegung der Rechtsphilosophie,* p. 21 (1889).
101 *Moralphilosophie,* vol. I, p. 2 (1911).
102 *Ibid.,* vol. I, p. 424.
103 *Ibid.,* vol. I, p. 425.
104 *Ibid.,* vol. I, p. 333.
105 *Ibid.,* vol. I, p. 425.
106 *Ibid.,* vol. I, p. 477 ff. Compare also Cathrein, *Naturrecht und positives Recht* (1901); Hertling, *Naturrecht und Sozialpolitik* (1893); *Mausbach, Christlich-Katholische Ethik* (1906); Mausbach, *Philosophia Moralis* (12th edit., 1921); Scherer, *Religion und Ethos* (1908); Scherer, *Sittlichkeit und Recht* (1904); Hertling, *Recht, Staat und Gesellschaft* (1906); Koch, *Das menschliche Leben und die natürlichen Grundzüge der Sittlichkeit* (2d and 3d edit., 1916); Schneider, *Die göttliche Weltordnung und religionslose Sittlichkeit* (1900); Fessler, *Die Philosophie des Rechts* (1907); Schilling, *Lehrbuch des Naturrechts* (1859-1863); Hillebrand, *Recht und Sitte* (1896).
107 *Recht, Staat und Gesellschaft,* p. 30 (1906).
108 *Ibid.,* p. 30 ff.
109 *Ibid.,* p. 71.

because there is also the moral conscience of every individual which in case of a conflict is of a decisive nature.[110] B. Stern declares that the essence of law and right is eternally immutable. For the Idea of law and right is in itself a universal human idea.[111] The kernel of all law and right must be discovered in ethics.[112] The truly rational law (*Vernumftrecht*) is "the Idea of justice which seeks realization in the empirical world."[113]

The positivists such as Bierling define law as "all that which persons living under some form of association eventually recognize as the norm and rule of their communal life."[114] The purpose of all law is "a determinate external behavior of man towards man. The means of attaining this purpose, wherein alone the law consists, are norms and imperatives."[115] Bergbohm, the great antagonist of natural law,[116] insists that legal philosophy cannot create law. For reason merely assists in the deduction of legal principles. Since there are no such things as absolute and objective principles of law and right, we are forced to operate with certain legal ideals rather than legal Ideas.[117] Gareis defines law as "a peaceable ordering (*Friedensordnung*) of the external relations of men . . . to one another. It is a form of ordering or regulating of human relations through the enactment or issuance of commands and prohibitions."[118] Jurisprudence or legal philosophy is "legal encyclopedia," that is, "a systematic and unified survey of the peaceable adjustment of the external relations of mankind and that of social communities."[119] According to Merkel law signifies "a

110 *Ibid.*, p. 73.

111 *Positive Begründung des philosophischen Strafrechts*, p. 15 ff. (1905).

112 *Ibid.*, p. 18 ff.

113 *Ibid.*, p. 63. Similar ideas are to be found in J. Stern, *Recht und Rechtswissenschaft* (1904); Lauterburg, *Recht und Sittlichkeit.*

114 Bierling, *Juristische Prinzipienlehre*, vol. I, p. 18 (1894-1898)

115 *Ibid.*, vol. I, p. 18.

116 *Jurisprudenz und Rechtsphilosophie*, vol. I, p. 435 ff., p. 523 ff. (1902).

117 *Ibid.*, vol. I, p. 420.

118 *Enzyklopädie der Rechtswissenschaft* (Holtzendorff, 1887), par. 5.

119 *Ibid.*, par. 5.

general directive which society carries out not only as regards the conduct of its members towards one another as well as towards this society itself, but also as regards the forces or forms by which the society as such functions." [120] Baumann, again, calls law and right "the sum total of those interests and claims which are indispensable in human intercourse based upon the principle of freedom." [121] Dernburg defines law and right as "the ordering of the relations of life which is guaranteed by the general will." [122] Somlo, on the other hand, sees in law merely the norms enacted by a comprehensive and permanent supreme power [state] which by mere tradition enjoys supreme authority.[123] "All those assertions about law and right, which for the time being ignore the specific content of law and right, are the fundamental principles (*Grundlehren*) of the science of law." [124] The concepts developed in these fundamental principles are called "jural principles (*juristische Grundbegriffe*); and the system of these fundamental principles is defined as fundamental jural doctrines (*juristische Grundlehren*)." [125] Law signifies "the sum total of norms enacted by a universal, constant and supreme power which, as a rule, enjoys obedience." [126] The concept of law and right is an empirical concept; it is the "relative *a priori* of legal science." [127] Law denotes the ordering of the social actuality.[128]

Knapp defines legal philosophy as the task "to expose and remove all legal phantasms." [129] It is "the high police of all legal science, watching over the hiding places of the pro-

120 *Elemente der allgemeinen Rechtslehre,* par. 1.

121 *Handbuch der Moral,* p. 374. Compare also E. v. Hartmenn, *Die Phänomenologie des sittlichen Bewussteins,* p. 499 ff. (1879).

122 *Das bürgerliche Recht des deutschen Reichs und Preussens,* vol. I, par. 3 (1903).

123 *Juristische Grundlehre,* p. 105 (1907).

124 *Ibid.,* p. 8.

125 *Ibid.,* p. 8.

126 *Ibid.,* p. 127.

127 *Ibid.,* p. 127.

128 *Ibid.,* p. 55.

