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Nineteenth Century German Legal Science

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NINETEENTH CENTURY GERMAN LEGAL SCIENCE†*

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> Modern Jurisprudence is emphatically a German creation. Kant, Hegel, Hugo, Savigny, Thibaut, Falck, and their laborious and not unworthy successors have stamped their Personality, their Nomenclature, their Ethical tone, their Methods of philosophical analysis . . . ineffaceably upon the Science of jurisprudence.[1]

When Sheldon Amos, in 1872, emphasized the importance of German scholarship for late nineteenth century legal thought, he expressed a view widely shared among his contemporaries. The major reason for their interest in German learning was that the

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[1] S. AMOS, THE SCIENCE OF JURISPRUDENCE 505 (1872).

common lawyers of the "classical period" of Anglo-American jurisprudence, roughly the two generations from the 1850s to World War I,[2] were intensely preoccupied with the idea of law as a science. This idea was neither exclusively nor originally German,[3] but in the nineteenth century German scholars pursued it more consistently, debated it more intensely, and refined it more highly than any other contemporary legal culture. As a result, many leading jurists in England and the United States considered German "Rechtswissenschaft" a reference point, and frequently a model.[4] Today most Anglo-American scholars of comparative legal history acknowledge this role of German legal thought, and have already explored individual aspects of it.[5]

Despite this consensus about the importance of German ideas for "classical" Anglo-American jurisprudence among nineteenth

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[2] What I call "the classical period" is roughly identical with Grant Gilmore's "Age of Faith." *See* G. GILMORE, THE AGES OF AMERICAN LAW 41–67 (1977). It is the period dominated by what Karl Llewellyn called "the formal style," *see* K. LLEWELLYN, THE COMMON LAW TRADITION 35–45 (1962), and what Thomas C. Grey called "classical legal science." *See* Grey, *Langdell's Orthodoxy*, 45 U. PITT. L. REV. 1 (1983). While different scholars have different ideas about the exact time frame of this period (*compare* Kennedy, *Toward a Historical Understanding of Legal Consciousness: The Case of Classical Legal Thought in America 1850-1940*, in 3 RESEARCH IN LAW AND SOCIOLOGY 3 (S. Spitzer ed. 1980) *with* Sugarman, *Legal Theory, the Common Law Mind and the Making of the Textbook Tradition*, in LEGAL THEORY AND COMMON LAW 26, 44 (W. Twining ed. 1986) (ca. 1850–1907)), the idea of legal science was most popular from the 1850s to the dawn of realism. For the purposes of this article, World War I is a convenient cut-off date because it marked a rapid decline in the influence of German ideas on American legal thought. The concept of legal science dominated particularly the jurisprudence of Langdell and his school at Harvard, from where it spread to American legal academia in general. *See* J. REDLICH, THE COMMON LAW AND THE CASE METHOD IN AMERICAN UNIVERSITY LAW SCHOOLS, 16–17 (1914).

[3] The idea of law as a science has been a major ingredient of the civil law tradition, at least since the middle ages. *See* H.J. BERMAN, LAW AND REVOLUTION 151–64 (1983). In the common law orbit, it had a tradition even before the 19th century. *See* D. BOORSTIN, THE MYSTERIOUS SCIENCE OF LAW (1941); Shapiro, *Law and Science in 17th Century England*, 21 STAN. L. REV. 727 (1969).

[4] *See, e.g.*, J. BRYCE, ON THE ACADEMIC STUDY OF THE CIVIL LAW 17 (1871); Beale, *The Development of Jurisprudence During the Past Century*, 18 HARV. L. REV. 271, 283 (1905); Smith, *Four German Jurists*, 10 POL. SCI. Q. 664, 666 (1895).

[5] *See, e.g.*, Clark, *Tracing the Roots of American Legal Education*, 51 RABELS ZEITSCHRIFT 313 (1987); Hoeflich, *Transatlantic Friendships & The German Influence on American Law in the First Half of the Nineteenth Century*, 35 AM. J. COMP. L. 599 (1987); Reimann, *The Historical School Against Codification: Savigny, Carter, and the Defeat of the New York Civil Code*, 37 AM. J. COMP. L. 95 (1989) [hereinafter Reimann, *The Historical School Against Codification*]; Reimann, *Holmes' 'Common Law' and German Legal Science*, in: Robert W. Gordon (ed.) (forthcoming) [hereinafter Reimann, *Holmes' 'Common Law'*]; Riesenfeld, *The Influence of German Legal Theory on American Law: The Heritage of Savigny and His Disciples*, 37 AM. J. COMP. L. 1 (1989); Schwartz, *Einflüsse deutscher Zivilistik im Auslande*, in RECHTSGESCHICHTE UND GEGENWART 26 (Wieacker & Thieme eds. 1960).

century as well as present-day legal scholars, there has been surprisingly little understanding of what nineteenth century German legal science really was. Quite to the contrary, references to it are rife with ambiguities and contradictions.

Even the common law jurists of the "Age of Faith"[6] themselves had no clear and uniform conception of German legal science. Some praised the "German exactness in detail,"[7] while others criticized the German "tendency to excessive generalization."[8] Thus, scholars employed German jurisprudence to reinforce arguments that sometimes pointed in opposite directions. When Holmes criticized Langdell, he referred to German legal science in order to demonstrate the evils of formalism and abstract logic. On the other hand, Holmes often relied on German scholarship to support his own conclusions.[9] When James Coolidge Carter attacked Field's New York Civil Code, he built on German arguments against codification. Field in turn pointed out that the Germans were in fact in the process of large-scale codification and cited German works in favor of his own project.[10] Common lawyers sometimes held such divergent views of the same German thinker that scholars as different as the historian Maitland and the analytical jurist Markby could both consider themselves followers of Savigny.[11] German legal science meant many things to different people, and in fact sometimes, as in Holmes' case, meant different things to the same person.

In present-day Anglo-American scholarship, the meaning of German legal science is still not clear. Existing accounts of nineteenth century German jurisprudence are largely limited to summary descriptions of the most basic developments and of a few fundamental ideas.[12] Some scholars acknowledge that the nine-

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[6] *See* G. GILMORE, THE AGES OF AMERICAN LAW 41 (1977).

[7] Holmes, *Book Review*, 11 AM. L. REV. 327 (1877); the Review is unsigned but attributed to Holmes by M. HOWE, JUSTICE OLIVER WENDELL HOLMES: THE PROVING YEARS 147 n.28 (1963).

[8] Smith, *supra* note 4, at 682.

[9] Reimann, *Holmes' 'Common Law'*, *supra* note 5.

[10] Reimann, *The Historical School Against Codification*, *supra* note 5, at 101–07.

[11] *See* H.A.L. FISHER, FREDERICK WILLIAM MAITLAND 18–19 (1910 & reprint 1984); W. MARKBY, ELEMENTS OF LAW (1871).

[12] *See, e.g.*, J. P. DAWSON, THE ORACLES OF THE LAW, 441–42, 451–59, (1968); O. ROBINSON, T. FERGUSON, W. GORDON, AN INTRODUCTION TO EUROPEAN LEGAL HISTORY 465–72 (1985); P. STEIN, LEGAL EVOLUTION 51–68, (1980); Gale, *A Very German Legal Science: Savigny and the Historical School*, 18 STAN. J. INT'L L. 123 (1982). There is also a variety of older essays on the German historical school of law, the most interesting of which is Kantorowicz, *Savigny and the Historical School of Law*, 53 L.Q.R. 326 (1937). The multitude of accounts from the 19th and early 20th century of this topic in the Anglo-American literature attests to the

teenth century concept of legal science originated in Savigny's work, but even his theory has not been explored in any depth. Some consider it similar to Anglo-American classical orthodoxy of the Langdellian kind and recognize that it built on notions of organic growth and deductive logic, but the meaning and relationship of these notions remains as obscure as their methodological underpinnings and implications.[13] In sum, German legal science is a phenomenon about which Anglo-American scholars have written fairly continuously without ever pinning down its essence.[14]

This article is the preliminary part of a larger study of the influence of nineteenth century German jurisprudence on the classical period of Anglo-American legal thought. In order to provide the basis for an understanding of the diverse instances and aspects of this influence, it analyzes the concept of legal science in nineteenth century Germany. It is limited, however, in two ways. It focuses only on the classical concept of "Rechtswissenschaft" that was debated early in the century, fully developed by the historical school and later modified by its various offshoots, thus excluding the new and radically different ideas advanced late in the century by Jhering and his successors.[15] And it is concerned only with the

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common lawyers' considerable interest in German jurisprudence in the 19th and early 20th century. *See, e.g.*, L. CUSHING, INTRODUCTION TO THE STUDY OF ROMAN LAW 269–79 (1854); N. KORKUNOV, GENERAL THEORY OF LAW 143–56 (1909); J. REDDIE, HISTORICAL NOTICES OF THE ROMAN LAW AND THE RECENT PROGRESS OF ITS STUDY IN GERMANY (1826); Freund, *Historical Jurisprudence in Germany*, 5 POL. SCI. Q. 468 (1890); Leonhard, *Methods Followed in Germany by the Historical School of Law*, 7 COLUM. L. REV. 573 (1907); Rose, *Controversies of Modern Continental Jurists*, 2 S.L. REV. 551 (1876); Anon., *On the Schools of German Jurists*, VI MONTHLY L. MAG. & POL. REV. 77 (1838–41?); Anon., *The German Historical School of Jurisprudence*, 14 AM. JURIST 43 (1835); *see also* Patterson, *Historical and Evolutionary Theories of Law*, 51 COLUM. L. REV. 681, 686–89 (1951).

[13] *See* Clark, *supra* note 5, at 328–30. Grey compares "Anglo-American classical orthodoxy" to post-1800 European "legal science" in general but calls Savigny's work its "prototype." Grey, *supra* note 2, at 5 n.17.

