# GERMAN INFLUENCES IN ENGLISH LEGAL EDUCATION JURISPRUDENCE IN THE 19TH CENTURY.

English lawyers have generally taken pride in the fact that English law has not been greatly affected by alien intrusions, but rather has grown from native roots. During the sixteenth century, English legal institutions stood in danger of being replaced by the institutions of the civil law, but the threat of engulfment never became a reality, and thereafter civil law studies became of very limited importance. While civilians trained at Oxford or Cambridge might find employment in some English jurisdictions, the vast majority of English lawyers required no civil law training to fit them for practice, and a complete professional training might be obtained outside the universities.

At the time this story begins, the beginning of the nineteenth century, there was nothing approaching an English school of law to which young men intending to practise law might go. Little or nothing was to be gained from going to Oxford or Cambridge, except perhaps a taste for the classics and manners befitting a gentleman, and law was to be learned only through private study and instruction.

There were a few individuals who appreciated the deficiencies of a system in which the young law student was left to gather such pearls of legal wisdom as he could find in the law offices. There were a few who realized that English lawyers were members of a profession noted for its want of cultural attainment, and there were some who believed that the appalling condition to which English law had been reduced could have been avoided if lawyers as a whole had been a better educated group. It was these critics who set in motion a re-appraisal of English legal education which was to lead to the revival of the Inns of Court and other training institutions and to the overhauling of the law degree courses in the universities. Although by present day standards the reformers did not achieve the ideal in legal education, their efforts did result in the creation of law schools in which the demands both for professional training and for a liberal education were partially met.

It is understandable that the English reformers should have looked to countries outside England for ideas about how legal education should be organized, and it was not accidental that heed should have been taken of the law schools of Germany. At this time the German schools were very active institutions, and the academic legal

profession in Germany was poised on the threshold of the great debate between the Pandectists and the historical school. No one could doubt that the German law professors were men of culture, and if English legal education had to be injected with a measure of *Kultur,* it was only natural that the example of German scholarship should be studied.

The cultural element was supplied in England by the revival of civil law studies and by the introduction of courses of jurisprudence in both the Inns of Court and the universities. What merits attention here is the extent to which German civil law studies and German juristic thought affected the content of the English curricula and the thought of the English civilians and jurists. However, in singling out German influences as a topic for study it is not to be concluded that there were no other influences at work. In any event, the question of influence is a delicate one, for influence can mean several things, and in the present context does not necessarily mean that German ideas may have been accepted by English lawyers. The first problem is to determine the extent to which German thinking and practices were known and understood in England; the second is to examine English attitudes to German thought and practices. To establish influence it is not necessary to show perfect coincidence between the matters compared or a causal relationship between them, for one may be influenced in a negative way. Hence, if one can establish that a particular German idea came to the attention of Englishmen, was discussed by them, and finally contradicted or repudiated by them, there may be justification for supposing that without some acquaintance with German ideas the English would not have been provoked into developing their own ideas.

With these preliminaries we may now turn to consider the reception in England of German ideas concerning legal education in general and English attitudes towards German civil law scholarship and German juristic thought.

## Legal Education.

At the beginning of the nineteenth century English legal education was at an abysmally low ebb. The Inns of Court had ceased to fulfil their function as centres for instruction for those intending to practise at the English Bar, and the universities of Oxford and Cambridge offered little or nothing for the potential lawyer. For the most part the only kind of law taught at the two universities was civil law, and while civil law degrees were offered, formal instruction was

virtually non-existent, and the degree requirements could be met by fulfilment of the residence requirements and observance of the prescribed rituals. In the absence of anything approaching a system of legal education, the lawyer in training had to rely on his own resources and such morsels as he might glean in the course of his apprenticeship to practitioners. When several generations of English lawyers were reared upon a multitude of single instances and considered their business to be the acquisition of a technical jargon and a stock-pile of leading cases to be secreted in the interstices of a retentive memory, the consequences could not but be catastrophic. Legal learning became the monopoly of a jealous guild of practitioners, and most lawyers tended to regard the systematic teaching of law as "useless if not positively harmful."[1]

Though the dismal picture presented by legal learning in the eighteenth century was relieved by a few shafts of light, by the realization of a few that things were not well and might be improved, and by Blackstone's efforts to remove English law from the realm of unintelligent rote-learning to the realm of a body of doctrine which might be illuminated by attention to broad principles, and to classification and systematization of legal rules, it was not until the advent of the Benthamites that constructive steps were taken towards amelioration of the sad state of affairs.

Those Benthamites interested in legal studies and law reform began with the assumption that law was a subject eminently suited to academic instruction, and that by reforming English legal education some improvement in English law might be expected. In their opinion the cornerstone of law teaching should be jurisprudence, and what was meant by jurisprudence was fairly clear in their minds. It was not a *pot-pourri* of fuzzy reflections about law, but was a stern discipline whose relationship to the branches of positive law was comparable with the relationship of mathematics to the physical sciences.

It is scarcely surprising that the Benthamites should not have looked to either of the two universities or to the Inns of Court for the salvation of English legal education, for these were conservative institutions; and, though the Benthamites were scarcely revolutionaries, they were sufficiently disaffected from tradition to be given the name of Philosophic Radicals. For the execution of their plans for reformed legal education they looked instead to that institution which was

[1] See 12 HOLDSWORTH, A HISTORY OF ENGLISH LAW (London, 1938), 78 *et seq.*, and H. E. MALDEN, TRINITY HALL (*University of Cambridge—College Histories,* London, 1902), 213-238.

largely their own creation, the University of London, the very idea of which had been conceived by Thomas Campbell during a sojourn at the University of Bonn.[2] The person to whom the Benthamites entrusted the task of reviving English legal education was John Austin.

Appointed to the newly established Chair of Jurisprudence and the Law of Nations in the University of London (since 1836, University College) in 1827, Austin, who had never had any experience of life in an English university, set sail for Germany in the spring of 1828. The purpose of his visit was to learn something about German law schools and to familiarize himself with German jurisprudence and Roman law.[3] During his brief sojourn at the University of Bonn, Austin applied himself with diligence and vigour, first in learning the German language and then in learning Roman law. He found little to be admired in German jurisprudence which he described as being "in a backward state", but he was enthusiastic about German expositions of Roman law, and found them to be "models of arrangement."[4] In his own lectures Austin's great debt to German civil law studies is clearly apparent. Not only did many of his lectures in jurisprudence consist of what today would be considered to be exercises in comparative law—English and Roman law compared—but they were arranged along the lines of the much admired German expository texts.

It should never be forgotten that Germany always remained very dear to Austin, and it was one of his many disappointments that he could not make the school in London a replica of the school at Bonn. He had found that in Germany legal studies at a general level were considered to be part of the normal course of instruction for future legislators and administrators and believed that this system could be applied in England to advantage.[5] Austin was not, however, so completely bemused with the virtues of German law schools that he did not perceive their deficiencies, for he thought they concerned themselves too little with practicalities.[6] Drawing on his German experience, he proposed that the ideal English law curriculum would be one in

2 See H. HALE BELLOT, UNIVERSITY COLLEGE, LONDON, 1826-1926 (London, 1929).

3 A useful account of Austin's visit to Bonn and the effect it had upon his work has been written by Andreas B. Schwartz, *John Austin and the Jurisprudence of his Time*, (1934-1935) 1 POLITICA 177-199.

4 JANET ROSS, THREE GENERATIONS OF ENGLISH WOMEN (rev. ed., London, 1893), 67-69.

5 AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED (H. L. A. Hart ed. (*Library of Ideas*), London, 1954), 389-390.

6 *Ibid.*, 381, 390.

which the law student would take instruction in "the general principles of jurisprudence and legislation (the two including ethics generally), international law, the history of the English law (with outlines of the Roman, Canon and Feudal, as its three principal sources), and the actual English law (as divided into fit compartments)."[7] The role of jurisprudence was that of an organizer of loose parts.[8] From such a curriculum one might expect an improvement in the quality of English legal literature and improvements in the substance of English law. It was Austin's hope that England might produce, as Germany had produced, a class of academic lawyers who not only commanded the respect of their practising brethren and the public at large, but who would have the time and breadth of learning to write good law books.[9] The greatest need was "a good institutional treatise, philosophical, historical and dogmatical." Here one may surmise that what Austin had in mind was an English counterpart of the German legal encyclopaedia.

If Austin had the misfortune to teach only for a short period and to have thereafter to retire from the active teaching world, it must not be thought that his words about legal education went unheeded. His students included some bright young men who eventually became prominent in public life. It was probably through some of them and through those Benthamites who had been shocked into a realization that one small experiment carried out by one man, a man eminently unfit for proselytizing, could not be expected to work miracles in the field of legal education, that attempts were made to have legal education considered as a matter of concern to the public at large.

Before Austin's death in 1859, four reports on English legal education had been tabled: one dealing with the subject in general, one with the Inns of Court, and the other two, the reports on the universities of Oxford and Cambridge, dealing incidentally with provision for legal instruction.[10] In all four reports unqualified recognition was

7 *Ibid.*, 389.

8 *Ibid.*, 379-382.

9 *Ibid.*, 390-391.

10 Great Britain, *Parliamentary Papers*:—

Vol. X (Reports of Commissioners, etc.), 1846—*Report of the Select Committee on Legal Education*, 1-531.

Vol. XVIII (Reports of Commissioners, etc.), 1854-1855—*Report of the Commissioners appointed to inquire into the Arrangements in the Inns of Court and Inns of Chancery for promoting the Study of Law and Jurisprudence*, 345-362.