129 *System der Rechtsphilosophie,* p. 215, p. 241 ff.; see also foreword (1857).

fessional and habitual enemies of exact science." [130] Law denotes "the enforced subjection of the individual to whatever is conceived as being in the common interest of everyone." [131] It is, historically speaking, a "struggle over the decisive and deciding objective power;" [132] an "appeal to an ultimate objective power which enforces and executes the various legal enactments." [133] Every established legal order or body of positive laws has a definite purpose or end. And in each instance this end "is the father of the law." [134] The paramount end of law is the forcible securing of those interests which by implication constitute the real content of the law.[135] With Jellinek the legal order signifies "the sum total of all those conditions or prerequisites that are necessary to sustain social existence." Law and right denote a "moral minimum." [136] The legal order is primarily a teleological unity, a system of purposes.[137] Sternberg calls legal philosophy in the wider sense of the term "our complete knowledge of law. But this knowledge is, on the one hand, practical experience, and on the other hand, philosophical understanding. Accordingly it may be divided into the science of law . . . also called jurisprudence, and the philosophy of law." [138] Richard Schmidt also insists that "the theory of law may set itself narrower or wider limits for its task. Accordingly it is either jurisprudence (science of law) . . . ; or philosophy of law. In its narrower sense jurisprudence has to do primarily with the immediate application of the law, the carrying out of existing laws, juristic technique . . . It inquires only with respect to the law as to which we can say that it obtains; that it is in force; that is: that it is generally recognized as furnishing a measure or standard

130 *Ibid.*, p. 205, p. 9, p. 10.
131 *Ibid.*, p. 197.
132 *Ibid.*, p. 217.
133 *Ibid.*, p. 218.
134 *Ibid.*, p. 219.
135 *Ibid.*, p. 207.
136 *Die sozialethische Bedeutung des Rechts*, p. 42.
137 *Allgemeine Staatslehre*, p. 195 ff., p. 302 ff.
138 *Allgemeine Staatslehre*, vol. I, par. 12.

for the events of life, for legal transactions, for wrongs, for tax administration, for acts of police, for affairs of international intercourse and the like. In the modern state this is mainly the written law." [139]

Jhering defines law as "the sum total of constraining rules which obtain in a politically organized society," [140] in other words, "the system of purposes and interests secured by compulsory means." [141] Law and right as well as the legal order are the product of politically organized society.[142] Law is "a disciplined force." [143] The basic idea of the legal order is "the securing of the common or social interests of all . . . against certain particular or selfish interests which threaten these social interests." [144] The legal order is "the systematic organization of social compulsion." [145] The ultimate end of "the legal order as well as of law is the establishment and security of the basic conditions and prerequisites of social existence." [146] Ofner likewise insists on the social purposiveness of the law, for the purpose is the true essence of the law. The end of law is "to be subservient to the well-being of society as well as that of each of its many members." [147] True law is social law; and social law "takes into account the vital as well as economic conditions and prerequisites of the life of a people no less than the means of how to improve these conditions." [148] It is social law "because

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139 *Einführung in das Recht*, 2d edit., par 4.

140 *Der Zweck im Recht*, vol. I, p. 320 (1877).

141 *Ibid.*, vol I, p. 240.

142 *Ibid.*, vol I, p. 241.

143 *Ibid.*, vol. I, p. 252.

144 *Ibid.*, vol. I, p. 292.

145 *Ibid.*, vol. I, p. 320.

146 *Ibid.*, vol. I, p. 417. The *Grundmotiv* of Jhering's whole philosophy of law is the programmatic statement that "the purpose is the creator of all law." Similar ideas are to be found in Lilienfeld, *Gedanken über die Sozialwissenschaften der Zukunft* (1871-1883); Schäffle, *Bau und Leben des sozialen Körper* (1875-1878); Gumplowicz, *Grundriss der Soziologie* (1885); Gumplowicz, *Allgemeines Staatsrecht* (1897); Jerusalem, *Soziologie des Rechts* (1925); Wiese, *Zur Grundlegung der Gesellschaft* (1906); Scherrer, *Soziologie und Entwicklungsgeschichte der Menschheit* (1905-1908).

147 *Soziales Recht*, p. 6.

148 *Ibid.*, p. 6

peoples themselves are no longer the object of the law . . . but the source of the law." [149] It is social law "because it rejects any conceptual jurisprudence which merely interprets literally the existing laws; and because it opposes a purely formalistic jurisprudence which only takes into account the legal consequences attached to certain legal principles and concepts." [150]

Kirchmann, who became famous by his well-known dictum that "three corrective words by the legislator turn whole legal libraries into waste paper," defines law and right as "a systematic balance between sensuous appetite and moral restraint." [151] The fundamental law is "force secured and justified by a moral element which is inherent in this force." [152] Law has its origin not in the state,[153] but in the commands of authorities.[154] And those commands are the law.[155] Law does not always require external compulsion, for it can rest upon mere unchallenged authority.[156] According to Dühring law and the legal order are systematic and orderly means of compulsion directed against arbitrary force.[157] Criminal law is nothing else than "organized retaliation." [158] Gumplowicz calls law the product of power,[159] while Anton Menger insists that, in the final analysis, "every legal order so far has arisen from certain factors inherent in the general struggle for power." [160] Hence law and the legal order are nothing else than "the systematized sum total of those powers which are being acknowledged within a certain nation." [161]

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149 *Ibid.*, p. 6
150 *Ibid.*, p. 6
151 *Grundbegriffe des Rechts und der Moral*, p. 114 (1869).
152 *Ibid.*, p. 108.
153 *Ibid.*, p. 146.
154 *Ibid.*, p. 109.
155 *Ibid.*, .p. 149 ff.
156 *Ibid.*, p. 110.
157 *Wirklichkeitsphilosophie*, p. 407 (1895)
158 *Ibid.*, p. 130.
159 *Die soziologische Staatsidee*, p. 7 (1892)
160 *Neue Staatslehre*, p. 3, p. 21 ff. (1905)
161 *Ibid.*, p. 210.