[14] Robert Stevens, for example, recognizes the importance of German "scienticism" for the reform of American legal education after 1870, but never defines what this "scienticism" was. R. STEVENS, LAW SCHOOL 51, 134 (1983). The context suggests, however, that Stevens has the methodology of late 19th century German natural sciences in mind, not the Savignian notion of legal science. *Id.* Holmes, in contrast, referred to scientific German historiography when he said that "[u]nder the influence of Germany, science is gradually drawing legal history into its sphere." Holmes, *The Use and Meaning of Law Schools, and their Methods of Instruction*, 20 AM. L. REV. 919, 921 (1886).

[15] This later 19th century jurisprudence is so different from the one considered here that it requires a separate study. The jurisprudence of interests, free school of law, and the sociological jurisprudence developed by German jurists after Jhering have also been influential in Anglo-American legal thought, particularly on Pound, Cardozo, and some of the Realists. For a preliminary study, see Herget & Wallace, *The German Free Law Movement as the Source of American Legal Realism*, 73 VA. L. REV. 399 (1987).

jurisprudential dimension of this concept, thus leaving the exploration of its role in the political and social context of nineteenth century Germany for later study.[16]

Even in this limited sense, nineteenth century German legal science was a highly complex phenomenon. On one hand, it was marked by a great diversity of approaches, most of which were reflected in Anglo-American legal scholarship in one way or another. On the other hand, it was also united under a shared concept of "Rechtswissenschaft" that Anglo-American scholars have not extensively explored. In order to trace its origins, to develop the diversity of its external manifestations, and also to demonstrate the internal coherence of its basic ideas, this article explores nineteenth century German legal science in three major steps.[17]

Laying the foundation, section I describes the birth of German legal science. The development of a new jurisprudence was the response to the methodological needs that arose from the deconstruction of natural law (subsection A). To meet these needs, the leading scholars explored historical as well as systematic approaches in their search for a science of positive law (subsection B). The ensuing jurisprudential debate ended with the victory of a jurisprudence that combined both approaches–Savigny's historical theory of law (subsection C).

Savigny's historical jurisprudence became the seed out of which a multitude of branches grew. In section II, this article unfolds the diversity of legal science. One group of scholars pursued the systematic dimension and was split into those focusing on Roman law, and others dealing with German law (subsection A). A different branch emphasized the historical dimension, again partially analyzing Roman law and partially exploring German legal history (subsection B). The result was a variety of scholarship that makes it possible to perceive German jurisprudence in many different ways, but which also makes it difficult to see the common ideas underlying the diversity.

In section III, this article analyzes and synthesizes these fundamental ideas in order to show how their interplay constituted the

[16] For a study of the political background of the German Civil Code, see M. JOHN, POLITICS AND THE LAW IN NINETEENTH CENTURY GERMANY (1989).

[17] The discussion in sections I and II is based predominantly on original writings of the historical jurists themselves rather than on modern scholarship about them. While the exposition is my own, most of the substantive views presented in these parts are in the public domain of German legal historiography. Where they are not, the text marks them as mine. Section III presents my own analysis, synthesis and characterization of 19th century German legal science.

concept of legal science itself. It first identifies and disentangles the various notions involved. The major elements constituting the concept of "Rechtswissenschaft" are separated through an analysis of Savigny's themes of "Geschichte" (history) and "System" (subsection A). The meaning of these fundamental concepts is easily misunderstood, much to the detriment of a sober appreciation of nineteenth century German legal science. Interpreting them only as products of a romantic veneration of the past, and of a blind faith in logic, respectively, makes the historical school look hopelessly irrational in its premises and naively formalistic in its results.[18] In fact, history and system were complex ideas that reflected subtle methodological considerations.

The identification of the major elements of legal science makes it possible to demonstrate their interaction. The gist of "Rechtswissenschaft" was the synthesis of "Geschichte" and "System" (subsection B). This synthesis was the fundamental credo of German jurists throughout the nineteenth century and a basic methodological problem. It required the reconciliation of historical truth with logical order. Savigny united both concepts by presenting law as a phenomenon that was rooted in the organic whole of the culture and that served the protection of individual freedom. These ideas look, again, very nebulous, but they actually rested on a sophisticated view of the function of modern jurisprudence.

As a result of the combination of historical method, systematic goal, and individualist function of law, the character of "Rechtswissenschaft" was marked by a mixture of positivism, idealism, and formalism (subsection C). In a concluding section (IV), the article briefly relates these findings to the perspective of the contemporary Anglo-American scholars. It suggests, in a preliminary fashion, that it was the very diversity of German legal science's branches and the very richness of its basic concept that made it so intriguing for late nineteenth century common law jurists.

I. The Rise of Legal Science

A. *The Deconstruction of Natural Law*

The new concept of legal science developed by German jurists near the beginning of the nineteenth century was a response to a

[18] Edwin Patteson provides an example of such a misunderstanding when he writes that it was "essential[ly] the thesis of Savigny and the German historical school" that "primitive or very old legal principles and doctrines are the best ones." Patteson, *The Origin of the Case Method*, 4 J. Leg. Ed. 1, 9 (1951).

specific methodological challenge. This challenge resulted primarily from the jurisprudential vacuum left after Kant's critical philosophy had destroyed the faith in the premises and methods of natural law that had dominated the previous centuries.[19]

The idea of natural law, rooted in Greek and Roman philosophy, has been an essential part of the Western legal tradition and has acquired a multitude of meanings throughout the centuries. Its modern version, "the Law of Reason," which shaped European legal thought in the seventeenth and eighteenth centuries, finds its origins in Hobbes, Grotius, Spinoza, Pufendorf and Leibniz.[20] But its most prominent and influential version in eighteenth century Germany was the school of Christian Wolff. Wolff and his followers became the main target of the epistemological attacks on natural law and, particularly for the historical school, the outright symbol of the flaws of its method.[21]

The Wolffian approach indeed demonstrates both the appeal and the weakness of the "Law of Reason" in extreme form. It was impressive as an exercise in systematic logic, but it was shallow and confused as a method of jurisprudence. Wolff introduces his philosophy with a few fundamental legal principles. Most of his maxims, like the general command not to harm others (*neminem laede*) or to give each his due (*suum cuique tribuere*) were in fact of ancient origin. But because for Wolff they stemmed directly from human nature, he considered them to be of eternal, timeless validity, independent of their historical context. From these generalities, he deduced increasingly particular rules through quasi-mathematical operation (more geometrical) down to such detail that these rules could actually govern legal practice. In this manner, he built a huge, strictly logical, comprehensive system of natural law.[22] Wolff's logical method dominated legal theory in eighteenth century Germany.

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[19] Besides the jurisprudential embarassment caused by Kant's work, there was also a highly practical need for a new legal science. German law was extremely fragmented and confused and in desparate need of unification and clarification.

[20] For an excellent discussion of the continental natural law tradition, see F. WIEACKER, PRIVATRECHTSGESCHICHTE DER NEUZEIT 249–347 (2nd ed. 1967). *See also* H. WELZEL, NATURRECHT UND MATERIALE GERECHTIGKEIT (4th ed. 1962).

[21] *See* H. HATTENHAUER, THIBAUT UND SAVIGNY 100 (1973); Savigny, *Über den Zweck dieser Zeitschrift*, 1 ZEITSCHRIFT FÜR GESCHICHTLICHE RECHTSWISSENSCHAFT 1–7 (1815).

[22] C. WOLFF, INSTITUTIONES IURIS NATURAE ET GENTIUM (1750); C. WOLFF, JUS NATURAE METHODO SCIENTIFICA PERTRACTATUM (8 vols. 1740-1748). On Wolff, see G. KLEINHEYER & J. SCHRÖDER, DEUTSCHE JURISTEN AUS FÜNF JAHRHUNDERTEN 305–12 (2nd ed. 1983) [hereinafter KLEINHEYER/SCHRÖDER]; F. WIEACKER, *supra* note 20, at 318–20; STINTZING & LANDSBERG, GESCHICHTE DER DEUTSCHEN RECHTSWISSENSCHAFT, vol. III, part 1, 19–206 (1898) [hereinafter STINTZING/LANDSBERG vol./part].

His system also exercised some influence on legislation by providing a model for codification, particularly in Prussia.[23]

This natural law approach was "philosophy" in the pre-Kantian, eighteenth century sense. It was general learning that encompassed ethics, mathematics, natural sciences, law, and other fields.[24] Because the natural lawyers saw no need rigidly to separate these disciplines, they saw no harm in deducing positive legal rules from philosophical principles.[25] In reality, however, the gap between the "Law of Reason" and the law in the courts was considerable because the legal practice of the age, the "*usus modernus pandectarum*," pursued its own muddled course and paid little attention to the speculative philosophy of the natural lawyers.[26]

Despite its impressive logical systems, the "Law of Reason" suffered from the major methodological weakness that it uncritically mixed a variety of elements—ethics and law, positive law and ideal law, observation and speculation. As Kant's critical philosophy eventually pointed out with merciless clarity, each of these elements was of a different nature and therefore required different thought processes. Mixing up these elements, therefore, led to hopeless methodological confusion.

When the natural law approach failed to distinguish between ethics and law, it confused different kinds of standards of conduct. Kant insisted on their separation. Ethical standards are internal; that is, they concern one's conscience but cannot be enforced by external authority. Legal standards are external; that is, they concern one's external behavior and can be enforced, for example, by the state. Thus, the rules in these two spheres are of a very different nature. For example, "live honestly" is an ethical but not a legally enforceable rule; in contrast, "fulfill your contractual obligations" is a legally enforceable rule, but the internal reasons (ethical or not) for someone's willingness to obey it are irrelevant to the law. Because Wolff's fundamental principles, and indeed the whole system built

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[23] F. WIEACKER, *supra* note 20, at 321, 332.

[24] Wolff was originally professor of mathematics and philosophy, and assumed a chair for natural law only later in his career.

[25] C. RITTER, DER RECHTSGEDANKE KANTS NACH DEN FRÜHEN QUELLEN 26–28 (1971).