Vol. XXII (Reports of Commissioners, etc.), 1852—*Oxford University Commission: Report of Her Majesty's Commissioners appointed to inquire into the State, Discipline, Studies, and Revenues of the Uni-*

given to the need for formal legal instruction, and it was generally agreed that jurisprudence and Roman law were indispensable components of a legal curriculum. Evidence was sought not only from Englishmen who had suggestions to make as to how English legal education might be improved, but also from individuals having some knowledge of law schools in Europe, the United States, and Scotland. Evidence about the law faculties in German universities no doubt helped to shame many English lawyers into a realization that the English faculties and the Inns of Court had fallen by the wayside.[11] While those who expressed admiration for the German schools hinted that they might provide models as guides, there does not seem to have been any suggestion that the German law faculties should be regarded as the final answer.[12] And, indeed, it should be added, to import the German model without modification would have involved a drastic change in the organization of English universities, at least of Oxford and Cambridge. But there was more to be said against adopting the German-style law school than that: The German law degrees were taken by men who intended to follow political and administrative careers as well as by men intending to be legal practitioners, and for this reason German law students received a liberal education rather than a strictly professional training. The English reformers certainly took this into account, but they were impressed with the idea that, henceforth, English legal studies should rise above the insular and technical bias which had characterized legal education in the past century. In the result the reforms in English legal education in both the Inns of Court and the universities represented a compromise between the needs of the practising profession and the demand that a lawyer should be a liberally educated man.

The typical viewpoint of the English educators is epitomised in the evidence given by W. D. Lewis before the Inns of Court Commission. Though he was speaking with reference to jurisprudence, his remarks were equally applicable to law studies as a whole. Lewis's opinion was expressed thus:

*versity and Colleges of Oxford.*

Vol. XLIV (Reports of Commissioners, etc.), 1852-1853—*Cambridge University Commission: Report of Her Majesty's Commissioners appointed to inquire into the State, Discipline, Studies, and Revenues of the University and Colleges of Cambridge.*

11 See, for example, the evidence of G. A. Moriarty given to the Select Committee on Legal Education, and the information the Committee received concerning the assistance that had been given by German professors and the example of the schools at Heidelberg and Bonn in the establishment of the Dublin Law Institute: *Report* (cited *supra,* note 10), 231-245, 336.

12 *Ibid.,* 492-498.

"I think . . . that in discussing the science of Jurisprudence, our Lectures ought to aim at something different from the German and most of the continental expositions of Law that I have met with . . . the fault of which is their being too abstract and too remote from practical life, and generalizing too much. The theories of foreign jurists sometimes appear not reduced to particulars enough to be of practical use to the student, when in after life he becomes a legislator or politician."[13]

In the matter of English legal textbook writing German influence was unmistakable. There was no such thing as a good introductory text ranging over the whole field of English law apart from Blackstone's *Commentaries.* There were many poorly written and poorly organized practitioners' manuals, but for a compendious volume explaining general principles and the rationale of the laws of England, and drawing comparisons with foreign laws, one sought in vain. Austin's *Lectures on Jurisprudence,* unsatisfactory as they were as readable student literature, represented the first English text on jurisprudence; and the inspiration for this was undoubtedly German, namely, the German encyclopaedia or juristic survey. Austin's former German tutor, von Arnesburg Arndts, himself the author of one of the most popular German encyclopaedias, described the nature of this type of legal work as follows:

" . . . a scientific and systematic outline or general view of the whole province of jurisprudence in the German sense, the province of positive law, together with the data of that science; its purpose is to determine the compass and limits of jurisprudence, its relation to other sciences, its internal divisions, and the mutual relations of its constituent parts."[14]

Later introductory law books and jurisprudence texts published in England in the nineteenth century revealed more than a superficial resemblance to the German encyclopaedia.

## Civil Law Studies.

In the sixteenth and seventeenth centuries the civil law had been

13 *Inns of Court Commission Report* (cited *supra,* note 10), 462.

14 Cited in *Guide to the Law and Legal Literature of Germany* (prepared by Edwin M. Borchard for the United States Library of Congress; Washington, D.C., 1912), 21. Presumably the citation is from ARNOTT'S JURISTISCHE ENCYKLOPADIE UND METHODOLOGIE (11th ed., E. Grueber ed., Stuttgart and Berlin, 1910). The *Guide* contains useful notes on German encyclopaedic material, as also does N. M. KORKUNOV, GENERAL THEORY OF LAW (translated by W. G. Hastings in *Modern Legal Philosophy Series* (New York, 1922)), 9-22.

associated by English lawyers with alien ideologies, but in the Victorian era the old associations had disappeared, and there was a growing belief that common lawyers might benefit from knowing something about the system of law upon which the legal systems of continental Europe were based. The common law of the time was an unruly and unsystematized body of rules, and thoughts were turning towards reforms of substance and towards codification. Hence there might be inspiration to be gained from studying Roman law which—and this no one doubted—was superior to the common law from the point of view of orderly arrangement. Further, by looking at foreign law the critical faculties of the common lawyer might be aroused. But, these lofty considerations aside, there was still some practical value in studying the civil law, for Britain had an Empire and as a Great Power was deeply involved in international dealings. Knowledge of the Roman law was a great help to the student of international law, and was an aid to understanding foreign law and the legal systems of some of the colonies.

Once it was agreed that English legal education might be improved by the introduction of jurisprudence and Roman law as basic courses, the question was how should they be taught, and who was to teach them? It was at this point that eyes were turned to Germany. Though the verdict on the usefulness of German jurisprudence was negative, the German jurists were at least considered and may, indirectly, have helped English jurists to formulate their ideas more forcefully. When it came to Roman law the story was very different, for in this area the English acknowledged their deficiencies and the mediocrity of their civilians. The German Roman law scholars were, on the other hand, readily admitted to be supreme, and their works were avidly consumed by those who taught the subject in England.

A word must be said about the reasons for the decline of civil law studies in England prior to the nineteenth century. Before the English Reformation the teaching of civil law had been associated closely with instruction in canon law; but following the severance of the English Church from the Roman Church in the reign of Henry VIII the universities of Oxford and Cambridge shed the canonical limb. Unable to survive without its excommunicated partner, the civil law as a subject of academic study went into a decline from which it was not to recover fully until the latter part of the nineteenth century, though in an attempt to arrest this process of degeneration Henry VIII had appointed Regius Professors of Civil Law in each of the two universities and in 1547 charged two commissions with

the task of inquiring into the situation and of recommending remedial measures.

As the tensions created by the religious crises of the sixteenth century relaxed, there was a slight improvement in the standing of the civil law, and the civilians who, from the thirteenth century, had been excluded from practice in the courts of common law, were able to apply their talents in Chancery, admiralty, and the ecclesiastical and conciliar jurisdictions. During the seventeenth century, they followed the example of the common lawyers by organizing themselves into a quasi-corporate society, Doctors' Commons, the civilian counterpart of the Inns of Court. In addition to the business they found in domestic jurisdictions the English civilians made international law and diplomacy their special province.[15]

In spite of these circumstances tending towards preservation of the profession of the civil law, the degree courses at Oxford and Cambridge had become, by the middle of the eighteenth century, little more than a series of empty rituals.[16] For their part, the common lawyers scorned the civil law and its practitioners as an alien intrusion. Speaking in 1871, Viscount Bryce commented on the suspicious and contemptuous attitude of the common lawyers thus:—

> "A century ago this feeling was still so active, that Lord Mansfield's enemies found it worthwhile to charge him with having, as a Scotsman, an undue partiality for the Roman law, and designing, by means of its despotic principles, to sap the liberties of Englishmen—'corrupting by treacherous arts the noble simplicity and free spirit of our Saxon laws'."[17]

The impetus to the revival of the study of civil law in the nineteenth century did not proceed either from the civilians themselves or from Bentham. The former, it is true, had not been uncritical of the state of legal learning in England[18] and several of them made noteworthy contributions to eighteenth-century literature on legal

15 On the state of civil law studies in the sixteenth and seventeenth centuries see 4 HOLDSWORTH, A HISTORY OF ENGLISH LAW (2nd ed., London, 1937), and F. W. Maitland, *English Law and the Renaissance* in SELECTED HISTORICAL ESSAYS OF F. W. MAITLAND (Helen Cam ed., Cambridge, 1957).

16 See note 1, *supra*.

17 2 BRYCE, STUDIES IN HISTORY AND JURISPRUDENCE (London, 1901), 478.

18 See, for example, the evidence of J. G. Phillimore, Regius Professor of Civil Law at Oxford, in the Minutes of Evidence annexed to the *Report of the Select Committee on Legal Education* (cited in note 10 *supra*), 14-24, and his evidence before the *Inns of Court Commission* (cited in note 10 *supra*), 465-470. Of the Cambridge civilians interested in the reform of legal education particular mention should be made of James W. Geldart, Regius

theory,[19] but none were directly involved with the movement for reform. Bentham, on the other hand, was the direct source of inspiration for the younger utilitarians who formed the vanguard of reform, but he himself had no time for civil law and knew very little about it. Perhaps the greatest credit for having pointed out the advantages to be derived from a renewed study of Roman law, ancient and modern, belongs to John Austin.

Prior to his appointment to the Chair at University College, London, Austin had been engaged by his neighbour James Mill to tutor Mill the younger in Roman law.[20] The elder Mill was deeply interested in jurisprudence and, as a Scotsman, he probably had firm notions on the utility of studying the civil law.[21] For his part Austin considered Roman law to be:—

> " . . . greatly and palpably superior, considered as a system or whole, to the Law of England. Turning from the study of the English to the study of the Roman Law, you escape from the empire of chaos and darkness, to a world which seems by comparison, the region of order and light."[22]

Yet he cautioned against resort to Roman law "as a magazine of legislative[23] wisdom", and pointed out that since some of the principles of Roman law were "derived from barbarous ages", the relative perfection of Roman law should not be interpreted as being representative of the true ends of law.[24]

Whilst Austin extolled the virtues of studying Roman law his competence to expound upon the subject has been questioned. Nevertheless, the manner in which he employed his meagre and imperfect Roman law learning was of some significance. In postulating a codi-

Professor from 1813, and of Sir Henry Maine, who assumed the Chair in 1857: See Maine's evidence before the *Cambridge University Commission* of 1852 (cited in note 10 *supra*), 77-79.