Ueberweg tells us that "the sphere of free self-determination and free self-assertion which belongs to every individual . . . is the right of each person . . . The total sum of these self-determinations is the law." [162] Rümelin calls law "a vital order of society (*soziale Lebensordnung*) in and through which the idea of the good achieves actual force in order to . . . secure a firm foundation for the complete realization of all vital ends and interests of man." [163] Law has its source and origin in the "human desire for order" (*Ordnungstrieb*).[164] Heck, who together with Rümelin is the founder of the "jurisprudence of interests" (*Interessensjurisprudenz*),[165] insists that true and just law has always to take into account the general conditions of life as well as the nature of those interests which are conflicting in the various jural relations among individuals.[166] Law is an instrument to secure social peace (*soziale Friedenssatzung*). It serves the maintenance and promotion of certain social conditions conducive to a fuller social life. And in doing so law preserves peace among the various individuals claiming certain interests.[167] Legal philosophy is not concerned with a logical or abstract deduction of norms or principles. It proceeds from the notion that law is a purposive creation of rational man, and that, in the final analysis, all existing legal norms owe their origin to the concept, pursuit, balance, and realization of interests.[168] Legal philosophy is based upon the general observation that within an existing society there are certain interests which either supplement, or conflict with, one another, for total life is bound to bring about a clash of interests or claims. Hence it is the foremost task of law and the legal order to define, delimit, and regulate these in-

162 *Welt-und Lebensanschauung,* p. 434.
163 *Reden und Aufsätze,* vol. I, p. 76.
164 *Ibid.,* vol I, p. 80, vol. II, p. 349.
165 This school is definitely under the influence of Jhering.
166 Heck, *Gesetzesauslegung und Interessensjurisprudenz,* p. 310.
167 *Ibid.,* p. 308.
168 *Das Problem der Rechtsgewinnung,* p. 30 (1912). Compare also Rümelin, *Schadensersatz ohne Verschulden,* p. 60 (1910).

terests. Law creates the individual norms in order to evaluate individual interests. Thus it might be said that every legal norm properly so-called actually signifies a value judgment about an actual interest.[169]

Kohler calls the legal order "an enforced adjustment of the various relations of human life which arise from the social nature of man." [170] Legal philosophy demonstrates "how in each stage of evolving mankind certain legal institutions manifest those evolutionary ideas which are inherent in the various peoples." [171] "Legal philosophy is a branch of general philosophy, or to be more exact, of that type of philosophy which deals with man and human civilization." [172] Law, among other things, has its proper place in the cultural evolution and history of mankind, for culture and civilization are possible only if mankind accepts order. "The legal order signifies the order of all vital relations. This order is imposed on the whole of mankind in the interest of securing and promoting cultural values." [173] The law must always be in conformity with the ever changing cultural reality. Hence there is no such thing as an eternally immutable absolute law.[174] All legal philosophy which fails to take into account legal history is completely worthless.[175] Law and the legal order, being part of an ever evolving human civilization, are perennially in flux.[176] The end of law is the fullest unfolding of human civilization in that it helps to bring about the universal purpose of mankind.[177] Individual rights denote certain concrete relations sanctioned by the legal order.[178] Baumgarten defines law as "a highly

169 *Gesetzesauslegung und Interessensjurisprudenz*, p. 310.
170 *Einführung in die Rechtswissenschaft*, p. 1 (1902).
171 *Enzyklopädie der Rechtswissenschaft* (Holtzendorff), par. 8; see also p. 610 ff.; *Archiv für Rechts-und Wirtschaftsphilosophie* vol. I (1907).
172 *Lehrbuch der Rechtsphilosophie* (3 edit., 1923), p. 1.
173 *Ibid.*, p. 9.
174 *Ibid.*, p. 10.
175 *Ibid.*, p. 10.
176 *Einführung in die Rechtswissenschaft*, p. 2.
177 *Ibid.*, p. 3.
178 *Ibid.*, p. 10.

developed, positive and valid vital order (*Lebensordnung*) which, upon closer scrutiny, reveals itself as a harmonious and integrated unity. This vital order consists of morally significant commands, sanctions which are attached to these commands, and authorizations." [179] According to Berolzheimer legal philosophy is "a general theory of law" which investigates the formal or constructive aspect of fundamental juristic conceptions and legal institutions." [180] Legal philosophy in the narrow sense of the term is "a rational critique of the positive law." [181] It has for its foremost task to uncover the ideal element in the law.[182] The final purpose of law is the bringing about of peace and order.[183]

Tönnies instances that "everything which is in accord with the very significance of a social relation, that is to say, which has a meaning in and for this relation, is the law of this social relation." [184] Natural law is "an order of human co-existence which assigns to each volitional act its proper domain of function. Thus natural law is actually the sum total of all legal duties and rights." [185] Law is the product of reason, the result of man's living in a society.[186] According to Dilthey law signifies "a system of ends (*Zweckzusammenhang*) based upon a definite realization of what is right and just (*Rechtsbewusstsein*). This *Rechtsbewusstsein* is a constantly functioning psychological factor," [187] a volitional fact or state of the will (*Willensbestand*).[188] Law and social order are two correlative terms.[189] Law has for its supposition the total will (*Gesamtwille*), that is to say, the