[26] The "*usus modernus pandectarum*," the "modern use of the Pandects" (or "Digest," the most important part of Justinian's Corpus Iuris Civilis), was the prevailing style of the practically oriented legal scholarship in 18th century central Europe. As its name indicates, it used the Roman law for modern purposes. While it must be credited with the development of many modern legal doctrines, it was not comprehensively systematic and lacked a sound methodological theory. Particularly 19th century jurists thus considered it inferior to their own approach and not truly "scientific."

on them, tried to be both ethical and legal at the same time, they were confused and lacked analytical value.[27]

To make matters worse, the eighteenth century natural law school also failed to distinguish between the knowledge of actual rules and the search for ideal standards. Kant's analysis of human reasoning processes convinced him that there is a fundamental difference between knowledge gained through experience and maxims found through the application of pure reason.[28] Kant believed that both were possible but that they performed very different functions. In law, for example, knowledge of actual rules was a matter of experience (perhaps in the form of memorization) and therefore empirical. While practically indispensable, such empirical knowledge could never determine the reasonableness of these rules. Empirical knowledge could never provide ideal standards. These ideal standards could only be found completely independently from all experience, by pure reason alone.[29] In the natural law systems, however, positive rules and ideal standards were often not distinguished at all. This made it impossible to test their validity because it was unclear whether experience (empirical truth) or pure reason (abstract reasonableness) was the proper criterion. Thus, the maxims of natural law provided no reliable basis for a legal system.[30]

This critique thoroughly discredited the natural law school in the eyes of the generation of legal thinkers after Kant.[31] To remedy the methodological confusion, Kant divided the natural law field into several clearly defined disciplines with distinct methods and goals. Kant first distinguished ethics, dealing with internal standards

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[27] I. KANT, METAPHYSIK DER SITTEN 214, 218–21 (Akademie Textausgabe 1902) (1797).

[28] I. KANT, KRITIK DER REINEN VERNUNFT (Königsberg 1781).

[29] I. KANT, *supra* note 27, Einleitung in die Rechtslehre B., at 229–30. The standards found by Kant himself were his so-called categorical imperatives. *See id.*, Einleitung IV., 222–23.

[30] As Kant clearly recognized, the natural lawyers' failure to distinguish between ideal standards and empirical knowledge was rooted in their failure to perceive the fundamental differences between man-made laws and natural laws. As to the former, the distinction between (empirical) knowledge of what they are and (philosophical) judgment about what they ought to be is crucial, while as to the latter this distinction makes no sense.

[31] Of course, there were other reasons besides Kant's philosophy for the demise of the natural law systems. With the rise of the bourgeoisie to first economic and later political power, the rigid patterns of the general ethical principles of the law of reason became a straightjacket for an increasingly dynamic and complex society. *See* Habermas, *Wie ist Legitimität durch Legalität möglich?*, 1987 KRITISCHE JUSTIZ 1, 8. In particular, the bourgeoisie revolted against the natural law philosophy when this approach manifested itself in the paternalistic government of the enlightened monarchs. *See* F. WIEACKER, *supra* note 20, at 348–51.

of conduct, from law, which concerns externally enforceable conduct. Within law, Kant isolated legal philosophy determining ideal standards (the province of the philosopher applying pure reason) and the science of positive law (the realm of the jurist drawing on experience).[32] Hegel endorsed Kant's distinctions, and they became almost commonplace in the early nineteenth century.[33]

As a result, however, the question of how to pursue these specialized disciplines arose.[34] Ethics could be left to moral philosophy. In law, the search for ideal standards was the concern of legal philosophy. Kant demonstrated the application, merits and limits of pure reason,[35] and soon Hegel provided a legal philosophy built on his own theory of state and law.[36] But the development of a science of positive law remained a problem for jurists. Here Kant (and later Hegel) provided little direct guidance. It was clear only that this science must differ radically from legal philosophy in that it had to be empirical, not speculative.[37] But how could anything empirical go beyond mere knowledge, which is essentially memorization, and become a "science?"

B. *The Search for a Science of Positive Law*

As early nineteenth century German jurists searched for a new legal science, they also began to use the term "Rechtswissenschaft."[38] Thus "Rechtswissenschaft" meant from the very beginning legal science in the limited Kantian sense, a science of positive law. The methods and goals of such a science of positive law depended, of course, on the factors that made an intellectual endeavour a "science." With respect to this question, again, Kant's critical philosophy had broken new ground. It had not only discredited the natural law approach but had also given the term "science," or rather its German equivalent "Wissenschaft," a new meaning. The change

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[32] I. KANT, *supra* note 27, Einleitung in die Rechtslehre A., at 229.

[33] G.F.W. HEGEL, PHILOSOPHY OF RIGHT § 212, at 136 (Knox trans. 1942).

[34] For an in-depth analysis of the methodological implications, see Blühdorn, *'Kantianer' und Kant. Die Wende von der Rechtsmetaphysik zur 'Wissenschaft' vom positiven Recht*, in 90 SAVIGNY ZEITSCHRIFT FÜR RECHTSGESCHICHTE, ROM. ABT. 305 (1973).

[35] I. KANT, *supra* note 27, Rechtslehre.

[36] *See* G.F.W. HEGEL, *supra* note 33.

[37] *See* K. KOHLSCHÜTTER, VORLESUNGEN ÜBER DEN BEGRIFF DER RECHTSWISSENSCHAFT 185–86 (1798).

[38] *See generally* J. SCHRÖDER, WISSENSCHAFTSTHEORIE UND LEHRE VON DER "PRAKTISCHEN JURISPRUDENZ" AUF DEUTSCHEN UNIVERSITÄTEN AN DER WENDE ZUM 19. JAHRHUNDERT, 82–168 (1979).

from earlier notions was subtle, but of immense significance for the development of nineteenth century German "Rechtswissenschaft."

In the natural law period, "Wissenschaft" meant ability and knowledge in the subjective sense, meaning what individuals knew about a subject matter and what skills they had to prove their knowledge through logic—the "ability of the mind to demonstrate everything that one asserts in an undisputable manner on undeniable grounds."[39] This demonstration often took the form of building a "System." "System" was the order in which the material, like a treatise or lecture, was presented. It was an external concept because it signified an external arrangement. The subjective concept of "Wissenschaft" and the external concept of "System" were not inherently connected—one could exist without the other, although the former was often presented in the form of the latter.[40]

Towards the end of the eighteenth century, a different meaning emerged. Jurists now understood "Wissenschaft" as the systematic "whole of knowledge."[41] It meant knowledge in the objective sense—the product of the human power of cognition, the insight into the quality and order of things. Such knowledge had to be systematic. "System" now signified the structure of a field of knowledge. It was an internal concept because it reflected the inherent structure of its subject, independent from its external presentation. Objective "Wissenschaft" and internal "System" were now inextricably linked. "Wissenschaft" was characterized by the recognition of a subject's inherent structure, the "System."[42]

Thus, from a Kantian perspective, it was clear that the new legal science had to meet at least two criteria. First, in order to avoid the speculation of the Wolffian school, it had to be a science of positive law only, which required that its method be strictly empirical. Second, in order to be a true "Wissenschaft," it had to develop the inherent structure of its subject; therefore, its goal had to be a scientific system.

These two conditions produced the major challenge of developing a science of positive law. The empirical method required attention to actual data, the systematic goal the demonstration of

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[39] "eine Fertigkeit des Verstandes, alles, was man behauptet, aus unwidersprechlichen Gründen unumstösslich darzutun." *Id.* at 132 (quoting C. WOLFF, DEUTSCHE LOGIK (1713)). Whether jurisprudence could qualify as "Wissenschaft" according to these criteria was a much debated question already in the 18th century. *Id.* at 133–34.

[40] *Id.* at 88.

[41] Das "Ganze der Erkenntnis." *Id.* at 95.

[42] *Id.* at 94–95, 98–99, 113–15, 130–31, 167–68.

an order in them. But the establishment of a new science of law was not only a challenge, it was also a promise. Kant's philosophy changed not only the meaning of "Wissenschaft" but also its status. As long as it had meant subjective knowledge, it had been only a means to an end. In its new sense of the detection of the systematic structures inherent in the data, it was now an end in itself. It stood for the goal of a scholarly community and became a normative concept. In eighteenth century Germany, "Wissenschaftlichkeit" (scientific character) had not been a value judgment; in nineteenth century Germany it was the primary indicator of the intellectual dignity of a discipline.

This new dignity of "Wissenschaft" perhaps explains why the best legal minds in early nineteenth century Germany all participated in the development of a new legal science. The heated debates among the various schools about the proper approach revolved around three fundamental methodological questions.[43] If legal science had to be empirical, where would its data come from? If it had to build a system, what would this system be like? And what was the relationship between the empirical and the systematic side?

The answer to the first question—the appropriate source of the relevant data—gradually emerged as the age of rationalism gave way to the age of historicism. Jurisprudence began to turn away from the veneration of deductive logic and to consider law a historical phenomenon. Gustav Hugo, the most prominent scholar of the "Göttinger Rechtsschule,"[44] represented this new trend. For Hugo, legal science had to explain the reasons behind the positive rules, and these reasons could be philosophical or historical:

> While the immediately practical, trade-like, as it is correctly called, knowledge of law goes only to the question What is the law? the scientific knowledge of law asks also for the grounds, and since they are twofold, the grounds of reason and the historical ones, two questions follow: Is something that is law reasonable? and How did it become law?[45]

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[43] For a comprehensive study, see H. STÜHLER, DIE DISKUSSION UM DIE ERNEUERUNG DER RECHTSWISSENSCHAFT VON 1780–1815 (1978).

[44] On Hugo, see KLEINHEYER/SCHRÖDER, *supra* note 22, at 128–31; STINTZING/LANDSBERG III.2 (1910), *supra* note 22, at 1–48; F. WIEACKER, *supra* note 20, at 378–81.

[45] "Statt daß die unmittelbar practische, wie man mit Recht sagt, handwerksmäßige Rechtserkenntnis nur auf die Frage geht: Was ist Rechtens? so fragt die wissenschaftliche auch nach den Gründen, und da diese doppelt sind: die Vernunftgründe und die geschicht-

This concept of a new legal science was still relatively crude, but it was an important first step. It was not fully "scientific" in the Kantian sense because it failed to explore the internal structure of its subject, the scientific system.[46] But it went beyond Kant in an important respect because it required that a scientific jurisprudence consider law historically. The data of legal science would have to come from history.