19 See 12 HOLDSWORTH, A HISTORY OF ENGLISH LAW, 644-646.

20 LADY DUFF GORDON, LETTERS FROM EGYPT (rev. ed., 2nd imp., London, 1912), and JOHN STUART MILL, AUTOBIOGRAPHY (preface by John J. Coss, New York, 1924), 45.

21 See ALEXANDER BAIN, JAMES MILL: A BIOGRAPHY (New York, 1882), 37-38, 191; and Mill's essay on *Jurisprudence* in JEREMY BENTHAM, JAMES MILL, JOHN STUART MILL: SELECTED WRITINGS (Philip Wheelwright ed., New York, 1935), 211-252.

22 *Outline of the Course of Lectures,* in 1 AUSTIN, LECTURES ON JURISPRUDENCE (5th ed. rev. and ed. Robert Campbell; London, 1885), 58.

23 AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED (H. L. A. Hart ed., London, 1954), 376.

24 *Ibid.,* 378.

fied, self-contained, consistently formulated system of legal rules as the ideal to which all legal systems should approximate, he held up the Roman codes as models. Secondly, in attempting to draw from the diversity of legal systems certain common or pervading legal notions, he drew upon what were then the most readily accessible materials, namely, Roman and English law.

In the years that were to follow, a comparative approach held favour among many English jurists, as also did the historical approach. For both historical and comparative studies Roman law became the principal system of law with which English law was compared. The new attitude was exemplified in Sir Henry Maine's essay on *Roman Law and Legal Education,* published in 1856 in *The Cambridge Essays.*[25] Maine re-affirmed Austin's contention that Roman law provided a model of rigorous consistency in legal terminology and rule-formulation but, in addition, suggested that it was indispensable to an understanding of the development of the law, of moral and political philosophy on the Continent, and of international law and foreign legal systems. Similar opinions were voiced by Viscount Bryce who assumed the Regius Chair of Civil Law at Oxford in 1871.[26]

Although Oxford and Cambridge were the principal institutions for the study of Roman law, University College (London) did not fall far behind. After Austin vacated the Chair of Jurisprudence there followed a series of jurisprudence teachers who gave more stress to Roman law than to jurisprudence.[27] The same tendency appeared in the lectures on Jurisprudence and Civil Law at the Inns of Court.[28] At Cambridge, where there was no separate Chair in Jurisprudence, it was the civilians who assumed the chief responsibility for giving

25 Reprinted in MAINE, VILLAGE COMMUNITIES IN THE EAST AND WEST (3rd ed., New York, 1889), 330-383.

26 *The Academical Study of the Civil Law,* in 2 BRYCE, STUDIES IN HISTORY AND JURISPRUDENCE (London, 1901), 475-503—Bryce's inaugural address at the University of Oxford.

27 This group included John Thomas Graves, Charles James Hargreaves, Charles James Foster, John Philip Green, Joseph Sharpe, and Henry John Roby. When Hargreaves assumed the Chair of Jurisprudence in 1843 he was also made professor of Roman Law; this arrangement was continued until Roby's resignation in 1868, when a separate Chair of Roman Law was established. See George W. Keeton, *University College, London, and the Law,* (1939) 51 JURID. REV. 118-133.

28 The two lecturers in Jurisprudence and Civil Law appointed by the Middle Temple between the years 1847 and 1850, George Long and Sir George Bowyer, were both Roman Law enthusiasts. See LONG, TWO DISCOURSES DELIVERED IN THE MIDDLE TEMPLE HALL, WITH AN OUTLINE OF THE COURSE (London, 1847), and BOWYER, READINGS BEFORE THE SOCIETY OF THE MIDDLE TEMPLE IN THE YEAR 1850 (London, 1851). Maine, who was appointed by

instruction in jurisprudence,[29] whilst at Oxford Bryce's lectures on civil law could without risk of misrepresentation have been advertised as lectures on jurisprudence.

While very few of the nineteenth-century English civil law scholars studied for any length of time in Germany there was never any doubt in their minds that the Germans were pre-eminent in the field. The collection of Austin's books which his widow bequeathed to the Inner Temple revealed that Austin possessed a large quantity of German editions of Roman law texts and commentaries.[30] One of the differences between Austin's use of German legal materials and that of subsequent English jurists was in his heavier reliance upon the literature of the Pandectists.[31] Austin seems to have been less meticulous than later generations of English students of Roman law about distinguishing between republican and classical Roman law on the one hand and the civil law applying in the German States which had been adapted from ancient Roman texts. In this connexion a brief note on the fate of Roman law in Germany is relevant.

The reception of Roman law in Germany had been accomplished by the sixteenth century but local customary law continued to be operative. During the next three centuries Roman-founded law became more widespread in its application by reason of the doctrine that in the event of there being no rule of customary law (*Landrecht*) to

the Council of Legal Education in 1853 to lecture on Jurisprudence and Civil Law to students of all the Inns' approached jurisprudence through the study of Roman law and, judging from the reading lists for students and from the examination papers, this trend was maintained by Maine's successors, Joseph Sharpe, Sheldon Amos, Alexander Henry, William A. Hunter, Sir Edward Creasy, Frederic Harrison, and John F. Bate—see successive issues of the *Law Times*.

29 For example, John T. Abdy, Edwin C. Clark, and Sir Henry Maine.

30 See 1 AUSTIN, LECTURES ON JURISPRUDENCE, ix-xiii.

31 The extent to which Austin consulted these writings can be gauged by the marginal notes in his books (some of these notes have been reproduced in Robert Campbell's edition of the LECTURES). Andreas B. Schwartz, in the preparation of his article on *John Austin and the German Jurisprudence of his Time* (cited *supra*, note 3) consulted the Austin Collection in the library of the Inner Temple and formed the conclusion that Austin's main studies were of CHRISTIAN G. HAUBOLD, INSTITUTIONUM IURIS ROMANI PRIVATI HISTORICO-DOGMATICARUM LINEAMENTA (Leipzig, 1826) and his INSTITUTIONUM IURIS ROMANI PRIVATI HISTORICO-DOGMATICARUM DENUO RECOGNITARUM EPITOME (Leipzig, 1821); ANTON THIBAUT, SYSTEM DES PANDEKTEN RECHTS (Jena, 1828); CHRISTIAN MUHLENBRUCH, DOCTRINA PANDECTARUM (Halle, 1827); FERDINAND MACKELDEY, LEHRBUCH DES HEUTIGEN ROMISCHEN RECHTS (Giessen, 1827); GUSTAV HUGO, LEHRBUCH DER GESCHICHTE DES ROMISCHEN RECHTS (Berlin, 1826) and NIELS FALCK, JURISTISCHE ENCYKLOPADIE (see Schwartz, *loc. cit.*). Unfortunately, the Austin Collection, which had been bequeathed by his widow to the Inner Temple, was destroyed

govern an issue, Roman law should apply.[32] The ascendancy of the Roman law was assisted by several factors. First, as social and political circumstances changed, there was a need for changed laws and the systems of customary law were less adaptable than Roman law. Secondly, since Roman law only was a subject of academic study, it had little difficulty in competing with a legal system lacking formal literary expression and an academic tradition. The German civilians were a learned and not uninfluential body who adapted Roman principles to the needs of the day and, in time, their interpretative literature, known as *Pandekten Recht,* became an authoritative source of law. The *Pandects,* the texts in which the modernized Roman law was propounded, recalled the writings of the post-glossators, and just as the post-glossators had been opposed by the humanists of the Renaissance period who had urged the study of the original Roman texts, so also were the Pandectists in Germany opposed by a school which agitated for a return to the study of Roman law in the setting of the times in which it had developed.[33]

The motives for the German reaction were not, however, purely scholarly, for in the early years of the nineteenth century there was a strong current of opinion against the imposition of alien law and favouring a return to a system of law which more truly represented the moral convictions and way of life of the German peoples.[34] The leading representative of this school of thought, Karl von Savigny, at no time suggested that the study of Roman law should be abandoned. Rather he suggested that study of Roman law in its historical setting was a necessary preliminary to the reconstruction of Germanic law and to this end he dispersed his energies in a series of volumes which, even today, remain classic works on the history of Roman law. His six-volume work, *Geschichte des römischen Rechts im Mittelalter* published between 1815 and 1831, and his eight-volume work, *System des Heutigen römischen Rechts* published between 1840 and 1849, did

during World War II.

32 See KARL GAREIS, INTRODUCTION TO THE SCIENCE OF LAW (trans. Albert Kocourek; New York, 1924—*Modern Legal Philosophy Series*), 308.

33 See VINOGRADOFF, ROMAN LAW IN MEDIAEVAL EUROPE (London and New York, 1909), 106-131; and the *Guide to the Law and Legal Literature of Germany* (cited *supra,* note 14), 52-55.