179 *Die Wissenschaft vom Recht und ihre Methode,* vol. I, p. 162 (1920).
180 *System der Rechts-und Wirtschaftphilosophie,* vol. II, p. 20 (1906).
181 *Ibid.,* vol. II, p. 1.
182 *Ibid.,* vol. II, p. 17.
183 *Ibid.,* vol. II, p. 113.
184 *Gemeinschaft und Gesellschaft,* p. 23 (1887).
185 *Ibid,* p. 23.
186 *Ibid.,* p. 236.
187 *Einleitung in die Geisteswissenschaften,* vol. I, p. 68 (1883). Compare also *ibid.,* p. 97.
188 *Ibid.,* vol. I, p. 69.
189 *Ibid.,* vol. I, p. 69.

common will of the total commmunity.[190] It is "a function of the external organization of society." [191] It "apportions the spheres of the power of action of each individual in relation to the task which, in accordance with his position, this individual has within an externally organized society." [192] Law is not consciously made, but merely discovered.[193] Lipps defines law as "a will or command expressed or expressible in form of general statements." [194] This will "not only demands practical recognition by a group of individuals, but also, if the need arises, possesses the means and power to enforce this practical recognition." [195] Schuppe calls law and right that "specific intent which forbids one person to injure another. This specific intent emanates from a basic axiological consideration which in turn creates a general and logically necessary intent or will to affirm the right of self-assertion." [196]

According to Wundt law and right are not the product of arbitrary convention, but "the natural result of that type of conscious activity which has its ever flowing source in those experiences and aspirations which have been stimulated by the fact that men live in groups. Originally law, custom, and morals were one and the same; and law was intimately related to religious views and convictions." [197] In the course of history law becomes differentiated both from original custom and morals.[198] Law is "the sum total of those norms . . . which politically organized society not only enforces among those . . . who are ruled by one and the same political authority or state, but which the same state also observes in its relations to its subjects as well as to other

190 *Ibid.*, vol. I, p. 69.
191 *Ibid.*, vol. I, p. 97.
192 *Ibid.*, vol. I, p. 97.
193 *Ibid.*, vol. I, p. 97. This statement alone would assign to Dilthey a prominent place in the so-called "historical school" of jurisprudence.
194 *Die ethischen Grundfragen*, p. 227 (1899).
195 *Ibid.*, p. 227.
196 *Grundzüge der Ethik und der Rechtsphilosophie*, p. 293 (1882).
197 *Logik*, vol. II, p. 2 (1880).
198 *Ibid.*, vol. II, p. 2.

states." [199] In its close relation to an already existing moral custom legal custom developed; and this legal custom soon becomes strict law in that it turns into common law and statutory law.[200] The ever changing legal ideals of different times and places are nothing else than the various forms in which the Idea of right, law, and justice progressively unfolds itself in positive laws.[201] Law and right must always pursue a moral end.[202] A right means "every officially recognized claim to, or interest in, a good." [203] Law as such is "the body of all individual rights and duties . . . which the total moral will, the source of all true law, grants to or imposes upon itself and upon all subordinate individual wills in order that we may pursue our moral ends and protect our moral rights." [204]

Höffding calls law "the sum total of certain manifest rules for the application of coercion." [205] In its overall meaning law signifies an attempt to guarantee a "moral minimum." [206] "The living legal genius of a people, its vital sense for what is right and just, . . . is the last stronghold of every law, legal order, and legal system." [207] Münsterberg defines law as that "order in and through which the realization of the common will of all in their reciprocal relations with one another is being guaranteed and secured in a purposeful manner through the application of force." [208] Rickert calls legal philosophy a "normative science," [209] while H. Cohen considers law "the mathematics of the social sciences." [210]

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199 *Ethik*, p. 215 (1886).
200 *Ibid.*, p. 217.
201 *Ibid.*, p. 567.
202 *Ibid.*, p. 580.
203 *Ibid.*, p. 575.
204 *Ibid.*, p. 580.
205 *Ethik*, p. 533.
206 *Ibid.*, p. 525. This notion was later adopted by Jellinek, see note 136, *supra*.
207 *Ibid.*, p. 551.
208 *Philosophie der Werte*, p. 367 (1908).
209 *Die Grenzen der naturwissenschaftlichen Begriffsbildung*, 2d edit., p. 508 ff. (1913).
210 *Ethik des reinen Willens*, p. 66 ff. (1904).

Ethics must realize itself in the law.[211] Legal philosophy, on the other hand, stands in need of ethics which is the real foundation of all law and legal philosophy,[212] for law has its roots in ethics.[213] The "law of laws" is the natural law which signifies the ethical kernel of all law.[214] Justice is the fundamental virtue of the law and the legal order.[215]

Schäffle defines law and custom as "orders and systems of individual actions. Those orders are established by society; they are adjusted to the historical conditions which form the basis of social preservation; they are gained from experience as to what is in the interest or runs contrary to the interests of man; they are externally enforced by the force of the popular legal genius; and they are strengthened by tradition and long practice." [216] Post calls law "the realization of the legal genius of whole interested groups . . . in their historical development," [217] while Vierkandt, the sociologist, considers law "a fixed relation of the power of action . . . ." [218] Legal relations are "restrictions of that basic urge or impulse which is the source of arbitrary power." [219] Law is "the emanation of an organized collective will which establishes certain definite institutions or organs in order to bring about the fullest realization of this organized collective will." [220]