The answer to the second question—how to build a system out of the material—slowly developed out of Kant's concept of "Wissenschaft." Somehow the mass of empirically discovered data of law had to be reduced to their underlying principles. These principles then had to be the organizing criteria for the building of a rational system. The "historical-philosophical school," mainly Johann Paul Anselm Feuerbach[47] and Anton Friedrich Justus Thibaut,[48] best represents this approach. According to Feuerbach, the construction of the system required three steps:

> The first is the correctness, exact certitude, acute precision, lucid clarity of the legal concepts, the second the internal coherence of the legal rules, the third the systematic coherence of the legal dogmas.[49]

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lichen, so entstehen auch die beyden Fragen: Ist es vernünftig, dass Etwas Rechtens sey? und Wie ist es Rechtens geworden?" G. HUGO, LEHRBUCH DER JURISTISCHEN ENCYCLOPÄDIE, FÜNFTER, GANZ VON NEUEM AUSGEARBEITETER VERSUCH (1817) 32–33.

[46] But Hugo followed Kant in his emphasis on positive law and in his concomitant rejection of metaphysical speculation. For Hugo, "grounds of reason" ("Vernunftgründe") did not mean philosophical speculation. Hugo did not see much sense in metaphysics "because in a certain way nothing in positive law, and in a certain way everything fits it" ("denn mit diesem stimmt gewisser Maßen Nichts, und gewisser Maßen Alles, im wirklichen Rechte, überein"). *Id.* at 33. Instead, he wanted to look at "what is given through experience, at the good and bad consequences" ("auf das in der Erfahrung Gegebene, auf die guten und schlimmen Folgen"). *Id.* at 33–34. Thus, Hugo wanted to explore positive law, explain it from its historical background, and test its practical reasonableness.

[47] On Feuerbach see E. KIPPER, JOHANN PAUL ANSELM FEUERBACH (2nd ed. 1989); KLEINHEYER/SCHRÖDER, *supra* note 22, at 79–85; STINTZING/LANDSBERG III.2 (1910), *supra* note 22, at 115–39; E. WOLF, GROSSE RECHTSDENKER DER DEUTSCHEN GEISTESGESCHICHTE 543–90 (4th ed. 1963).

[48] On Thibaut see KLEINHEYER/SCHRÖDER, *supra* note 22, at 287–90; STINTZING/LANDSBERG III.2 (1910), *supra* note 22, at 69–88; F. WIEACKER, *supra* note 20, at 390–91.

[49] "Die erste ist die Richtigkeit, genauer Bestimmtheit, scharfe Präzision, lichtvolle Klarheit der rechtlichen Begriffe: die zweite der innere Zusammenhang der Rechtssätze: die dritte der systematische Zusammenhang der Rechtslehren." Feuerbach, *Über Philosophie und Empirie in ihrem Verhältnis zur positiven Rechtswissenschaft*, in J. FEUERBACH & C. MITTERMAIER, THEORIE DER ERFAHRUNG IN DER RECHTSWISSENSCHAFT 80 (1804 & 1968 reprint).

Similarly, Thibaut defined legal science as the "systematic sum total of laws."[50] A "System" consisting of the true principles of the law had become the mark of "Rechtswissenschaft."[51]

The third question—the relationship between empirical and systematic method—turned out to be the hardest. Feuerbach and Thibaut, among others, only stated that both methods were necessary. As the name of their approach—"historical-philosophical"—indicated, their method of finding the material of positive law was empirical,[52] which meant primarily historical, while the technique that brought this material into a principled order was "philosophical." "Philosophy" in this context was, particularly for Feuerbach, the inquiry into the fundamental concepts of law, the reasoning leading to the recognition of their relationships, and the broad view of law required to organize them into a system.[53] But the interplay between the historical and the systematic method remained unclear.

Despite these intense efforts to open a new chapter of jurisprudence by developing a science of positive law, the influence of the age of reason still lingered on in this early period of "Rechtswissenschaft." After centuries of searching for justice, the jurists were reluctant suddenly to limit their discipline strictly to the question of what the law and its appropriate system is, and to exclude (and leave to legal philosophy) all thinking about what it ought to be. For Feuerbach and Thibaut, "philosophy" was not only principled legal reasoning, it was also measuring the value of the empirical material by the standards of reason in the Kantian sense. For them, legal science still had to encompass both the systematization of empirically found rules and their scrutiny through the powers of

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[50] "Ein systematischer Inbegriff von Gesetzen." A.F.J. THIBAUT, SYSTEM DES PANDEKTENRECHTS 4 (7th ed. 1828).

[51] For Thibaut and Feuerbach, however, the "system" remained only formal, i.e. a division and organization of the positive law into formal categories in order to simplify the legal material. Thibaut considered a substantive ("materielles") system, i.e. one according to underlying principles, impossible in respect to positive law because the lawgiver does not make rules according to such substantive principles. *Id.* Feuerbach also spoke only of the "formal criteria of a science of positive law" ("formellen Bedingungen einer Wissenschaft vom positiven Recht"). Feuerbach, *supra* note 49, at 80. This distinguishes Thibaut's and Feuerbach's conception of "system" from Savigny's. See *infra* notes 70–74 and accompanying text.

[52] On the early nineteenth century concept of empiricism and positivism of law, see Blühdorn, *Zum Zusammenhang von "Positivität" und "Empirie" im Verständnis der deutschen Rechtswissenschaft zu Beginn des 19. Jahrhunderts*, in POSITIVISMUS IM 19. JAHRHUNDERT 123–59 (J. Blühdorn & J. Ritter eds. 1971).

[53] Feuerbach, *supra* note 49, at 94–95.

reason: "Empirical knowledge gives to jurisprudence its body, philosophical knowledge gives it its spirit."[54]

Because Feuerbach and Thibaut presumed normative thinking about positive law to be part of a jurist's task, they were among the leading advocates of legal reform in their day. Confident that the application of post-Kantian, practical reason provided guidance,[55] they called for legal improvement through modern, enlightened, and rational legislation. The best-known example of this program is Thibaut's call for a comprehensive German codification in 1814.[56]

C. *The Historical Theory of Law*

When Thibaut's call for a German code met with the passionate opposition of Friedrich Karl von Savigny[57] in the so-called codification debate,[58] the historical school of law was born. A major reason for Savigny's objection to codification was that he did not share, indeed firmly rejected, Thibaut's (and Feuerbach's) belief in reason as an important element of legal science.[59] Against their "ahistorical school" that valued reason more highly than tradition, Savigny developed his historical theory of law. Taking Kant seriously, he unequivocally broke with the law of reason, firmly excluded all spec-

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[54] *Id.* at 98; *see also* Thibaut, *Über den Einfluss der Philosophie auf die Auslegung der positiven Gesetze*, in 1 VERSUCHE ÜBER EINZELNE THEILE DES POSITIVEN RECHTS 124–75 (1817).

[55] Feuerbach, *supra* note 49, at 97–98.

[56] A.F.J. THIBAUT, ÜBER DIE NOTHWENDIGKEIT EINES ALLGEMEINEN BÜRGERLICHEN RECHTS FÜR DEUTSCHLAND (1814), *reprinted in* H. HATTENHAUER, THIBAUT UND SAVIGNY 61 (1973).

[57] The literature on Savigny is vast. The most important works in German are: J. RÜCKERT, IDEALISMUS, JURISPRUDENZ UND POLITIK BEI FRIEDRICH KARL VON SAVIGNY (1984); A. STOLL, FRIEDRICH KARL VON SAVIGNY (1927–39); F. WIEACKER, GRÜNDER UND BEWAHRER 107–43 (1959); E. WOLF, *supra* note 47, at 467–542. For a biography in English, see Montmorency, *Friedrich Karl von Savigny*, in GREAT JURISTS OF THE WORLD 561 (J. Macdowell & E. Manson eds. 1914).

[58] For a brief summary of the principal arguments, see Reimann, *The Historical School Against Codification*, *supra* note 5, at 97–98, and the literature cited *supra* note 12. For a subtle and preceptive analysis see J. RÜCKERT, *supra* note 57, at 161–93.

[59] Of course, the disagreement between Thibaut and Savigny had many more aspects. The contestants were cultural symbols for different ages, political agendas and methodological approaches. *See* J. RÜCKERT, *supra* note 57, at 160–61; F. WIEACKER, *supra* note 20, at 395–96. Thibaut as well as Feuerbach were highly critical of the historical school because Savigny excluded philosophical elements (in the sense of testing law through reason) from the realm of legal science. See *infra* note 160 and accompanying text. On the background of Savigny's turning away from idealist philosophy, see Jacobs, *Des Ursprung der geschichtlichen Rechtswissenschaft in der Abwendung Savignys von der idealistischen Philosophie*, 1989 Tijdschrift voor Rechtsgeschiedenis 241.

ulation about justice from the realm of legal science, and developed a jurisprudence strictly limited to positive law. His approach provided the long-sought answers to the basic methodological questions concerning positive legal science. Savigny became the true founder of modern German "Rechtswissenschaft."[60]

Savigny endorsed Hugo's idea of looking at the historical roots of the law as a means to discover the data of legal science. He agreed with Feuerbach and Thibaut on the goal of building a system. And he also considered both the empirical-historical and the systematic methods necessary. But he went beyond his colleagues' theories in all three respects. First, his concept of the historical nature of law was new and idiosyncratic. Second, his idea of the envisaged system was more sophisticated than that of Feuerbach and Thibaut. And finally, Savigny developed a concept for the combination of both the historical and the systematic aspects. These three dimensions of Savigny's thought are the hallmarks of the historical school he established. Each will be considered in turn.[61]

Savigny's view of law as a historical phenomenon that he expressly presented as a counterpart to the Wolffian school was complex and subtle.[62] Its major elements were that law was essentially custom originally emanating from the people, that in later stages of civilization it was administered by the learned jurists, and that it evolved organically over time.