34 The movement against the ascendancy of Roman law in Germany went back to at least the seventeenth century. Among the lawyers of that period who urged that Germanic law be revived were Herman Conring (1606-1681), Benedict Carpzov (1595-1666), David Mevins (1606-1670), and Christian Thomasius (1655-1728). See A GENERAL SURVEY OF EVENTS, SOURCES, PERSONS & MOVEMENTS IN CONTINENTAL LEGAL HISTORY (Vol. I of *Continental Legal History Series* published by the Association of American Law Schools, Boston, 1912), 439-441.

not go unnoticed in the English-speaking world and several volumes were translated into English.[35] Bibliographical references and reading lists for students evidence the high regard in which Savigny was held among English scholars.[36] George Long's lectures on jurisprudence in the Middle Temple in 1847 drew heavily on the *System der heutigen römischen Rechts*.[37]

The respect engendered in England for the researches of German scholars into Roman law did not abate during the nineteenth century. In the works of Edward Poste,[38] J. B. Moyle,[39] and B. Erwin Grueber,[40] the debts to German mentors are expressly acknowledged and to the last Savigny is accorded the highest place. It took many years before the English-trained civilians began to contribute literature of an original kind to civil law scholarship and during this time many of the teachers of Roman law in English law schools had to be imported either from Scotland or from the Continent.[41]

## The Reception of German Jurisprudence and Legal Philosophy.

Consideration of the province and function of jurisprudence was

35 Volume I of the GESCHICHTE DES ROMISCHEN RECHTS IM MITTELALTER was translated by E. Cathcart (Edinburgh, 1829); Vol. I of the SYSTEM DES HEUTIGEN ROMISCHEN RECHTS by William Holloway in 1867. Vol. II of the SYSTEM was translated by W. H. Rattigan and published under the title of JURAL RELATIONS, OR, THE ROMAN LAW OF PERSONS AS SUBJECTS OF JURAL RELATIONS (London, 1884); Vol. VIII by William Guthrie, under the title of PRIVATE INTERNATIONAL LAW: A TREATISE ON THE CONFLICT OF LAWS AND THE LIMITS OF THEIR OPERATION IN RESPECT OF TIME AND PLACE (Edinburgh, 1869). The last-mentioned translation is particularly valuable for the reason that Guthrie translated part of the preface to the whole series (see *op. cit., Introduction,* ix-xli). The second edition of PRIVATE INTERNATIONAL LAW appeared in 1880 under a slightly different title.

AN EPITOME AND ANALYSIS OF A TREATISE ON OBLIGATIONS IN ROMAN LAW, translated by Archibald Brown (London, 1872) is a translation of SAVIGNY'S incomplete OBLIGATIONENRECHT of 1853, and the TREATISE ON POSSESSION: OR, THE IUS POSSESSIONIS OF THE CIVIL LAW (6th ed., London, 1848) is a translation of DAS RECHT DES BESITZES, first published in Germany in 1803.

36 In addition to Savigny's works, students were referred to C. F. MUHLENBRUCH, DOCTRINA PANDECTARUM; F. W. TIGERSTROM, INNERE GESCHICHTE DER ROMISCHEN RECHTS; and L. A. WARNKONIG, DOCTRINA IURIS PHILOSOPHICA and INSTITUTIONES IURIS ROMANI PRIVATI. The reading lists can be found in the *Law Times*.

37 See LONG, TWO DISCOURSES DELIVERED IN THE MIDDLE TEMPLE HALL (note 28 *supra*).

38 GAI INSTITUTIONES IURIS CIVILIS (4th ed., Oxford, 1904), with translation and commentary.

39 THE CONTRACT OF SALE IN THE CIVIL LAW (Oxford, 1892).

40 THE ROMAN LAW OF DAMAGE TO PROPERTY (Oxford, 1886).

41 The majority of the Scots civilians were taken by University College, London.

virtually unknown in England before Austin and Bentham, which is not to say that English lawyers wrote nothing about jurisprudence. Jurisprudence was simply a word with no precise meaning and was often used to refer to English law as a whole rather than to theorizing about law. If one is to seek any kind of legal theory in eighteenth-century England it is to be found in those secularized versions of natural law which had been expressed by Grotius, Pufendorf, and Wolff, popularised by Burlamaqui[42] and expounded for English readers by such writers as Richard Wooddeson.[43] In other words the foundations of English and German jurisprudence for the greater part of the eighteenth century were the same.

With Bentham and Kant begins a process the end of which is the disappearance of a common philosophical base for English and German jurisprudence. Though neither English nor German jurisprudence of the nineteenth century can be characterized as exclusively Benthamite or Kantian, the fact was that the language of both was different, and effective communication between English and German legal theorists became increasingly difficult.

An English lawyer visiting German universities in the early part of the nineteenth century would probably have returned home impressed with the breadth of education received by young Germans in the law schools and with the intellectual stimulation which the faculties of law imparted. When Austin went to Bonn he entered upon a scene of transition in which natural law doctrines of Pufendorf vintage were giving way to jurisprudence with an historical orientation. Although none of the leading historical jurists taught at Bonn there were two professors there who figured prominently in the historical movement in Germany. They were Berthold Niebuhr,[44] the celebrated historian of Rome, and August von Schlegel,[45] the philologist. The lawyers at Bonn belonged to an older generation, the generation of the Pandectists, and their concern was chiefly with deduction of legal rules from general principles and with classification.[46] That Austin drank deeply

42 Two of Burlamaqui's most important works were translated into English by Thomas Nugent; they were later combined and published as THE PRINCIPLES OF NATURAL AND POLITIC LAW (London, 1763).

43 Wooddeson, one-time Vinerian Professor at Oxford, wrote ELEMENTS OF JURISPRUDENCE TREATED OF IN THE PRELIMINARY PART OF A COURSE OF LECTURES ON THE LAWS OF ENGLAND (London, 1783); see H. G. HANBURY, THE VINERIAN CHAIR AND LEGAL EDUCATION (Oxford, 1958), 61-78.

44 1776-1832; see G. P. GOOCH, HISTORY AND HISTORIANS IN THE NINETEENTH CENTURY (3rd ed., London, 1920).

45 See CYRUS REDDING, PAST CELEBRITIES WHOM I HAVE KNOWN (London, 1866), Vol. I, 269-291.

46 For examples of Pandectist literature see Edwin M. Borchard's *Guide, etc.*

from the wells of this group is evidenced by the extent to which he drew upon their writings.

It is probable that Austin made the acquaintance of Thibaut[47] at Heidelberg, but he was not to meet Savigny of Berlin until after his *Lectures on Jurisprudence* were written. There is no record of his having met Gustav Hugo[48] of Göttingen, another forerunner of the historical school, though he did use Hugo's encyclopaedia[49] and may have derived the sub-title of his lectures from Hugo's *Naturrecht als eine Philosophie des positiven Rechts.*[50]

Superficially, the work of the German historical jurists might be regarded as models of description of the development of legal rules and institutions but in many cases there was a deeper meaning, an implicit philosophy of history which was either Hegelian or closely allied to the Hegelian philosophy. The explication of this metaphysic was not spontaneous, and Savigny's concept of the *Volksgeist* does not fully express the Hegelian dialectic as much as has often been supposed. While the idea of the *Volksgeist* fitted in well with the Hegelian philosophy of history, Savigny's reputation should rest more on the method he developed in tracing legal growth. That the order of development in German juristic thought was from close attention to the antecedents of existing legal rules to an interpretation of the history of law which subjected "all things to the government of intelligible law"[51] was recognised by Roscoe Pound when he spoke of the merger of the philosophical and historical schools.[52] Savigny's emphasis upon the close relationship between a legal order and a particular way of life and his injunction against revolutionary changes without careful consideration of historical experience became in time a fatalistic belief

(cited note 14 *supra*).

47 Anton Thibaut (1772-1840), the opponent of Savigny, was noted for his pleas for the codification of German law. In 1814 he published the pamphlet, UBER DIE NOTWENDIGKEIT EINES ALLGEMEINEN BURGERLICHEN GESETZBUCHES FUR DEUTSCHLAND (On the Necessity for a General Civil Code for Germany), which prompted Savigny to reply with his more celebrated VOM BERUF UNSERER ZEIT FUR GESETZGEBUNG UND RECHTSWISSENSCHAFT (Heidelberg, 1815), translated by Abraham Hayward under the title of ON THE VOCATION OF OUR AGE FOR LEGISLATION AND JURISPRUDENCE (London, 1831).

48 1798-1844.

49 LEHRBUCH EINES CIVILISTISCHES CURSUS.

50 For the place of Thibaut, Savigny, and Hugo in German legal thought see ERNST LANDSBERG, GESCHICHTE DER DEUTSCHEN RECHTSWISSENSCHAFT (Leipzig, 1898), 1-49, 69-88.

51 Lord Acton, *German Schools of History,* in his HISTORICAL ESSAYS AND STUDIES (ed. J. N. Figgis and R. V. Laurence; London, 1907), 360 *et seq.*

52 See his Introduction in KARL GAREIS, INTRODUCTION TO THE SCIENCE OF LAW, translated by Albert Kocourek (*Modern Legal Philosophy Series,* New York,

that men were impotent to change the inexorable dynamic of a single force at work in the universe. The *Volksgeist* became an ideological symbol for German nationalism and was brought into a relationship approaching synonymity with the Hegelian unit of social and political reality, the nation.[53]

Besides the school which took its metaphysics from Hegel and its method from Savigny there were the Kantians. Whereas the Hegelians sought to give ethical priority to the interests of the nation, the Kantians treated the individual as the prime moral unit and viewed government and law as instruments for the realization of the individual's freedom of will. Although the political and ideological implications of Kant's philosophy made him, in theory, a foil to Hegel, it may be asserted without much fear of contradiction that, in the juristic field, Kant's influence made itself felt more in the realms of methodology than in the realms of what Bentham and Austin called the science of legislation.

The distinction between the spheres of the "is" and the "ought to be" (*Sein* and *Sollen*), which was to become the corner-stone of the legal theory of the Vienna School in the twentieth century, was originally Kant's. These categories were not implicit in the phenomenal world but belonged to the realm of pure thought. No empirical reference was required to demonstrate their validity—they were *à priori* distinctions. Kant separated ethics and law on the basis that the former determined the quality of intentions whereas the latter determined the quality of actions; yet he regarded the two species of norms as being related by virtue of the fact that both belonged to the domain of *Sollen* and that both stood to be judged according to their compatibility with the categorical imperative.

At the risk of over-simplification the concept of the categorical imperative and its function may be explained as follows. The categorical imperative enjoined individuals to act according to a maxim which could be at the same time elevated to the status of a universal law. This imperative was predicated upon the postulate of the autonomy of human will and upon a view of human nature according to which individuals have a capacity of formulating for themselves rules of conduct by which they will abide. For the human will to realize itself and for the categorical imperative to be effective it was neces-

1921), iii-ix.