Matzat, who attempts to explain the origin and nature of law on the basis of a socio-biological theory, calls law a "process or relationship of assimilation (*Anpassungsverhältnis*) of the many — the sum total of these processes of assimilation." [221] It is, in other words, a "relationship of

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211 *Ibid.*, p. 213.
212 *Ibid.*, p. 214.
213 *Ibid.*, p. 215.
214 *Ibid.*, p. 68, p. 70.
215 *Ibid.*, p. 71.
216 *Bau und Leben des sozialen Körpers*, vol. I, p. 334 ff. (1875-1878).
217 *Einleitung in das Studium der ethnologischen Jurisprudenz*, p. 9, p. 18 ff.
218 *Gesellschaftslehre*, p. 257 (1923).
219 *Ibid.*, p. 257.
220 *Ibid.*, p. 383.
221 *Philosophie der Anpassung mit besonderer Berücksichtigung des Rechts und des Staats*, p. 149 (1903)

mutual assimilation between two or more persons in which the external conduct of one person is being determined by the will of another person, and . . . the external conduct of this other person is being determined by the will of the first person." [222] Woltmann, a social Darwinist, on the other hand, defines law and the struggle for law and order as a struggle for "the law of the stronger." [223] According to Goldscheid, however, "law and right as found in the cultural evolution of mankind is nothing else than a synthesis between natural law and historically evolved positive enactments." [224] All positive law has to adjust itself to the Idea of the cultural evolution of mankind.[225] The "epigenetic" concept of law and justice is tantamount to the postulate of self-preservation and individual self-unfolding.[226] This "epigenetic" concept of law and justice always inquires: "What social achievement does any individual have to show in order to be justified in considering himself evolutionally superior to his fellow man." [227] Mezger calls "the preservation of social existence and the promotion of life in general the supreme end of law." [228] "The preservation of social existence and of life as the end of law is tantamount to a perpetuation of the social struggle in a form which, however, permits the survival of the contestants." [229] Hence law means "the enforced removal of those extremist points of view . . . which would lead to a complete annihilation of the opposing point of view." [230] "The creation of an appropriate or fair competition among men . . . is the principle of just law." [231] For such a fair competition constitutes "the source

222 *Ibid.*, p. 169.
223 *Politische Anthropologie*, p. 154 ff. (1903).
224 *Entwicklungswerttheorie, Entwicklungsökonomie, Menschenökonomie*, p. 163 (1908).
225 *Ibid.*, p. 165.
226 *Ibid.*, p. 166 ff.
227 *Ibid.*, p. 167.
228 *Sein und Sollen im Recht*, p. 79 (1920).
229 *Ibid.*, p. 102.
230 *Ibid.*, p. 102.
231 *Ibid.*, p. 103.

of the welfare of the whole, that is to say, the preservation of the greatest number of the strongest and most vital individuals." [232]

Benedikt, who essays to explain the meaning of law on a psychological basis, defines law as the very factor which brings about a balance between pleasure and aversion.[233] Stricker, on the other hand, calls law the product of man's instinctive desire for power.[234] Hoppe insists that law is something "which satisfies our spiritual emotions, something which is being accepted by the rational process as aiming at a praiseworthy end." [235] Beling, again, insists that law "cannot be anything else than a fact of mass psychology" (*massenpsychologische Tatsächlichkeit*).[236] It is the task of legal science or legal philosophy "to determine the concept of law and right; in addition it has to furnish the jurist with a method by which the content of the law may be defined; furthermore it has to examine the law as to its ideal justification; and finally it must outline the ideal legal order underlying all social existence." [237]

The cultural aspects of law from a Neo-Kantian point of view are emphasized by M. E. Mayer who insists that "law in the wider sense of the term is the sum total of actions undertaken by a politically organized society in order to guarantee the promotion of certain common interests through the establishment and application of a system of norms." [238] "Law in the narrower sense of the term is the

232 *Ibid.*, p. 104.

233 *Zur Psychologie der Moral und des Rechts*, p. 52 (1875).

234 *Physiologie des Rechts*, p. 3 (1884).

235 *Der psychologische Ursprung des Rechts*, p. 4 (1885). Similar ideas are to be found in H. Maier, *Die Psychologie des emotionalen Denkens* (1908); Stark, *Die Analyse des Rechts* (1916); Bozi, *Im Kampf um ein erfahrungswissenschaftliches Recht* (1917); Kornfeld, *Das Rechtsgefühl* (in: *Zeitschrift für Rechtsphilosophie*, vol. I); Riezler, *Das Rechtsgefühl* (1921); Sturm, *Die psychologischen Grundlagen des Rechts* (1910); Sturm, *Die Form des Rechts* (1911); Sturm, *Die Materie des Rechts* (1911); Sturm, *Recht und Völkerrecht* (1918); Nelson, *Die Rechtswissenschaft ohne Recht* (1917); Nelson, *System der philosophischen Rechtslehre* (1920); Haff, *Rechtspsychologie* (1924).

236 *Rechtswissenschaft und Recht*, p. 12 (1923).

237 *Ibid.*, p. 44.