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[60] At least one commentator disagrees and considers Hugo and Feuerbach the true founders of modern German legal science. Undeniably these scholars first laid the methodological foundations on which Savigny built, so that the originality of his ideas must not be overrated. H. STÜHLER, *supra* note 43. But Savigny went way beyond his predecessors. See *infra* notes 62–76 and accompanying text. Furthermore, in terms of influence on the course of 19th century German jurisprudence, Savigny is clearly the most important thinker.

[61] Savigny developed his concept of legal science in four major works. He laid the early foundations in his JURISTISCHE METHODENLEHRE of 1802–03. F.C.v. SAVIGNY, JURISTISCHE METHODENLEHRE (G. Wesenberg ed. 1951) (1802–03) [hereinafter SAVIGNY, METHODENLEHRE]. He developed his full-blown historical theory of law over a decade later in two essays–his reply to Thibaut, *Vom Beruf unserer Zeit für Gesetzgebung und Rechtswissenschaft* (1814) (*reprinted in* H. HATTENHAUER, THIBAUT UND SAVIGNY 95 (1973) [hereinafter SAVIGNY, BERUF]) (for an English translation, see A. HAYWARD, ON THE VOCATION OF OUR AGE FOR LEGISLATION AND JURISPRUDENCE (1831) [hereinafter VOCATION]), and his introductory essay for the journal he founded with Eichhorn, *Über den Zweck dieser Zeitschrift*, 1 ZEITSCHRIFT FÜR GESCHICHTLICHE RECHTSWISSENSCHAFT 1 (1815). He stated his theory again in the first volume of SYSTEM DES HEUTIGEN RÖMISCHEN RECHTS (1840) [hereinafter SAVIGNY, SYSTEM I]. During the 37 years between the METHODENLEHRE and the SYSTEM, Savigny's ideas changed to some extent, but his basic theory remained virtually the same.

[62] *See* STINTZING/LANDSBERG III.2 (1910), *supra* note 22, at 207.

For Savigny, law as custom was the result of "internal silently-operating powers" working within the people.[63] Like language, it reflected a people's indigenous character. It was therefore an expression of what Savigny later called the "Volksgeist," the spirit of the people.[64] It is easy to dismiss this idea as hopelessly nebulous. While it undeniably contains a romantic element,[65] Savigny's theory of the "Volksgeist" is not nearly as fanciful as it seems. "Volksgeist" had a very specific meaning. "Volk" in this context was neither a social nor an empirical, but instead a cultural concept. And "Geist" was not, like Hegel's "Weltgeist," a highly abstract intellectual entity, but the concrete, generally shared cultural characteristics of a people. "Volksgeist" then meant the character of a nation as a culture. The law was part of this character. The law's "essence is the life of man itself, viewed from one particular perspective." As such, Savigny postulated in a modern manner, it "has no independent existence."[66] Its essence is not philosophy or reason, but the expression of cultural characteristics. Therefore, it was a historical and not a metaphysical phenomenon.

Savigny claimed that in advanced stages of civilization, this customary law lay in the hands no longer of the common people but of the academic jurists. At first glance, the leadership of specialized experts appears to be inconsistent with the roots of the law in the spirit of the whole people. But the notion of the "Volksgeist" as the essence of a nation's culture requires further qualification. Savigny's concept of "culture" was not anthropological but intellec-

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[63] VOCATION, *supra* note 61, at 30 ("innere, stillwirkende Kräfte"); SAVIGNY, BERUF, *supra* note 61, at 105.

[64] SAVIGNY, SYSTEM I, *supra* note 61, at 14. The term "Volksgeist" was not Savigny's, but Puchta's invention. Savigny adopted it from Puchta. In his earlier works, he only used the term "common consciousness of the community," VOCATION, *supra* note 61, at 28 ("Bewußtsein des gesammten Volkes,"); SAVIGNY, BERUF, *supra* note 61, at 104. For further information about the origins of the "Volksgeistlehre" and for a critical evaluation, see Kantorowicz, *Volkgeist und Historische Rechtsschule* (1912), in H.U. KANTOROWICZ, RECHTSHISTORISCHE SCHRIFTEN 435 (Coing/Immel eds. 1970). Kantorowicz was generally critical of Savigny's historical theory of law. *See* Kantorowicz, *Was ist uns Savigny?*, *id.* at 397.

[65] The Germanists more fully developed this element than Savigny himself did. See *infra* note 122 and accompanying text for a similar point about the Germanists' attitude toward the historical method.

[66] "Das Recht nämlich hat kein Daseyn für sich, sein Wesen vielmehr ist das Leben der Menschen selbst, von einer besonderen Seite angesehen." SAVIGNY, BERUF, *supra* note 61, at 114–15 (here the translation into English is not Hayward's, which is awkward, but my own). Savigny concluded that legal science must look to reality in order to avoid falling into empty formalism. VOCATION, *supra* note 61, at 47; SAVIGNY, BERUF, *supra* note 61, at 115.

tual. "Culture" was not the totality of habits of a people, but the characteristics of its intellectual life. When this life grew more sophisticated over time, the ideas of intellectual elites in their respective fields shaped it more and more. In respect to law, therefore, the jurists represented the nation as a culture.[67]

Savigny saw the law not only as a customary but also as a historically developing phenomenon. It grew organically over time. Again, one must be careful to avoid misunderstanding. When Savigny considered the development of law, he did not have legal practice in mind, but the ideas of the jurists. The growth of law, the path of the "Volksgeist," was the organic development of its intellectual principles.

Savigny's historical view of law determined his notion of legal science. As law was historical by nature, legal science must become historical. This again has often been misunderstood. It did not mean historical studies for their own sake, because the goal was not a glorification, nor even a description, of the past. Instead, it meant a science of positive law aiming at the detection of its innermost principles. But because positive law was the result of historical development, these principles must be found in law's historical dimension. The study of the past was only a tool. Savigny envisaged not "Rechtsgeschichte" (legal history), but "geschichtliche Rechtswissenschaft" (historical legal science).[68]

Once the leading principles had been found, the historical work had been done. Legal science could turn away from the sources, leaving them to the archives and to antiquarian research.[69] The legal scientists could then begin to build a truly scientific system with these principles. Of course, the construction of this system did not mean that from this point on law could be treated as static. By understanding its history, the legal scientists had, so to speak, only caught up with its growth up to the present. The leading principles of the law were themselves organic and thus demanded further growth. But the jurists now fully understood these principles and could therefore develop the system of law in accordance with them rather than in violation of them.

Savigny's idea of such a system was more refined than the concepts of his predecessors.[70] For Savigny, the system was not "a

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[67] VOCATION, *supra* note 61, at 28–30; SAVIGNY, BERUF, *supra* note 61, at 104–05.

[68] Hence the title of his journal as *Zeitschrift für geschichtliche Rechtswissenschaft* (founded 1815).

[69] SAVIGNY, BERUF, *supra* note 61, at 176.

[70] See *infra* notes 162–70 and accompanying text. Savigny's terminology was somewhat

mere framework, a convenient aggregate of the material" which would be "only a facilitation of memory."[71] Instead, he saw "the essence of the systematic method in the recognition and demonstration of the internal coherence or relationship, through which the individual legal concepts and rules are united into one great whole."[72] After Kant, only such a system could be recognized as scientific because only it could reflect the internal structure of legal science itself. Methodologically, that meant that the system would "define the relationship of the individual norms to one another, to determine what must be connected and what kept separate. For example, property rights and obligations must be kept separate."[73] Furthermore, "in every individual part of the system the relationship between rule and exception must be exactly demonstrated."[74]

Finally, Savigny believed that legal science was possible only through a combination of both the historical and the systematic method. The historical studies provided the material (the leading principles revealed over time) to which the system then gave the proper scientific form. And, more importantly, the two methods actually pursued the same goal, albeit in different dimensions.

> The given variety of law . . . is twofold, namely in part contemporaneous, and in part successive, which necessarily requires a twofold scientific treatment. The reduction of the contemporaneous variety to its inherent unity is the systematic method . . . . The treatment of the successive variety, however, is the truly historical method.[75]

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confusing in this area. Occasionally, Savigny used the term "philosophisch" (philosophical) instead of "systematisch" (systematic). *See, e.g.*, SAVIGNY, METHODENLEHRE, *supra* note 61, at 15. "Philosophie" in this context was the systematic method, not (natural law) metaphysics of pure (Kantian) reason.

[71] SAVIGNY, METHODENLEHRE, *supra* note 61, at 16. "[E]in bloßes Fachwerk, ein bequemes Aggregat der Materien," "bloße Erleichterung des Gedächtnisses." *Id.*

[72] SAVIGNY, SYSTEM I, *supra* note 61, at XXXVI. "[D]as Wesen der systematischen Methode ist die Erkenntnis und Darstellung des inneren Zusammenhangs oder der Verwandtschaft, wodurch die einzelnen Rechtsbegriffe und Rechtsregeln zu einer großen Einheit verbunden werden."

[73] SAVIGNY, METHODENLEHRE, *supra* note 61, at 39. "Das Verhältnis der einzelnen Rechtssätze untereinander bestimmt, was getrennt und verbunden werden muss. So müssen z. B. Real und Obligationenrechte getrennt werden." *Id.*

[74] *Id.* "In jedem einzelnen Teil des Systems muß genau das Verhältnis zwischen Regel und Ausnahme dargestellt werden." *Id.*

[75] Savigny, *Rezension von Gönner, Über Gesetzgebung und Rechtswissenschaft in unserer Zeit*, in 1 ZEITSCHRIFT FÜR GESCHICHTLICHE RECHTSWISSENSCHAFT 395 (1815). "Dieses gegebene Mannichfaltige . . . aber ist selbst zwiefach, nämlich theils ein gleichzeitiges, theils ein successives, woraus nothwendig auch eine zwiefache wissenschaftliche Behandlung entstehen muss. Das Zurückführen des gleichzeitig Mannichfaltigen auf die ihm innewohnende Einheit ist das

Thus it was the very combination of both methods that made Savigny's concept of jurisprudence "truly scientific."[76] Only both methods together could achieve the goal of science—the detection of unity and order in apparent variety and chaos.