53 See JULIUS STONE, THE PROVINCE AND FUNCTION OF LAW (Sydney, 1946), 438-442, and W. FRIEDMANN, *Western and German Legal Thought*, in LEGAL THEORY (3rd ed., London, 1953), 429-436.

sary that certain minimum conditions be present. Such conditions were satisfied by a legal system in which individual wills were circumscribed only to the extent necessary to secure a maximum distribution of freedom of action.

Notwithstanding that Kant's theory about the function of law conformed to the tenets of nineteenth-century liberalism, the formalism with which it was expressed seems to have made it irrelevant to the business of practical politics. Thus while Kant was critical of unlimited despotism and while he thought peace among nations a condition precedent to man's moral perfection, he said very little about the content of the laws requisite to produce freedom. Equality meant equality before the law, civil liberty, liberty to do that not proscribed by law; legislation, which in theory was the preserve of the people at large, was to be evaluated according to the principle that its content should be identical with legislation which would have been promulgated by the people at large had they actually legislated.[54]

In view of the formalism and positivistic tendencies in Kant's theory it is surprising that his followers should have so often chosen to speak in terms of *Naturrecht,* for there was certainly little affinity between their ideas and the natural law doctrines propounded by the schoolmen on the one hand and the secularized natural school of Grotius, Pufendorf, and others on the other hand. The natural law referred to by the nineteenth-century Kantians was nothing more than the ethics of Kant brought into relation with with the theory about the limits and functions of law. The discussion proceeded on a high level of abstraction and bore little relevance to the practical concerns of the interpretation and application of positive law and the problem of law reform.[55] In this respect the Kantian school was radically different

54 STONE, *op cit.*, c. ix, and REINHOLD ARIS, HISTORY OF POLITICAL THOUGHT IN GERMANY 1789 TO 1815 (London, 1936), c. ii.

55 The nineteenth-century German Kantians included K. C. F. Krause, Ahrens, Schelling, J. G. Fichte, and A. Trendelenberg. Fichte (1762-1814), who has been described by Stone as "an able disciple of Kant clothed in natural law garb" (*op. cit.* 244), is best known as a jurist for his GRUNDLAGE DES NATURRECHTS NACH DEN PRINZIPIEN DER WISSENSCHAFTSLEHRE (1896-1897); this work was translated into English by A. E. KROEGER under the title of THE SCIENCE OF RIGHTS (Philadelphia, 1869). Krause (1781-1832), author of GRUNDLAGE DES NATURRECHTS ODER RECHTSPHILOSOPHIE GRUNDRISS DES IDEALS DES RECHTS (Jena, 1803) and of ABRISS DES SYSTEMS DER RECHTSPHILOSOPHIE ODER DES NATURRECHTS (Gottingen, 1828), has been called "the founder of the organic and positive school of natural law." Schelling (1775-1854) drew inspiration from both Kant and Fichte and in his NEUE DEDUKTION DES NATURRECHTS postulated the freedom of the individual will, subject to the limits imposed by the general will, and exhorted men to realize their self-autonomy. For Trendelenburg (1802-1872), author of

from the Benthamite school in England, for the latter's counterpart of *Naturrecht,* the principle of utility, for all its imperfections as a philosophical principle, was nevertheless a very practical criterion which might be employed not only in explaining the ultimate purpose of law but also in assessing the worth of positive law and formulating means for its reform.

In considering the impact of German legal philosophy on nineteenth-century England, a discussion of Austin's attitude towards Savigny and Kant provides a convenient point of departure. During Austin's first extended sojourn in Germany (1828) he apparently did not give much attention to German legal philosophy which to him was nothing worthy of emulation, but concentrated his endeavours upon gaining a firm knowledge of Roman law and Pandectist literature. Although he was, in later years, to spend even more time in Germany, the only surviving record of his understanding and appreciation of German legal philosophy is his *Lectures on Jurisprudence.* It is not improbable that the comments Austin made in the *Lectures* do not represent his final views and that his understanding was deepened as a result of his meetings with such individuals as Savigny and Schelling.[56]

Be this as it may, the *Lectures* reveal Austin to have been only vaguely aware of the subtleties in Savigny's and Kant's writings. With regard to the theory of the *Volksgeist* he saw no mystic significance in the thesis that law should be adapted to time, place, and circumstance, saw nothing remarkable in the fact that the substance of the law might represent what had formerly been custom or positive morality, and was emphatic that even if historical experience conditioned existing law it should not operate as some kind of transcendentally imposed limit upon the course of change dictated by the principle of utility. His own concept of the role of history is expressed in the following passage:—

> "Government and Law as they ought to be in advanced societies, are not to be learned from the imperfect Institutions of barbarians.

NATURRECHT AUF DEM GRUNDE DER ETHIK (2nd ed., Leipzig, 1868), "the conception of law stands in an essential and intimate relation to the content of morality."

See FRITZ BEROLZHEIMER, THE WORLD'S LEGAL PHILOSOPHIES, translated by R. S. Justrow (*Modern Legal Philosophy Series,* New York, 1924); Edwin M. Borchard, *Jurisprudence in Germany,* (1912) 12 COL. L. REV. 301; and W. FRIEDMANN, LEGAL THEORY, *passim.*

56 Austin's meetings with these German scholars and others have been noted by the author in an unpublished dissertation on *John Austin and Jurisprudence in nineteenth-century England.*

The circumstances in which they were placed were different from our own; their ability to form a judgment upon the institutions best adapted to their own circumstances, were not so great as our own.

"But although Legislation must be bottomed in general principles drawn from an accurate observation of human nature, and not in the imperfect records called history, there are cases in which historical knowledge has its uses. *I.e.*: to explain the origin of laws, which are venerated for their antiquity. To explain much of the law, which now exists; and to enable us to separate the reason of modern times from the dross of antiquity.

"All systems of law have a common foundation in the common nature of mankind; but the principles which pervade them all, are fashioned and obscured in each by its individual peculiarities."[57]

That Austin missed the full import of Savigny's message is demonstrated by his equation of Bentham's view of historical experience with that of the German historical school. The only difference he perceived was in the obscurity which attended the expression of the German's ideas. Of the historical school, Austin wrote:—

"The idea darkly floating before their minds may be, that legislation ought to be governed by actual experience of the wants and exigencies of mankind. And here I would remark that a great mistake is often made with respect to Bentham's notions of law. Bentham belongs strictly to the *historical* school of jurisprudence. The proper sense of that term as used by the Germans is, that the jurists thus designated think that a body of law cannot be spun out from a few general principles assumed *à priori,* but must be founded on experience of the subjects and objects with which law is conversant. Bentham therefore manifestly belongs to this school. He has again and again declared in his works that the reports of the decisions of the English Courts are an invaluable mine of experience for the legislator. The character of the historical school of jurisprudence in Germany is commonly misconceived. They are imagined to be enemies of codification, because one or two of the most remarkable individuals among them, such as Hugo and Savigny, are so; but many others, Thibaut, for example, are its zealous friends. The meaning of their being called the historical school is simply this, that they agree with Bentham in thinking that law should be founded on an experimental view of the subjects and objects of law, and should be

57 2 LECTURES ON JURISPRUDENCE (5th ed.), 1030.

determined by general utility, not drawn out from a few arbitrary assumptions *à priori* called the law of nature. A fitting name for them would be the *inductive* and *utilitarian* school."[58]

The error which Austin committed was that of assuming that the empirical foundations of English jurisprudence were also the foundations of German legal thought, whereas there is very little support for the view that British empiricism exercised much persuasion over the minds of the German scholars. Moreover Austin's interpretation of Bentham's remarks on the utility of history was far too liberal. While Bentham recognized that history had lessons for the present he never really applied himself to the task of drawing conclusions from the past. With the Germans, on the other hand, the reasons for historical research were various. Mention has already been made of the political motives which inspired Savigny and his group and of the later jurists who applied Hegelian philosophy to legal history to produce a theory according to which ethical imperatives and knowledge of what the law should become were derived from a study of history. Not all German legal historians became embroiled in the philosophical implications of historical research, and the debate which had originated with Thibaut and Savigny had as one consequence the secession of a group of historians who chose to argue at length on the relative merits of Roman and Germanic law. Unable to compromise their differences this group diverged along the path of pure historical investigation, one sector concerning itself with the history of Roman law, the other with the history of Germanic law.[59] Both lost sight of the ultimate justification for their researches and reached the point where they "neither weighed nor judged events."[60]

After Austin, England developed its own historical school of whom Sir Henry Maine, Sir Frederick Pollock, F. W. Maitland, and Viscount Bryce are perhaps the best known representatives. All were highly

58 *Ibid.*, 679. It is curious to note, in passing, that Austin accepted Savigny's description of the stages in the development of law: *Ibid.*, 636.

59 A GENERAL SURVEY OF EVENTS, SOURCES, PERSONS & MOVEMENTS IN CONTINENTAL LEGAL HISTORY (Vol. I of *Continental Legal History Series* published by the Association of American Law Schools, Boston, 1912), 443.

60 THE PROGRESS OF CONTINENTAL LAW IN THE NINETEENTH CENTURY (Vol. X of *Continental Legal History Series* published by the Association of American Law Schools, Boston, 1918), 42. On the German historical school see Ernst Freund, *Historical Jurisprudence in Germany* (1890) 5 POL. SCI. Q. 468; Rudolph Leonhard, *Methods followed in Germany by the Historical School of Law,* (1907) 7 COL. L. REV. 573; Edwin Borchard, *Jurisprudence in Germany,* (1912) 12 COL. L. REV. 301; H. Kantorowicz, *Savigny and the Historical School of Law,* (1937) 53 L.Q. REV. 326; Edwin Patterson, *Historical and Evolutionary Theories of Law,* (1951) 51 COL. L. REV. 681; and STONE, *op. cit.,* c. xviii.

critical of Austin's want of historical sense and made it their business to remedy the deficiencies in his work by painstaking investigations into the origin and growth of English and Roman law. In other fields of history besides legal history there was considerable activity and there were few who challenged the contention that the standards for historical research had been set by the Germans.[61] However, to say that German historiography set the pattern of historical studies in England does not imply that German philosophies of history exercised an influence. Though the name of Savigny became a familiar one amongst English legal historians it is extremely doubtful whether the idea of the *Volksgeist* took root in the sceptical and pragmatic soil of a country which had many centuries ago won its battles against the intrusions of alien legal systems and had since turned a deaf ear to the utterances of legal scholars abroad.