238 *Rechtsphilosophie*, p. 56 (1922).

sum total of actions in which a politically organized society engages in order to promote, through the application of compulsion, certain common interests by the establishing and applying of a system of norms which in turn, are guaranteed by the application of sanctions." [239] Radbruch defines law as "a cultural phenomenon" and, as such, a historical fact related to a definite value or act of values.[240] Law is the work of man, but its significance can only be understood within the framework of an axiological method.[241] Law, at the same time, is more than a mere value; it is one of the real forms in which a definite historical civilization becomes manifest.[242] Hence the concept of law and right is a concept pointing towards a definite reality; a concept, that is, the real significance of which is to be found in the fact that it is related to a definite value.[243] Law, in the final analysis, is that reality the last significance of which is to be found in that it is subservient to the Idea of Justice.[244] The true purpose of all legal philosophy consists in that it realizes itself through the medium of interpretation and re-evaluation of already existing social facts.[245] Legal philosophy is primarily "legal axiology" (*Rechtswertbetrachtung*) and "legal teleology." As such it has one fundamental problem — the end of law.[246] "Norm, idea and life — legal philosophy has a share in all of these three. It has for its subject-matter the command of the law-giver, a will, and thus it is equally near to and far from the world that ought to be and that of values, and the world of what is practicable and what is." [247] Legal philosophy is "a cultural science" (*Kulturwissenschaft*). "Law does not belong to the realm of nature, nor to the realm of values, not to the realm of

239 *Ibid.*, p. 56.
240 *Rechtsphilosophie*, p. 32, p. 29 (1932).
241 *Ibid.*, p. 120, p. 32.
242 *Ibid.*, p. 29.
243 *Ibid.*, p. 32, p. 120.
244 *Ibid.*, p. 29, p. 32.
245 *Ibid.*, p. 33, p. 8, p. 119.
246 *Grundzüge der Rechtsphilosophie*, p. 28 ff. (1914).
247 *Ibid.*, p. 211.

faith; it belongs to the realm of human civilization. Hence legal philosophy or legal science is a cultural science." [248] Lask calls legal philosophy "a branch of the empirical cultural sciences." [249] Law is "a real factor of all cultural life." [250] "Not the laws, but law itself is the foremost subject of legal philosophy." [251]

Stammler considers the manifold interests in goods the "material," and law and right the "formal" aspect of social existence. Law is "an attempt at enforcing of what is being held to be right and just." [252] Law is, therefore, "the . . . compulsory rule of social co-existence," [253] the "necessary prerequisite of a systematic and and orderly arrangement of social life." [254] Order through law constitutes the condition of all social existence.[255] Just law (*richtiges Recht*) is "that law or norm which in a concrete situation fully coincides with the fundamental idea of right and justice." [256] For its fullest unfolding and complete realization law stands in need of ethics,[257] and ethics again needs for its realization in the existential world a "just law." [258] The science of "just law" starts with the concept of what is ideally right and just; it criticizes all laws and legal norms by this fundamental concept; and strives for the unity and harmony of all legal ideas. The basic idea of the "just law" is "the unity and harmony of all individual ends in the light of a single common purpose of society.[259] The social

248 *Ibid.*, p. 184. Similar ideas are to be found in Kohler (see note 170 ff., *supra*); Berolzheimer, *System der Rechts-und Wirtschaftsphilosophie* 5 vols. (1904 ff); Eleutheropulos, *Recht, Soziologie und Politik* (1908); Spann, *Der wahre Staat* (1921); Oppenheimer, *System der Soziologie* (1922); Vierkandt, *Gesellschaftslehre* (1923).

249 *Rechtsphilosophie* (in: *Gesammelte Schriften*, edit. Herrigel, 1923), p. 307.

250 *Ibid.*, p. 313.

251 *Ibid.*, p. 326.

252 *Die Lehre vom richtigen Recht*, p. 29 (1902).

253 *Wirtschaft und Recht nach der materialistischen Geschichtsauffassung*, 2d edit., p. 97 (1906).

254 *Ibid.*, p. 96. Compare also *Die Lehre vom richtigen Recht*, p. 29.

255 *Die Lehre vom richtigen Recht*, p. 7.

256 *Ibid.*, p. 15.

257 *Ibid.*, p. 87.

258 *Ibid.*, p. 90.

259 *Ibid.*, p. 197.

ideal is "the community of free will individuals." [260] "The appropriateness of a legally relevant content of the will is nothing else than the harmony of this will with the social ideal." [261] Theoretically "just law" is that law which is in conformity with the universally valid end of social existence.[262] The fundamental principles of "just law" are four: "(1) the content of a person's will must not be subject to the arbitrary will of another; (2) a rightful demand can only be maintained in such a manner and to such an extent that the person bound can still be his own neighbor (i.e., an end in himself.)" [263] They are Stammler's "principles of respect." [264] The "principles of participation" are: (3) "No person legally bound is to be excluded from the common interest arbitrarily; (4) a legally conferred power of disposition can only be exclusive so far as the person excluded may still be his own neighbor (i.e., an end in himself.)" [265] The method most appropriate to legal philosophy is the teleological method in collaboration with a logical or critical method.[266] Wielikowsky defines legal philosophy as "the epistemology of law" . . . which "furnishes a consistent system of the methodological prerequisites, the ever valid and significant principles of legal reasoning in general." [267] But legal philosophy has a still more important task, namely to be "a theory of legal values and legal evaluation." [268]

Binder emphasizes that legal philosophy is a topic for the philosopher rather than the jurist. "The jurist attempting to philosophize about the meaning of law and right must . . . be aware of the fact that in doing so he is rather a philosopher than a jurist." [269] Legal philosophy does not con-