At the beginning of the nineteenth century, however, the state of the law was a far cry from such unity and order. Confusion abounded with respect to the meaning and authority of the sources, the historical development of doctrine, the essence of legal concepts, and their relationship with each other. The work of establishing a "Rechtswissenschaft," through first historical, then systematic studies had yet to be done. Because he was both a theorist of legal science and the foremost legal scholar of his age, Savigny himself took the lead in doing this work.

Savigny's reputation as the founder of modern German legal science rests in large part on his accomplishments in actually carrying out his proposals. In 1803, at the age of 24, the young professor at the University of Marburg published "Das Recht des Besitzes."[77] Using a limited topic, possession, he demonstrated how historical research could isolate the leading ideas from the original records. Through meticulous analysis of the Roman law sources, he showed that the classical Roman law of possession rested on a few clear principles that were only later confused by the medieval scholars. Putting the medieval aberrations aside and using the principles he found in the classical period, Savigny developed a concept of possession that easily surpassed prior definitions in sophistication and clarity. The book at once established Savigny as one of the leading Roman law scholars and was admired by jurists all over the world.

When Savigny, in later years, undertook a comprehensive reworking of the law, he successively employed the two methods he had advocated in his programmatic works. He first proceeded to study the historical development of law. Devoting two decades of his life to this project, he produced the six volumes of his "Geschichte des römischen Rechts im Mittelalter."[78] Despite many inaccuracies, this work has continued to set the standard in its field. After the completion of the historical task, Savigny began to build the system of law he envisaged. While his "System des heutigen

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systematische Verfahren . . . Die Behandlung des successiv Mannichfaltigen dagegen ist das eigentlich historische Verfahren." *Id.*

[76] *Id.* at 396. Das Verfahren als "ächt wissenschaftlich[es]." *Id.*

[77] F.C.v. SAVIGNY, DAS RECHT DES BESITZES (1803).

[78] F.C.v. SAVIGNY, GESCHICHTE DES RÖMISCHEN RECHTS IM MITTELALTER (6 vols. 1815–1831).

römischen Rechts" remained incomplete,[79] it was a powerful demonstration of his synthetic abilities and soon enjoyed a worldwide reputation. It laid the foundation for later systematic treatises in which nineteenth century German "Rechtswissenschaft" would culminate.

Impressive as Savigny's practical demonstration of his new legal science was, it was also severely limited. Savigny considered only a narrow range of law, and he considered it from a narrow perspective. These limitations became highly important for the further development of German legal science.

Savigny circumscribed the material that he addressed in several ways. He focused almost exclusively on private law—property rights, domestic relations, contracts, delicts, and inheritance—while he excluded constitutional, administrative and other public law as a concern of politics, not of legal science.[80] Moreover, Savigny studied only the Roman sources. While he expressly claimed that his scientific method could, and indeed should, also be applied to the Germanic elements of the law, he never paid anything but lipservice to them and thus put German legal science on a Romanist track. Savigny limited this Roman private law track further because he limited his attention mostly to the texts of the learned jurists and the legal concepts developed by them. His history of Roman law was mainly an intellectual history of Roman law scholarship, and his system of Roman law was built on ideas, not rules in practice.

Savigny considered even this limited material from a narrow perspective that resulted from a narrow, formalist view of the function of law. Law served only to limit private spheres of freedom in such a way that these spheres could coexist in a society. Its concern was not to find the true idea of justice, or to be fair to the parties under the particular circumstances of a case. It drew only the "invisible line"[81] at which one individual's freedom had to end because another one's began. In the historical material, Savigny therefore was looking only for the abstract principles that governed the relationships and dealings among private individuals.

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[79] F.C.v. SAVIGNY, SYSTEM DES HEUTIGEN RÖMISCHEN RECHTS, (8 vols. 1840–1849). These first 8 volumes contained primarily the general doctrines. Of the more specific topics, Savigny only managed to treat the law of obligations in the two volumes of DAS OBLIGATIONENRECHT (1851–1853).

[80] Savigny made a conscious choice to exclude constitutional law from legal science as early as in the METHODENLEHRE, *supra* note 61, at 12. Constitutional law concerned the very existence of the state while legal science dealt with its (lawmaking) activity.

[81] SAVIGNY, SYSTEM I, *supra* note 61, at 331. "[U]nsichtbare Gränze." *Id.*

These two limitations were directly connected. The writings of the classical Roman jurists presented a law that was predominantly private, essentially individualist, and rationally formal. It would be hard to determine whether Savigny focused on the Roman sources because they matched his preconceived view of the function of law, or whether instead his view was a result of dealing with the Roman material. However this may be, Savigny's ideas and the Roman jurists' approach were highly congenial.

As a consequence of these limitations, and despite all claims to the contrary, Savigny's legal science was narrow in its focus and abstract in its character. For the coming generations, the theory of Savigny's "Rechtswissenschaft" provided a powerful model, the influence of which no nineteenth century German jurist escaped. But its limitations also became the source of criticism and conflict.

II. The Diversity of Legal Science

All German legal thinkers after Savigny built on his work, but different scholars developed different aspects of Savigny's ideas in different directions. Legal scholarship split mainly along the two lines that were foreshadowed in Savigny's approach. One division concerned the method used and divided the jurists into systematizers and historians. The other split concerned the material explored, and grouped jurists into Romanists and Germanists.

As a result, four major approaches can be distinguished. The systematic method was most rigorously applied to the Roman law material and led to the construction of highly complex systems of private law. Where this systematic approach was used to study the German sources, a system of German law was built as a counterpart to its Romanist competitor. The historical method was, again, applied to the Roman element of the civil law tradition and generated impressive scholarship on Roman legal history. And it was also used to explore the Teutonic and Germanic past and to write a history of German law.[82]

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[82] This picture of nineteenth century German jurisprudence is not complete. It omits several minor branches because of their inferior importance. But it excludes also the Hegelian school, which had a strong impact on constitutional theory and law. But despite this importance, the Hegelians exercised no significant influence on the concept of legal science itself because it was by and large limited to private law. See *supra* note 80 and accompanying text. Thus, 19th century Anglo-American scholars paid little attention to the Hegelian school.

Despite many similarities between their approaches (postulate of a science of positive law, historical and idealistic bent, belief in organic concepts), most Hegelians were ardent opponents of the historical school. Hegel himself blamed Savigny for denying that his era

These four main approaches are, however, only Weberian ideal types. In reality, the divisions were not entirely strict. While the split into Romanists and Germanists was mostly clear, systematic and historical methods were often combined, very much in Savigny's spirit. Thus, the characterization of leading scholars as representatives of certain branches is frequently a question of their emphasis on, rather than their exclusive use of, one method or another.

A. *The Systematic Dimension: The Roman and the German Law*

Savigny's most immediate legacy was the perfection of the systematic treatment of Roman law. This approach became the most important form of German legal scholarship at the time. Dominating in Germany and widely influential abroad, the "Pandektenwissenschaft," as it was later called, was the branch most frequently identified with German legal science in general. The story begins with the conceptual jurists' refinement of the systematic method and ends with its practical application to the Roman law material by the Pandectists. This combination of method and material generated the great systematic treatises of the second half of the century, and finally the codification of German private law.

Savigny had demonstrated the systematic approach in his *System of Modern Roman Law*,[83] but the work had remained incomplete both in coverage and in the execution of the systematic program. It still rested more on rules than on underlying principles, and it did not yet present a perfect legal order. Savigny's method required refinement if the ultimate system was going to be built. This system had to consist of the basic concepts of law and show their overall organic coherence.

To achieve this goal, Savigny's Romanist disciples went beyond his original historical theory of law and turned his systematic approach into "Begriffsjurisprudenz," or conceptual jurisprudence. They undertook to isolate the basic concepts in their purity, organize them logically, and create a system that was gapless and self-reproductive. The two most prominent conceptual jurists were

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had the ability for codification. G.F.W. HEGEL, PHILOSOPHY OF RIGHT (1821), 136 (Knox trans. 1942). The conflict between Hegel's disciple Eduard Gans, the first to attempt to write a universal history of law, *see* E. GANS, ERBRECHT IN WELTGESCHICHTLICHER ENTWICKLUNG (4 vols. 1829–35), and Savigny was so bitter that Savigny practically retired from the faculty of the University of Berlin when Gans joined it. For a brief overview of the Hegelian school, see F. WIEACKER, *supra* note 20, at 413–15. *See also* Schild, *Savigny und Hegel*, in 18–19 SAVIGNY Y LA CIENCIA JURIDICA DEL SIGNO XIX 271 (1978–79).

[83] See *supra* note 79.

Georg Friedrich Puchta and Rudolf von Jhering. Each represents a different version of this approach.

Puchta, Savigny's immediate successor on the chair for Roman law at the University of Berlin,[84] expressly followed his predecessor in the assumption that the historical and the systematic components were equally essential for legal science.[85] But in his work, he neglected historical studies while he drove the systematic method to new extremes.[86] For Puchta, the "System" had a higher meaning than for Savigny. It was not only a reflection of "the internal coherence which connects the parts of the law"[87] but instead the very essence of law itself: "the law itself is a system."[88] Puchta postulated, and set out to construct in his works, a comprehensive order of the concepts of positive law that organized them according to their internal relationship and the hierarchy of their generality. From the most general concepts, he deduced increasingly particular ones and in this manner created a pyramid of concepts in which all parts were logically interconnected.[89]

A perhaps even more important step beyond Savigny was the assumption that the system itself was capable of generating new law. Its logic was not only organizational but also productive. The basis for this claim was Puchta's refinement of Savigny's "Volksgeist" theory. Puchta agreed that the law emanated from the spirit of the people, and that the jurists were its keepers in advanced times. But he distinguished three kinds of law stemming from different sources: customary law emanating directly from the people (Volksrecht), legislative law coming from the lawgiver (Gesetzesrecht), and the law of the jurists created by legal science (Juristenrecht).[90] Puchta went beyond Savigny when he claimed that legislation and legal science were not only advanced expressions of originally customary law, but sources of law in their own right. "Thus science is not only a receptive activity . . . but also a productive one. It is itself

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[84] On Puchta, see J. BOHNERT, ÜBER DIE RECHTSLEHRE GEORG FRIEDRICH PUCHTAS (1975); KLEINHEYER/SCHRÖDER, *supra* note 22, at 205–08; STINTZING/LANDSBERG III.2 (1910), *supra* note 22, at 439–61; F. WIEACKER, *supra* note 20, at 399–402.