Whether Maine was greatly influenced by Savigny is controversial, and solution of the problem is made the more difficult by the fact that Maine was never an enthusiast for documentation. Sir Paul Vinogradoff was of the opinion that Maine was influenced by Savigny and thought that the latter's ideas were reflected in Maine's account of the process of growth in legal systems.[62] A contrary opinion has been expressed by Sir Carleton Kemp Allen who has suggested that there is little evidence that Maine was familiar with Savigny's work and that von Jhering was probably a greater influence.[63] Roscoe Pound went even further in ascribing an Hegelian basis to Maine's thesis that legal history showed a progression from a predominance of status relationships to a predominance of contractual relationships. The idea which was being realized through history was that of "free individual self-assertion."[64] Although Julius Stone has substantially agreed with Pound's interpretation he has expressed the opinion that neither the influence of Hegel nor of Darwin is apparent in Maine's writings.[65] No full-length study of Maine has yet been attempted, but the develop-

61 For the impact of German historiography on English historians, particularly the constitutional historians, see G. P. GOOCH, *op. cit.* note 44 *supra.*

62 Vinogradoff, *The Teaching of Sir Henry Maine,* (1904) 20 L. Q. REV. 119, 125-126.

63 ALLEN, LEGAL DUTIES (Oxford, 1931), 142-143.

64 POUND, INTERPRETATIONS OF LEGAL HISTORY (New York and Cambridge, 1923), 54-55.

65 STONE, *op. cit.,* 453, note 9. In contrast, W. A. Robson has concluded from Maine's comment that "even jurisprudence itself cannot escape from the great law of evolution" that "great influence was exercised by Darwin over a mind, *i.e.,* Maine's, which needed some theory to explain social progress in non-rational terms": see Robson's *Sir Henry Maine To-day* in MODERN THEORIES OF LAW (London, 1933), 164.

ment of and inspiration for his ideas is deserving of extensive analysis. Until such time as a comprehensive study is undertaken the influence of German thinking upon Maine will remain a moot point.

After Maine there were several English jurists who frankly acknowledged having been persuaded by Savigny. In *The Nature of Positive Law*,[66] John M. Lightwood, one of Maine's admirers, gave one of the most extensive comparisons of English and German jurisprudence existing at that time.[67] Although most of his remarks on German jurisprudence were based on Savigny's and on Jhering's work, he devoted a few pages to Adolf Trendelenburg's *Naturrecht auf dem Grunde der Ethik*. Summarily stated, the differences he perceived to exist between English and German juristic thought were:—

(a) English jurisprudence was orientated about the "Real" whereas German jurisprudence was concerned with the "Ideal."[68]

(b) Whereas the criterion of the goodness and badness of laws was for the English utility, for the Germans it was the morality subscribed to by the community as a whole.[69]

(c) Whereas the English regarded law and morality as two different spheres, the Germans made no rigid separation and looked upon law as a supplement to morality.[70]

(d) Among the English the form of law was generally considered to be that of command, whereas in Germany laws were considered to be rules setting the bounds for the exercise of individual wills.[71]

(e) Whereas in English jurisprudence sanction was viewed as an element of law, among the Germans laws could be said to exist even where no sanctions were annexed to rules.[72]

(f) For the English the source of law was the sovereign, whereas the Germans considered the people or the nation to be the

66 London, 1883.

67 John Mason Lightwood (1852-?) would appear to have been an insignificant figure. Educated at University College, London, he later became a Fellow of Trinity Hall, Cambridge, and was an unsuccessful applicant for the Chair of Jurisprudence at University College, London; see J. FOSTER, MEN AT THE BAR (London and Aylesbury, 1885), 278, and G. W. Keeton, *University College, London, and the Law*, (1939) 51 JURID. REV. 128.

68 THE NATURE OF POSITIVE LAW, 262.

69 *Ibid.*, 254.

70 *Ibid.*, 254, 262, 263, 295-300.

71 *Ibid.*, 262.

72 *Ibid.*, 253-254.

source.[73]

Notwithstanding that Lightwood wrote some time after Maine had challenged the Austinian theory that law cannot exist without a sovereign and after the Austinian definition of law had been severely criticized, he seems to have taken Austinian jurisprudence as the prototype of English jurisprudence. The matters which he singled out as typical of German jurisprudence were a blend of the Savigny and Kantian streams.

Lightwood appears to have adopted Savigny's description of the stages of legal development for he re-stated it without uttering a word of criticism. In Austinian jurisprudence he found little worthy of commendation. Like Savigny he admitted that legislation, as opposed to custom, was an inevitable but fitting mode of development of law in mature societies, but he did not thereby identify himself with the Austinian school. He went along with the Germans in regarding law as a complement to morality.

The second edition of a work which was a standard text for law students in the constituent colleges of the Queen's University of Ireland, James Reddie's *Inquiries into the Science of Law*,[74] was explicitly based upon Savigny's jurisprudence. Sheldon Amos, one of Austin's most faithful disciples, strongly recommended the study of German jurisprudence and ventured to remark that "The prospects of the Science of Jurisprudence, especially in England, will depend largely upon a greater familiarity than has hitherto been encouraged in Legal Education with the vast and invaluable Juridical Literature of Germany and France."[75]

If English jurists looked to Germany, for example in the matter of writing history, they turned their backs on German theories about the origin and destiny of legal systems. Moreover, whilst the English legal historians were generally of a conservative bent they did not oppose codification and always kept their juristic work and their political beliefs in separate compartments, whereas in Germany the historical school included many legal philosophers who contributed to

[73] *Ibid.*, 253-269.

[74] Reddie (1773-1852) was a Scots advocate and later a Scots judge and cannot for that reason be considered as one of the English jurists. For a biographical note see (1852-1853) 17 L. REV. & QUARTERLY J. 63-69.

[75] AMOS, A SYSTEMATIC VIEW OF THE SCIENCE OF JURISPRUDENCE (London, 1872), 505-506. Amos cautioned on the tremendous difficulties which were posed by the language of German juristic discourse and urged students studying German jurisprudence to acquire "a capacity to read philosophical German with facility and precision": *Ibid.*, 506.

the building of an ideology of nationalism and in so doing intermingled their juristic and political ideas.[76]

Turning to what Pound termed the philosophy of law, there is little room for doubt that the English jurists, whether they were followers of Austin or critics of Austin, were immune to German influences. The distinction which Bentham and Austin had made between law as it is and law as it ought to be was rigidly adhered to by all schools, and after the zenith of Philosophic Radicalism had passed, the chief preoccupation of the jurists was with positive law rather than with the standards according to which positive law should be judged. Anything savouring of metaphysics was anathema to most English lawyers, and according to the limits which they set to jurisprudence, what passed in Germany for legal philosophy was relegated by the English to the philosophers' domain.

Among Austin's books were several of Kant's treatises,[77] but that he ever used them to as great a degree as he used Bentham's works is doubtful. Austin did follow Kant in distinguishing between law and morals, but it is more probable that the distinction was derived from Bentham rather than from Kant. Pound has pointed out that in two of the German texts which Austin used extensively, Hugo's *Encyklopädie* and Mackeldey's *Lehrbuch des heutigen römischen Rechts,* there were elements of Kantian thinking. He concluded that Austin's views on the relation between law and morals were "Kant grafted onto Bentham."[78] In this writer's opinion the identity between Austin and Kant's separation of the realms of *Sein* and *Sollen* was purely accidental, and there is little basis for supposing that Austin's complete theory of the relationship between the realms of law and morals showed Kantian influence. Austin was usually highly critical of Kant and if he found anything in his writings which met with his approval it was usually a matter upon which he had already reached an opinion. Austin's assessment of Kant is epitomized in the following comment on *Metaphysische Anfangsgründo der Rechtslehre,* a work which Austin described as

> " . . . a treatise darkened by a philosophy which, I own, is my aversion, but abounding . . . with traces of rare sagacity. He

76 A. H. F. Lefroy, *Jurisprudence,* (1911) 27 L. Q. Rev. 180.

77 Kritik der Reinen Vernunft (7th ed., Leipzig, 1828); Prolegomena zu einer jeden Kunftigen Metaphysik (Riga, 1783); Kritik der Practischen Vernunft (6th ed., Leipzig, 1827); and Die Metaphysik der Sitten (Konigsberg, 1st part 1798; 2nd part 1803). In addition, Austin referred to Zum Ewigen Frieden.

78 Pound, Interpretations of Legal History 99.

(Kant) has seized a number of notions, complex and difficult in the extreme, with a distinctness and precision which are marvellous, considering the scantiness of his means. For, of positive systems of law he had scarcely the slightest tincture; and the knowledge of the principles of jurisprudence which he had borrowed from other writers, was drawn, for the most part, from the muddiest sources: from books about the fustian which is styled the Law of Nature."[79]

To understand the nature of the reaction of the Victorian jurists in England to German legal philosophy one must understand the trends in juristic thought in Scotland, for it was principally through the agency of the Scots that German philosophical ideas were made known in England. Because the foundation of Scots law was largely Roman law the ties between Scots and European lawyers were always much closer than were the ties of common lawyers and continental civilians; so it was only to be expected that Scotland should provide a more fertile medium for the reception of German philosophy.

In the eighteenth century what would be recognized today as legal philosophy was, in Scotland, the bailiwick of moral philosophers of the so-called "common sense" school.[80] During the nineteenth century the Scots lawyers made legal philosophy their special province, and when a Chair of Public Law was established at Edinburgh University in 1862 it soon became identified as a Chair dedicated to the study of the Law of Nature and Nations.[81] The first occupant of the Chair, James Lorimer,[82] held views similar to those of two members of the Kantian school, Krause and Ahrens, but the majority of the Scots legal philosophers were Hegelians.[83] In a series of lectures de-

79 2 AUSTIN, LECTURES ON JURISPRUDENCE (5th ed.), 940; see also *ibid.*, 713, and AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED (Hart ed.), 237 n., 286 n., 287 n., 343 n.