260 *Ibid.*, p. 198.
261 *Ibid.*, p. 201.
262 *Ibid.*, p. 185.
263 *Ibid.*, p. 148.
264 *Ibid.*, p. 148.
265 *Ibid.*, p. 149.
266 *Ibid.*, p. 13. Compare also, in general, *Theorie der Rechtswissenschaft* (1911); *Lehrbuch der Rechtsphilosophie* (1922).
267 *Die Neukantianer in der Rechtsphilosophie*, p. 176 (1914).
268 *Ibid.*, p. 178.
269 *Philosophie des Rechts*, p. 2 (1925).

cern itself with legal concepts, but rather with the Idea of law and right; "It is not our (*scil.*, the legal philosopher's) task to ascertain and analyze . . . cases which are legally relevant and to establish what ever element they may have in common. For it is our task to establish their rationally compelling nature, in other words, to uncover that one element which cannot be disputed away without changing completely the object of our investigation." [270] "The province of legal philosophy is not nature but civilization. The fundamental conception with which the legal philosopher must operate is not causality, that which must be, but freedom, that which ought to be. The rules with which legal philosophy or the science of law has to do are not theoretical, but practical; and the world which comes under its investigation is that of Ideas." [271] All law "exists for the sake of the Idea of law and right. But this Idea is not one and the same with an "ideal law," with a system of isolated and universally valid legal concepts . . . The Idea of law and right has the meaning of a higher directive which cannot be ignored whenever we are dealing with the empirical legal institutions of man." [272] Salomon calls legal philosophy "that domain of general philosophy which is related to the empirical science of law." [273] Legal philosophy is the doctrine of legal principles.[274] At the same time it is the first chapter of ethics. "Legal philosophy deals with those problems or phenomena of law and right which constitute the 'apex' and the core of all empirical legal sciences." [275]

Münch, a disciple of the axiological School of Heidelberg (Rickert, Windelband, Radbruch, Lask) defines law as "the uniform order of social existence which is meant to be absolutely valid and binding, and which, therefore, is being understood as something that can be enforced as well as some-

270 *Ibid.*, p. 119.
271 *Ibid.*, p. 852.
272 *Ibid.*, p. 789.
273 *Grundlegung zur Rechtsphilosophie*, 2d edit., p. 103 (1922).
274 *Ibid.*, p. 116.
275 *Ibid.*, p. 198

thing that ought to be observed." [276] Sauer insists that "the legal order is always composed of rigid and immutable norms. This order has its origin in a supreme power to coerce." [277] The legal order, however, is "assisted by the cultural order which has as its object the finer and better things of life." [278] This cultural order can no longer be "paragraphed by the law or turned into uniform rigid patterns by the state." [279] Legal philosophy mediates between positive legal science and social philosophy.[280] "From positive legal science legal philosophy gains its materials, while from social philosophy it derives its higher directives. Hence legal philosophy is part and parcel both of a positive legal science as well as social philosophy." [281]

Some writers on legal philosophy attempt to apply Husserl's "phenomenological approach" to jurisprudence. Thus Reinach sees the main task of all legal philosophy in the discovery of those truths *a priori* within the domain of law and right which, like pure mathematics or logical axioms are absolutely valid and, hence, precede all legal experience. By "grasping the true essence of law (*rechtliche Wesensschau*) we shall be able to discover within the law that which "is absolutely and necessarily valid about the law." [282] True legal concepts have their own ontological or existential meaning [283] The positive law at times develops quite independently of these *a priori* concepts in that it often ignores the very essence and the principles which actually constitute true law.[284] Felix Kaufmann insists that "legal philosophy is legal ontology (*Wesenslehre vom Recht*) . . . and as such constitutes the necessary theoretical foundation for every

276 In: *Zeitschrift für Rechtsphilosophie,* vol. I, p. 126. Compare also *Erlebnis und Gestaltung* (1913); *Kultur und Recht* (1918).
277 *Philosophie der Zukunft,* p. 202 (1923).
278 *Ibid.,* p. 203.
279 *Ibid.,* p. 203.
280 *Ibid.,* p. 396.
281 *Ibid.,* p. 396.
282 *Die apriorischen Grundlagen des bürgerlichen Rechts,* p. 5 (1913).
283 *Ibid.,* p. 6.
284 *Ibid.,* p. 6.

science of the positive law . . . ." [285] "The jurist is concerned with the ever changing empirical contents of the various legal norms, while the legal philosopher concentrates on the *a priori* and stable forms of these legal norms." [286] All legal philosophy is, therefore, "essentially an *a priori* theory of rules of law" (*Rechtssatz*).[287] The aim of all legal philosophy is to establish a "system of a pure theory of law." [288] Schreier claims that there are but four basic legal concepts, namely a statement of fact, a person, a performance (or act), and a sanction. Hence the basic formula of law and any legal norm is this: "Given a certain fact a person has to act under the pressure of a sanction." [289]

Kelsen insists that all legal philosophy is a "normative science." "The normative character of legal philosophy becomes manifest in a negative way in that legal philosophy has not to interpret actual events, that is to say, those events which belong into the existential realm. Legal philosophy is not an explicative science. The normative character of legal philosophy becomes manifest in a positive manner in that all legal philosophy has norms for its sole object . . . ." [290] The "exclusively normative nature of legal philosophy is based upon the particular character of the legal norm (*Rechtssatz*) as contrasted by the moral norm (*Sittengesetz*), in other words, upon the strictly heteronomous character of the legal norm." [291] "Since the legal norm originates in complete independence of all actual conduct of man, it is never an abstraction gained from experience . . . ." [292] Legal concepts are never teleological concepts. "A teleological interpretation can never lead to the discovery of legal concepts, but only to the establishment of sociologi-