[85] G.F. PUCHTA, CURSUS DER INSTITUTIONEN 99–100 (2d ed. 1845).

[86] *See* W. WILHELM, ZUR JURISTISCHEN METHODENLEHRE IM 19. JAHRHUNDERT 76–80 (1958).

[87] Des "inneren Zusammenhangs, welcher die Theile des Rechts verbindet," PUCHTA, *supra* note 85, at 100.

[88] Weil "das Recht selbst ein System ist." *Id.*

[89] This method and system was similar in some respects to the law of reason. See *infra* note 165 and accompanying text.

[90] G.F. PUCHTA, DAS GEWOHNHEITSRECHT (2 vols., 1828–37).

a source of law, besides customary law and legislative law there is scientific law."[91] At advanced stages of development customary law became less important, while legislation and, most of all, legal science became more important.

Puchta considered his era ready for the dominance of legal science. As a result, the jurists must not only systematize the already existing legal material, but create the new scientific law. This creation had to take place in the system. New rules could be deduced from given principles, and even new concepts could be created through the combination or division of existing ones. All scientific law originated from within the system's logic.

Puchta has frequently been blamed for the abstractness of his approach. It is undeniable that his exaltation of the conceptual system entailed the risk of losing sight of social and political realities. But his jurisprudence was not the result of a complete lack of practical sense or of blindness to the realities of social and political life. As some scholars have pointed out, Puchta demonstrated awareness for practical solutions as well as a keen perception of the political forces around him.[92] But even these scholars have failed to consider a favorable interpretation of his belief in the power of conceptual logic. One can see this belief as the conviction that the concepts and their systematic coherence reflect basic structures of reality. In their abstract form, as a meta-language, they allow a concentrated discourse through which new structures, otherwise not visible, come to light.

Twenty years after Puchta, conceptual jurisprudence reached its high-water mark in the theories of Rudolf von Jhering.[93] Jher-

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[91] "So ist die Wissenschaft nicht bloss eine receptive Thätigkeit (Interpretation der Gesetze und des Gewohnheitsrechts), sondern auch eine productive. Sie ist selbst eine Rechtsquelle, neben das Gewohnheitsheitsrecht und das gesetzliche Recht tritt ein Recht der Wissenschaft." G.F. PUCHTA, VORLESUNGEN ÜBER DAS HEUTIGE RÖMISCHE RECHT 39 (2d ed. 1849).

[92] R. OGOREK, RICHTERKÖNIG ODER SUBSUMPTIONSAUTOMAT 198–211 (1986); F. WIEACKER, *supra* note 20, at 400.

[93] The following paragraphs consider only Jhering's early jurisprudence. In the 1860s, Jhering's legal thought underwent a radical change as he turned away from conceptual jurisprudence and Pandektenwissenschaft and embraced a new, sociological concept of law. *See* R. VON JHERING, DER KAMPF UMS RECHT (THE STRUGGLE FOR LAW) (1872); R. VON JHERING, DER ZWECK IM RECHT (LAW AS A MEANS TO AN END) (2 vols. 1877–83). This later Jhering anticipated much of legal realism. *See* R. VON JHERING, 1 VOM GEIST DES RÖMISCHEN RECHTS AUF DEN VERSCHIEDENEN STUFEN SEINER ENTWICKLUNG (9th ed. 1907) 31–35, [hereinafter JHERING, GEIST I]. As explained in the introduction, this article does not address these later developments.

On Jhering, see KLEINHEYER/SCHRÖDER, *supra* note 22, at 132–37; STINTZING/LANDSBERG

ing's approach went beyond Puchta's ideas mainly in two ways. Jhering departed from Puchta (and from Savigny) when he demanded the liberation of legal science from the substance of Roman law, and when he gave conceptual jurisprudence a peculiarly naturalist form.

After decades of research in classical Roman law, even the Romanists began to tire of the Digest by the middle of the century. There was a growing consensus that its substance had been sufficiently absorbed. The close attention to the classical jurists' works that Savigny had demanded seemed no longer necessary. Instead, Roman law could now be used more freely and could even be disregarded where modern needs required modern solutions.[94] Jhering admonished his contemporaries to face the fact that "the times of Ulpian and Paulus are gone forever and will not return despite all efforts. To wish to retrieve them one would have to forget that every age should be an original, and not the copy of another."[95] As a turf for intellectual practice, however, Jhering held the classical Roman law in the highest esteem. Thus, the goal of his "Spirit of the Roman Law" was to distill the essence of the classical jurists' methods in order to use them for "general science of the nature and manifestations of law as such."[96] Jhering intended to absorb the methodological essence of Roman law but to end the slavish adherence to its substance.[97]

While the jurists gradually escaped the spell of the classical Roman law, they came more and more under the influence of the natural sciences, which produced impressive results and gained intellectual prestige around the middle of the century. Ideas from physics, chemistry and biology became attractive to the jurists, who sought ways to master the legal universe as the natural scientists were mastering the natural universe. Jhering's version of conceptual jurisprudence attests to this new trend. When he named his approach the "natural-historical method," he indicated that he considered it a new, "natural" version of historical legal science.

III.2 (1910), *supra* note 22, at 788–825; F. WIEACKER, *supra* note 20, at 450–53; E. WOLF, *supra* note 47, at 622–68.

[94] *See* STINTZING/LANDSBERG III.3 (1910), *supra* note 22, at 743–50

[95] "[D]ie Zeiten von Ulpian und Paulus sind für immer vorüber und werden trotz aller Bemühungen nicht wiederkehren. Um sie zurückzuwünschen, muss man vergessen, daß jede Zeit Original und nicht Kopie einer andern sein soll." JHERING, GEIST I, *supra* note 93, at 47.

[96] "[E]ine allgemeine Lehre von der Natur und Erscheinungsform des Rechts überhaupt." *Id.* at 23.

[97] E. WOLF, *supra* note 47, at 633–36.

The "natural-historical method" consisted of three steps. First, "analysis" broke down the complexity of legal rules and relationships into individual elements. It established a list of the building blocks of the law, a "legal alphabet." Second, "concentration" distilled the fundamental concepts from the individual rules, for example the concept of contract from the rules governing contractual relationships. Third, "construction" built a system by organizing the elements and concepts according to their internal relationship. In this system, the law was elevated to a "higher state of aggregation."[98] Its essence

> does not (only) lie in the fact that the law cannot be understood without its systematic coherence, because this is the case (also) with any (other) object of knowledge . . . . In law, the distinctive characteristic of the systematic task is that the particular is not only, as in any other science, put in its right place, but that this formal process has a substantive effect on the subject matter, that this procedure causes an internal transubstantiation of the maxims of law. The maxims of law take on an elevated condition, they strip off their quality as commands and prohibitions and form themselves into the elements and qualities of legal institutions . . . . A layman . . . would hardly deem it possible . . . how in the legal concepts, classifications, etc., in short, in the dogmatic logic, there can be a practical meaning more intensive than in the maxims of law. This logic of the law is, so to speak, the blossom, the praecipitat of the maxims of law; in one single, correctly stated concept there lies perhaps the substantive contents of ten prior maxims of law.[99]

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[98] R. VON JHERING, 2 GEIST DES RÖMISCHEN RECHTS, 361 (7th ed. 1907). For a more complete description of Jhering's method, see W. WILHELM, ZUR JURISTISCHEN METHODENLEHRE IM 19. JAHRHUNDERT 112–16 (1958).

[99] Seine Bedeutung "besteht nicht darin, daß das Recht ohne seinen systematischen Zusammenhang nicht verstanden werden kann, denn das ist bei jedem Gegenstande der Erkenntnis der Fall . . . Bei dem Rechte besteht nun das Unterscheidende der systematischen Thätigkeit darin, daß dadurch nicht bloß wie bei jeder andern Wissenschaft das einzelne an seine richtige Stelle gebracht wird, sondern daß dieser formale Prozeß eine materielle Rückwirkung auf den Stoff ausübt, daß durch diese Procedur mit den Rechtssätzen eine innere Umwandlung vor sich geht. Die Rechtssätze treten gewissermaßen in einen höhern Aggregatzustand, sie streifen ihre Form als Gebote und Verbote ab und gestalten sich zu Elementen und Qualitäten der Rechtsinstitute . . . . Ein Laie . . . würde es kaum für möglich halten . . . wie den Rechtsbegriffen, Eintheilungen u.s.w. kurz der dogmatischen Logik eine intensivere praktische Bedeutung innewohnen kann als den Rechtssätzen. Diese Logik des Rechts ist gewissermassen die Blüthe, das Präcipitat der Rechtssätze; in einen einzigen richtig gefaßten Begriff ist vielleicht der praktische Inhalt von zehn früheren Rechtssätzen aufgenommen." JHERING, GEIST I, *supra* note 93, at 36–37.

Jurisprudence thus went beyond mere interpretation and organization of the given material and turned into a "free art and science; into an art which molds and forms the material artfully, and which breathes life into it, into a science which can be called, despite the positive character of its object, a natural science in the realm of the intellect."[100]

The "Begriffsjurisprudenz," in Puchta's original or in Jhering's later naturalist version, reduced law to a game of induction and deduction. Scientific truth and thus the authority of a scientific legal rule did not depend on its historical documentation, practical sense, or social utility but only on its logical connection with the totality of the overall system. The law was no longer a product of history, but a creature of logic.