In his refutation of the social compact theory Austin mentioned Kant, Krug, Politz, and Genz as being representative of that version of the theory which treated the social compact as a hypothetical condition rather than as an historical event, but he considered such a view as being utterly worthless; see THE PROVINCE OF JURISPRUDENCE DETERMINED, 343. Austin's attitude towards Kant may have dated back to his youth, for one of the works which he read while an officer in the army, DRUMMOND'S ACADEMICAL QUESTIONS, held Kant up to ridicule.

80 For example, Frances Hutcheson, Thomas Reid, Adam Ferguson, Dugald Stewart, Thomas Brown, and James Beattie.

81 S. G. Kermack, *Jurisprudence and the Philosophy of Law,* in THE SOURCES AND LITERATURE OF SCOTS LAW (Stair Society, Edinburgh, 1936), 438, at 442.

82 1818-1890. Lorimer, a prolific writer, is best known as a jurist for THE INSTITUTES OF LAW: A TREATISE ON THE PRINCIPLES OF JURISPRUDENCE AS DETERMINED BY NATURE (Edinburgh, 1872).

83 Though this is true as a general proposition it should not be overlooked

livered at Edinburgh James Hutchison Stirling, perhaps the foremost Scottish Hegelian, in effect re-stated Hegel's *Philosophy of Right*.[84]

While English philosophers were not unaffected by developments north of the Tweed, it has not been until fairly recently that English and Scots jurists have achieved a *rapprochement*. In the latter part of the nineteenth century Scotsmen were often to be found in English law faculties, but their services were enlisted only for the teaching of Roman law. In the sphere of jurisprudence and legal philosophy there was little meeting of minds. The early issues of the Scots review, *The Journal of Jurisprudence,* are replete with indignant tirades against the English analytical jurists. A representative specimen of the Scots criticism of Austinian jurisprudence is to be found in the introduction to William Hastie's *Outlines of the Science of Jurisprudence,* an English translation of portions of several German encyclopaedic treatises.[85] One passage in the introduction merits unabridged quotation since it serves to high-light the differences between English and Scots legal thinking of the time and the manner in which a German-inspired legal philosophy was presented to English readers. Hastie wrote:—

> "It is evident in the first place that the Principle of Right must be rescued from its temporary deposition by Bentham and Austin,

that the Scottish reception of Kant was more favourable than the English. RENE WELLEK, IMMANUEL KANT IN ENGLAND (Princeton, 1931), 28-38, asserted that the first British philosopher to take note of Kant was the Scotsman, Thomas Brown. DUGALD STEWART'S GENERAL VIEW OF THE PROGRESS OF METAPHYSICAL, ETHICAL AND PRACTICAL PHILOSOPHY SINCE THE REVIVAL OF LETTERS IN EUROPE, IN TWO DISSERTATIONS (London, 1815, 1822), contained a commentary on Kant but was marred by the fact that Stewart did not read German. Another Scotsman, Sir William Hamilton, revealed a much sounder understanding of Kant in his review of COUSIN, COURS DE PHILOSOPHIE, in (1829) 50 EDINBURGH REV. 194-221. See also HENRY A. POCHMAN, GERMAN CULTURE IN AMERICA: PHILOSOPHICAL AND LITERARY INFLUENCES, 1600-1900 (Madison, Wis., 1957), 86-87; and note 87 *infra*.

84 (1873) 16 J. OF JURISPRUDENCE; the lectures were later reprinted as LECTURES ON THE PHILOSOPHY OF LAW (London, 1878). Stirling studied in Germany and was well versed in German philosophy in general. It has been said of his two-volume work, THE SECRET OF HEGEL (London, 1865), that "it marks at once the full arrival of German idealism in England" (POCHMAN, *op. cit.* 88). Other Scottish Hegelians who gave attention to legal philosophy were W. A. WATT, OUTLINE OF LEGAL PHILOSOPHY (1893) and THE THEORY OF CONTRACT IN ITS SOCIAL LIMIT (1897), and WILLIAM GALBRAITH MILLER, author of LECTURES ON THE PHILOSOPHY OF LAW (1884), THE LAW OF NATURE AND NATIONS IN SCOTLAND (1896), JURISPRUDENCE: ITS PLACE IN THE NEW CURRICULUM (1898), THE DATA OF JURISPRUDENCE (1904), and *The Science and Art of Jurisprudence,* (1878) 22 J. OF JURISPRUDENCE 1-10, 169-178.

85 OUTLINES OF THE SCIENCE OF JURISPRUDENCE: AN INTRODUCTION TO THE SYSTEMATIC STUDY OF LAW, translated and edited from the Juristic Encyclopaedias of Puchta, Friedlander, Falck, and Ahrens ( Edinburgh, 1887).

and raised again to its legitimate place in the forefront of science. The υστερον προτερον of the Analytical Jurists is their derivation of Right from Law, and the inveterate confusion of the relations of Jurisprudence must be corrected and overcome if the science is to attain any definiteness of principle, any criterion of progress, or any organic connection with the general movement of thought. And so the whole inquiry into the subject of Natural Right must be taken up anew, and the conception of it as at once anterior and superior to all Positive Law, according to the rational mode of apprehension from Ulpian to Kant, must receive renewed philosophical authentication. But, in the second place, the insufficiency of a merely abstract and universal conception of Right as a scientific basis of Jurisprudence must also be recognised; and the consequent necessity of an organic and systematic development of the whole jural conception, in view of the inherent involution of reason in all the social relationships, must be more earnestly undertaken. It will be the enduring merit of the Analytical Jurists to have pointed out the inadequacy of mere subjective abstractions to give vitality and force to the movement of Law, and the negative issues of their own empirical method only point out more clearly the need of a more rational realism. The quickening and fertilizing of scientific reflection in the sphere of Law can therefore only come from the appropriation and application of that organic method of thinking which is now being so fruitfully prosecuted in other departments of science, and which ought to be here the Ideal of Humanity. And in the third place the light of the whole historical evolution, as it has realized itself in the sphere of political life, must be brought to bear as far as possible upon the present position and problems of Jurisprudence."[86]

Hastie was scarcely a lone voice crying out in the Scottish wilderness, but rather an unoriginal though representative thinker. In the above passage, he revealed an approach thoroughly German in its inspiration, and an understanding of Bentham and Austin which can only be described as a complete misinterpretation.[87]

86 *Ibid.*, Translator's Preface, xxiv-xxvii.

87 Hastie's criticism of the English analytical school appears to have been based on what he considered to be "its unhistorical and unphilosophical bias." He believed analytical jurisprudence and utilitarianism to be inseparable and in so doing completely ignored the fundamental distinction made by the analytical jurists and the utilitarians between law as it is and law as it ought to be (see *op. cit.*, xix-xxiii). Essentially Hastie was a Kantian; this is evident in the following criticism of the analytical school:

To English jurists, jurisprudence was not concerned with such matters as the realization of some natural right or the elaboration of theories of justice. Although Austin had, in his *The Province of Jurisprudence Determined,* devoted several lectures to the subject of utility as the standard by which positive law was to be evaluated, later nineteenth-century jurists in England deplored this intrustion of what they considered to be irrelevant material and were usually content to write off the ideal element in a few paragraphs. Natural-law thinking was definitely not in vogue, and anything bordering on the metaphysical or epistomological was regarded as being not their concern.[88] To the late Victorian legal scholars there was a tendency for juristic thought on the continent to be equated with theories of justice and with issues which more properly were the concern of moral and political philosophers.[89]

Even Sir Frederick Pollock who, both in declaration and performance, showed himself to be most catholic in spirit, had little time for German legal philosophy. In his inaugural lecture at Oxford he remarked that even when one compared English views on what the law ought to be (theory of legislation) with German legal philosophy (*Naturrecht*) there was a wide margin of difference. The disparity consisted in the fact

> " . . . that the Continental schools consider their ideal of legal institutions as a thing to be contemplated in and for itself, with a metaphysical interest which is, as it were, cut adrift from practice; while the Englishman's ideal is of something to be realized, or approached as near as may be, in an actual State, for actual

• "Law is dealt with by them as an entirely outward thing, and in apparent forgetfulness of the fact, laid down as a self-evident axiom by every profound thinker in jurisprudence from Ulpian and Cicero to Kant and Krause—that all law is necessarily a product of the mind, and owes its universality in its various forms in history to the ever-present working of minds" (*op. cit.,* xxiv-xxv, note 1). It is scarcely surprising that the translator of Kant's juristic works should be Kantian in his sentiments: see Hastie (trans.), KANT'S PHILOSOPHY OF LAW (Edinburgh, 1887), and KANT'S PRINCIPLES OF POLITICS, INCLUDING HIS ESSAY ON PERPETUAL PEACE (Edinburgh, 1891), the first work being the translation of RECHTSLEHRE, which constitutes the first part of METAPHYSIK DER SITTEN (1797), and the second work being the translation of IDEE ZU EINER ALLGEMEINEN GESCHICHTE IN WELTBURGERLICHER ABSICHT (1784), the second and third parts of UBER DEN GEMEINSPRUCH (1793) and ZUM EWIGEN FRIEDEN (1795).