285 *Logik und Rechtswissenschaft*, p. 43 (1922).
286 *Ibid.*, p. 54.
287 *Ibid.*, p. 54.
288 *Ibid.*, p. 134.
289 *Grundbegriffe und Grundformen des Rechts*, p. 70 (1924).
290 *Hauptprobleme der Staatsrechtslehre*, p. 6 (1911).
291 *Ibid.*, p. 43.
292 *Ibid.*, p. 43.

cal, economic, or psychological concepts." [293] "The elimination of the teleological element from the conceptual construction of the law turns all legal concepts into purely formalistic categories." [294] Legal philosophy, as the "pure science of law," is a "geometry of the whole of legal phenomena." [295] A pure theory of law, being a science, "cannot answer the question whether or not a law is just, because this question cannot be answered scientifically." [296] Law signifies "a specific technique of social organization." [297] "Only a positive legal order evinced by objectively determinable acts — which is the positive law — can be the object of a science . . . [and] the object of a pure theory of law, which is a science, not metaphysics, of law." [298] "Law is a coercive order . . . ;" it is that "social technique which consists in bringing about the desired social conduct of men through the threat of a measure of coercion which is to be applied in case of a contrary conduct." [299] Law is "the organization of force." [300] For the law "attaches certain conditions for the use of force only by certain individuals and only under certain circumstances." [301] In the rule of law the employment of force is "a sanction, i.e., the reaction of a legal community against a wrong." [302] "The norms which form a legal order must be norms stipulating a . . . sanction." [303] The general legal norms "must be norms in which a certain sanction is made dependent upon certain condi-

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293 *Ibid.*, p. 89. Compare also *Die Grenzen der juristischen und der soziologischen Methode* (1911); *Die Rechtswissenschaft als Norm-oder als Kulturwissenschaft* (in: *Schmollers Jahrbuch*, vol. 40, 1916).

294 *Hauptprobleme der Staatsrechtslehre*, p. 92.

295 *Ibid.*, p. 93.

296 *A General Theory of Law and State* (in: *20th Century Legal Philosophy Series*, vol. I, p. 6 (1945). This book contains a complete restatement of all of Kelsen's views on law and legal philosophy. As for Kelsen's many writings, *ibid.*, p. 447-454.

297 *Ibid.*, p. 5.

298 *Ibid.*, p. 13.

299 *Ibid.*, p. 19.

300 *Ibid.*, p. 21.

301 *Ibid.*, p. 21.

302 *Ibid.*, p. 22.

303 *Ibid.*, p. 45.

tions." [304] The concept of "the legal rule . . . is the central concept of jurisprudence." [305] "A legal rule (*Rechtssatz*) or rule of law . . . is a hypothetical judgment attaching certain consequences to certain conditions." [306] Legal means that "the behavior of a person corresponds . . . to a legal norm which is presupposed to be valid . . . because this norm belongs to the positive legal order." [307] Illegal, on the other hand, "means the very condition for . . . a coercive act or sanction." [308] A legal duty "is nothing else but the validity of a legal norm which makes a sanction dependent upon the opposite of the behavior forming the legal duty. The legal duty is simply the legal norm in its relation to the individual to whose behavior the sanction is attached in the norm." [309] "There can be no legal rights before there is law." [310] A right is "a legal norm in its relation to the individual who, in order that the sanction shall be executed, must express a will to that effect." [311] In other words, a right is the setting into motion the consequences of a disregard of a certain norm or rule of law by an "interested" person.[312] A right is, therefore, "the execution of a certain sanction . . . initiated and carried out only in consequence of a declaration of will to that effect by a particular individual — the plaintiff." [313] All rights are relative rights.[314] "The legal order is a system of norms." [315] A legal norm is valid and compelling "by virtue of the fact that it has been created according to a definite rule and by virtue thereof." [316] Law is always positive law, and its positivity lies

304 *Ibid.*, p. 45.
305 *Ibid.*, p. 50.
306 *Ibid.*, p. 45.
307 *Ibid.*, p. 14.
308 *Ibid.*, p. 21.
309 *Ibid.*, p. 59.
310 *Ibid.*, p. 79.
311 *Ibid.*, p. 83.
312 *Ibid.*, p. 81 ff.
313 *Ibid.*, p. 84.
314 *Ibid.*, p. 85.
315 *Ibid.*, p. 110.
316 *Ibid.*, p. 113.

in the fact that it is created by the acts of human beings. It is law because it is something that is valid because it has been created as something meant to be valid.[317] "The basic norm of a positive legal order is nothing else than the fundamental rule according to which the various norms of the legal order are to be created." [318] And this basic norm — the constitution — "is valid because it is presupposed to be valid; and it is presupposed to be valid because without this presupposition no human act could be interpreted as a legal . . . act." [319]

This survey of definitions should make it quite clear that the majority of the ideas expressed by German legal philosophers are under the influence of philosophical speculation and not juristic consideration. The Germans, although never lacking in profound scholarship, seem to revel in abstractions which at times obscure rather than elucidate the subject. In any event, they seem to bear out Binder's famous statement that "the jurist attempting to philosophize about the meaning of law and right . . . must be aware of the fact that in doing so he is rather a philosopher than a jurist." [320]

Anton-Hermann Chroust.

317 *Ibid.*, p. 114.
318 *Ibid.*, p. 114.
319 *Ibid.*, p. 116.
320 *Philosophie des Rechts*, p. 2.