88 The author has examined in more detail the antipathy of nineteenth-century English jurists towards matters metaphysical and epistemological in the unpublished work referred to in note 56 *supra.*

89 The principal German legal philosophers who were criticized by the English jurists were Fichte, Schelling, Kant, Hegel, Stahl, Trendelenburg, Krause, and Ahrens.

citizens, and by the positive enactment of a legislature."[90]

Pollock directed most of his criticisms of the *Naturrecht* school against Lorimer,[91] but his antipathy towards German legal thought was considerably more restrained when he came to deal with the historical jurists. He was always insistent that jurisprudence should not stray too far from the path of the realities of legal practice, and suggested that "the most hopeful common ground for a better understanding of German jurisprudence is to be found . . . in the historical school. In Bluntschli's and in Holtzendorff's work, for example, German philosophical ideas are tempered by history and knowledge of practical politics."[92]

Viscount Bryce's opinion of German jurists was not unlike Pollock's. Kant and Hegel's works, to him, made decidedly hard reading; moreover, the gains to be won from studying them were "small in proportion to the time spent."[93] The methods of Kant and Hegel were too abstract to throw much light upon concrete legal problems. Nevertheless Bryce, like Pollock, qualified his appraisal of the Germans by saying that there were some legal philosophers who, while followers of Kant and Hegel, were much more intimately acquainted with the practicalities of the law and who had as a result of their firmer background produced works in which legal conceptions were actually analysed.[94] Savigny was one German thinker whom Bryce respected and whom he complimented for being a jurist who had

90 *The Methods of Jurisprudence* in POLLOCK, OXFORD LECTURES AND OTHER DISCOURSES (London, 1890) 15, 16.

91 See D. P. Heatley, *Pollock and Lorimer*, (1944) 56 JURID. REV. 6-26.

92 POLLOCK, OXFORD LECTURES, 17. For further exemplification of Pollock's views on the metaphysical jurists in Germany see his review of W. G. MILLER, PHILOSOPHY IN LAW, in (1881) 6 MIND 447. Pollock was not alone in his high regard for Bluntschli and Holtzendorff. (Johann Caspar Bluntschli (1808-1881), the Swiss-born publicist, was a student of Savigny's and began his academic career in 1833 as professor of Roman Law at Bonn. In later years his interests were concentrated on the fields of public law and international law. His LEHRE VOM MODERNEN STAAT was translated into English by D. G. Ritchie, P. E. Matheson, and R. Lodge in 1891 under the title of THE THEORY OF THE MODERN STATE. He lectured at one time in Scotland and contributed articles to the Journal of Jurisprudence—*The Philosophical School of Law,* (1879) 32 J. OF JURISPRUDENCE, 227, and *Thibaut and Savigny, ibid.,* 57-65. Franz von Holtzendorff was best known in England for his ENCYKLOPADIE DER RECHTSWISSENSCHAFT IN SYSTEMATISCHER UND ALPHABETISCHER BEARBEITUNG, the fourth edition of which (Leipzig, 1882) was favourably reviewed in (1885) 1 L. Q. REV. 62. The significance of this work is that at the time of publication it was, to use Friedlander's words, "the most important recent Encyclopaedia, from the standpoint of contemporary juristic science in Germany" (quoted in HASTIE, *op. cit.,* 276)).

93 2 BRYCE, STUDIES IN HISTORY AND JURISPRUDENCE (London, 1901), 177.

94 *Ibid.,* 178.

"opposed his historical method to the abstractions of the contemporary Hegelians."[95] One of Savigny's pupils, Karl Adolf von Vangerow, would seem to have had no mean influence upon Bryce's way of thinking. Bryce recalled how during a visit to Germany in his youth he had sought von Vangerow's advice:—

> "Inspired by my Scottish and Oxford training with the notion that in order to study a subject rightly one must begin with its metaphysics, I asked the professor, on one of the days when his students were permitted to call on him, what book on the philosophy of Law (*Rechtsphilosophie*) I ought to read."[96]

The answer he received from Vangerow was that the philosophy of law was not likely to be of any assistance to him;[97] this counsel Bryce appears to have digested!

Though there were isolated English jurists who, like Sir William Rattigan,[98] became attracted to German legal philosophy, and though one does not have to search for long to find German works referred to by such jurisprudence text-writers as Sir Thomas Erskine Holland, Sir William Markby, and Edwin C. Clark, there is no indication that German works on legal philosophy were studied deeply.[99] There is virtually no piece of English legal writing apart from Lightwood's book in which German ideas were expounded or analysed. This seems surprising when one recalls how deeply Hegelian philosophy penetrated into the English schools of philosophy in the late nineteenth century, and how prolific the Scots were in their translations from German originals and in their commentaries on German philosophy.

Frederic William Maitland, though hardly a Germanophile, was nevertheless one Englishman who quite freely acknowledged his profound interest in and respect for German legal scholarship. He was a master of the German tongue and both wrote in and translated

95 *Ibid.*, 203-204.

96 *Ibid.*, 204.

97 In 1863 Bryce spent a semester at Heidelberg where he studied under von Vangerow; see H. A. L. FISHER, JAMES BRYCE, VISCOUNT BRYCE OF DECHMONT, O.M. (New York, 1927), vol. i, 59-60, 132.

98 Rattigan (1842-1904) studied for a doctorate of laws at Gottingen and frankly admitted that he was much impressed with German legal philosophy; see his SCIENCE OF JURISPRUDENCE (London, 1888), xi-xii; DICTIONARY OF NATIONAL BIOGRAPHY 1901-1911, 162-163; and FOSTER, MEN AT THE BAR, 385.

99 See HOLLAND, THE ELEMENTS OF JURISPRUDENCE (13th ed., Oxford, 1924); MARKBY, ELEMENTS OF LAW (6th ed., Oxford, 1905); and CLARK, PRACTICAL JURISPRUDENCE (Cambridge, 1883) and HISTORY OF ROMAN PRIVATE LAW: PART II, JURISPRUDENCE (Cambridge, 1914).

from German. His brother-in-law, H. A. L. Fisher, reported that he was "greatly affected" by Savigny's *Geschichte des römischen Rechts* and "used to say[100] that Savigny first opened his eyes as to the way in which law should be regarded." Apparently Maitland at one time began a translation of the *Geschichte.*[101] That he did not subscribe to the Hegelian view about laws of history is clearly indicated in another of Fisher's recollections:—

> "It appeared to Maitland that one of the obstacles to an exact understanding of the past was the general acceptance of the idea that a normal programme could be laid down for the human race. Even if there were sufficient evidence to show that each independent portion of the human race must move through a fated series of change, it remained a fact that the rapidly progressive groups had not been independent . . . And again the complexity and interdependence of human affairs render it impossible to hope for scientific laws which will formulate a sequence of stages in any one province of men's activity."[102]

In 1900 Maitland published a translation of part of Otto von Gierke's *Das deutsche Genossenschaftrecht* under the title *Political Theories of the Middle Ages.*[103] German group-theory seemed, to Maitland, to offer new insights for the study and rationalization of English corporate and unincorporated entities. At the time Maitland seems to have been over-impressed with the reality of group-will or the will of the organism and had great difficulty in fitting the English corporation sole into the Gierkean scheme.[104]

## Conclusion.

Although English legal scholars of the nineteenth century gave more attention to German legal scholarship than to the work of any other European lawyers, there is little evidence that German ideas penetrated very deeply into the fabric of English legal thought except in one limited field, *i.e.,* legal historiography. One cannot say even that the inspiration for the reform of English legal education was German in origin. Certainly German law schools were examined, and

100 FISHER, FREDERIC WILLIAM MAITLAND: A BIOGRAPHICAL SKETCH (Cambridge, 1910), 18.
101 *Ibid.,* 19.
102 *Ibid.,* 97.
103 Cambridge University Press.
104 See S. J. Stoljar, *The Corporate Theories of Frederic William Maitland,* in L. C. Webb (ed.), LEGAL PERSONALITY AND POLITICAL PLURALISM (Melbourne, 1958).

such examinations may have assisted the English reformers in formulating their schemes, but the impetus to reform came from Englishmen who had never so much as set foot in Germany.

In the field of jurisprudence John Austin and a few lesser figures such as John M. Lightwood and Sir William Rattigan were affected by various streams of German thought. For his part Austin owed much to the classificatory schemes of the Pandectists but remained faithful throughout to the philosophical premises of utilitarianism. In his most outstanding lectures on *The Province of Jurisprudence Determined* there is nothing to suggest German influence except a few passing references to Kant, and on these occasions Austin revealed himself to be little attracted to German legal philosophy. Austin's repulsion was magnified ten times in the writings of such men as Pollock and Bryce, and it can be stated with confidence that the German idealism which was to take hold of such philosophers as T. H. Green and Bernard Bosanquet seemed to by-pass the English schools of jurisprudence entirely. Whenever the Kantian and Hegelian schools were mentioned by the late Victorian jurists, they were dismissed very promptly as acolytes of transcendental nonsense.

Throughout the period under study, Savigny remained a much respected German scholar whose researches in the history of Roman law had helped raise the sights of English legal historiography. The second half of the nineteenth century in England witnessed the emergence of a group of legal historians whose monumental works bore testimony to the inspiration of those German historians who wrote history without attempting to demonstrate the subtle workings of a universal spirit. Since in the study of Roman law in Germany the historical approach held sway, it was natural enough that civil law studies in England should likewise assume an historical bent. For many years all the staple texts used in the teaching of Roman law in England were German texts or translations from the German, but none of these could be described as vehicles of ideology or legal philosophy.

It has not been until fairly recently that attempts have been made to interpret German legal philosophy for English readers. In the United States German emigrés, native Americans much bemused with German scholarship and, above all, Roscoe Pound, gave to American readers a wealth of interpretative literature, and whilst Pound's interpretations were at least known in England, the impact there was never very profound. Two world wars could not but have fortified the English lawyer's prejudices against German intellectual

creations. Whatever suspicions English jurists may have entertained about the relationship between the emergence of the Fascist state and German legal idealism could not have been dispelled upon their reading of such essays as Ernst Troeltsch's *Natural Law and Humanity* (translated by Sir Ernest Barker and included as an appendix to his edition of Gierke's *Natural Law and the Theory of Society*) and W. G. Friedmann's *Western and German Legal Thought*.[105]

ENID CAMPBELL.*

[105] See also (1942) 58 L. Q. Rev. 257.

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