This conceptual jurisprudence pervaded German legal thought in the middle decades of the century. Its predominance attested to the waning influence of Savigny's original conception of the historical school. To be sure, many of Savigny's fundamental tenets—the focus on positive law, renewed efforts to study the past, and the concept of a system as a reflection of the inherent structure of the law—had by now been absorbed into the mainstream of jurisprudence. In that sense, all German legal science was part of the historical school. The majority of the Romanists, however, no longer pursued the unity of historical and systematic method. Puchta's and Jhering's work caused a split of the Romanist scholars into the many who, under their leadership, pursued modern dogmatic studies but abandoned all serious historical inquiry, and the few who became legal historians without much interest in the present.[101] It is frequently overlooked that the Romanists thereby abandoned Savigny's main ideal—the processing of the actual historical material into an organic system that presented the unity of history and order in legal science.

Several factors caused the decline in adherence to Savigny's original program towards the middle of the century. By the 1840s, much historical work had already been done, as Savigny himself indicated,[102] while the promise of the systematic method remained strong. The powers of the first generation of the historical school,

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[100] "[F]reie[n] Kunst und Wissenschaft; zu einer Kunst, die den Stoff künstlerisch bildet, gestaltet, ihm Leben einhaucht, und zu einer Wissenschaft, die trotz des Positiven in ihrem Gegenstande sich als Naturwissenschaft auf geistigem Gebiet bezeichnen läßt." R. VON JHERING, 2 GEIST DES RÖMISCHEN RECHTS 361 (7th ed. 1907).

[101] *See* STINTZING/LANDSBERG III.2 (1910), *supra* note 22, at 459–60.

[102] SAVIGNY, SYSTEM I, *supra* note 61, at XIII, XVI.

including Savigny, were waning. And the age of romanticism, to which Savigny's historical bent and his idea of the "Volksgeist" had appealed so much, came to a close. The 1848 revolution, unsuccessful as it was in many respects, demanded political action and swept away much of the contemplative, classicist attitude on which Savigny's theory rested.[103] This change in climate manifested itself in the Germanist legal scholars' attack on the dominance of Roman law and in their call for legal and political reform.[104] Finally, the growing power of the bourgeoisie, a result of increasing commerce and industrialization, made it less acceptable to rely only on the slow organic development of the law. There was an immediate need for dynamic reform, and the historical theory of law, strictly excluding the search for legal innovation from the realm of legal science, began to look out of date.

In the early 1850s, there was a growing consensus among the Romanists that it was time for legal science to leave the past behind and to build a modern, practically useful system of law.[105] Conceptual jurisprudence provided the method. To be sure, the more practically minded jurists probably looked upon Puchta's and Jhering's veneration of abstract logic with suspicion. But even they must have been tempted by the great, and indeed very practical, promise of the conceptual method. If all the basic elements of law could be distilled from the given rules, it was possible to "economize the material" of the law.[106] Its hitherto confusing mass under the weight of which all lawyers groaned could be reduced to its fundamental principles. The law would be vastly more intelligible and manageable. Furthermore, as a logical system containing all fundamental principles, legal science could achieve gaplessness and completeness. This would make legal reasoning comfortably predictable and independent from considerations from outside of the system.[107] And finally, the conceptual method could even create new law out of the system itself.[108]

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[103] Savigny, who had given up his chair at the University of Berlin upon his appointment as Minister of Justice by the Prussian king in 1842 and who in 1847 had become the President of the Prussian Council of Ministers, resigned with his fellow ministers in the course of the 1848 revolution.

[104] See *infra* note 131 and accompanying text.

[105] *See* STINTZING/LANDSBERG III.2 (1910), *supra* note 22, at 743–50.

[106] "[Mit dem] Material zu ökonomisiren." R. VON JHERING, 2 GEIST DES RÖMISCHEN RECHTS 322 (7th ed. 1907); *see also* JHERING, GEIST I, *supra* note 93, at 41.

[107] See *infra* note 207 and accompanying text.

[108] See *infra* notes 169–72 and accompanying text.

The fulfillment of these promises of economy, gaplessness, and self-reproduction was the agenda of legal science of the second half of the nineteenth century. By applying Puchta's and Jhering's conceptual method[109] to the "Pandects," i.e., that part of Justinian's Digest that contained most of the classical Roman law, the Romanists created the "Pandektenwissenschaft." From the Pandects they distilled the leading concepts—person, property, obligation, contract, delict, succession, etc.—and used them to build a modern and practically useful system of law. In his doctrinal work, Jhering was himself one of the leading representatives of this school and developed some of the most important doctrines of modern civil law.[110]

The harvest of the Pandektenwissenschaft was rich. Its great systems of private law were developed in teaching and writing. Adolf von Vangerow[111] artfully displayed the Pandectist system in his lectures at the University of Heidelberg in the 1860s. Hundreds of students, many from abroad, listened to von Vangerow whose fame as a teacher went beyond Germany. His *Treatise on the Pandects* embodied his teaching and was one of the leading authorities of its time.[112]

It was soon eclipsed, however, by Bernhard Windscheid's *Treatise on the Law of the Pandects*.[113] Windscheid, Vangerow's successor in Heidelberg and a lifelong friend of Jhering, was the most important and most widely known Pandectist.[114] His work was widely recognized as the ultimate achievement of the Pandektenwissenschaft and rightly praised for its combination of clarity of leading concepts with a sense for balanced solutions. Windscheid presented the private law of his time in all its complexity, and yet with great clarity as an internally logical order. Every concept and every rule had its place in a carefully designed, strictly hierarchical and gapless system.[115] More than any other work, it seemed to prove that con-

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[109] Albeit mostly without its naturalist terminology.

[110] The most impressive demonstration of Jhering's ability to extricate new doctrines from the classical Roman law was the development of the concept of the *culpa in contrahendo*, i.e. the principle that even before the conclusion of a contract the contracting parties owe to each other a duty of care. *See* R. VON JHERING, *Culpa in Contrahendo*, 4 JAHRBÜCHER FÜR DIE DOGMATIK DES HEUTIGEN RÖMISCHEN UND DEUTSCHEN PRIVATRECHTS 1 (1861).

[111] On Vangerow see KLEINHEYER/SCHRÖDER, *supra* note 22, at 354.

[112] K. A. VON VANGEROW, LEHRBUCH DER PANDEKTEN (3 vols. 1863–69).

[113] B. WINDSCHEID, LEHRBUCH DES PANDEKTENRECHTS (3 vols. 1862–70).

[114] On Windscheid see KLEINHEYER/SCHRÖDER, *supra* note 22, at 301–04; STINTZING/LANDSBERG III.2 (1910), *supra* note 22, at 854–65; E. WOLF, *supra* note 47, at 591–621.

[115] See the praise of Windscheid's work in STINTZING/LANDSBERG III.2 (1910), *supra* note 22, at 859–60.

ceptual jurisprudence made it possible to master the mass of the legal material through a scientific system. It unified and streamlined the otherwise diverse and chaotic positive law. Because of these qualities, Windscheid's treatise almost enjoyed the authority of a code in the late nineteenth century, not only among scholars but also in the courts. Like Vangerow's lectures, Windscheid's Lehrbuch was famous beyond German borders.

But the Pandektenwissenschaft also suffered from serious weaknesses. The influence of Puchta's and Jhering's conceptual method made it highly artificial. The concepts on which it rested were abstract entities, distilled from actual legal rules, but also detached from reality. From these abstract concepts it logically deduced legal rules to arrive at a system that was presented as the incarnation of timeless legal truth. But in the beauty of its logic, it paid scant attention to the realities of late nineteenth century German society. It knew only of contract, delict and property, but nothing of labor conflict, railroad accidents, and unsanitary housing conditions.[116]

The last fruit of the systematic Romanist legal science was the German Civil Code, drafted from 1874 to 1896, and enacted in 1900.[117] Windscheid himself was a member of the first drafting commission. To be sure, the authors drew not only on the work of the Romanists but also on indigenous German law. But in all other respects the Code was a child of the Pandektenwissenschaft. Its structure was that of the great Pandectist treatises. So much of the material used stemmed from Windscheid's Lehrbuch that the Code has frequently been called "a Windscheid Pandect treatise in statutory form."[118] And the method on which it rested, a system of leading concepts interconnected through logical operations, was the hallmark of conceptualism. As a result, it embodied the ideals of the Pandektenwissenschaft in its conceptual precision, systematic coherence, and logical consistency, but it also demonstrated the flaws of abstractness and disregard of the needs of a modern industrialized society.[119]

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[116] For an American critique of Windscheid's work, see Smith, *Four German Jurists*, 12 POL. SCI. Q. 59 (1897).

[117] *See* F. WIEACKER, *supra* note 20, at 468–86. For a contemporary account in English, see Freund, *The Proposed German Civil Code*, 24 AM. L.R. 237 (1890), and Freund, *The New German Civil Code*, 13 HARV. L. REV. 627 (1899).

[118] "[E]in in Gesetzesparagraphen gebrachtes Windscheidsches Pandektenlehrbuch." KLEINHEYER/SCHRÖDER, *supra* note 22, at 301.

[119] For the background of the Code and its enactment, see M. JOHN, POLITICS AND THE LAW IN LATE 19TH CENTURY GERMANY–THE ORIGINS OF THE CIVIL CODE (1989).

It was in part for these reasons that the other major branch of the historical school—the Germanists—considered the Roman law, which in their opinion invited such an approach, an inappropriate foundation for modern jurisprudence. Furthermore, Roman law was, despite the reception of much of its substance and methods during the Renaissance, the product of an alien and ancient culture. The needs of the present, however, demanded a modern system of law for Germany. From that perspective it made more sense to base such a system on indigenous German law that had its own, independent roots in the middle ages. It was to this tradition that the Germanists, the main competitors of the Pandektenwissenschaft, turned.[120]

Studies in German law had been part of the historical school from its very beginning. For the first two decades of the century, Romanists and Germanists had coexisted peacefully and considered themselves both adherents of the same historical jurisprudence. The "Zeitschrift für geschichtliche Rechtswissenschaft" as its organ was founded in 1816 by both Savigny and Karl Friedrich Eichhorn, the most prominent scholar of German law at the time.[121] A deep personal friendship connected Savigny with Jakob Grimm, another leading Germanist. Minor differences aside, the Germanists subscribed to Savigny's original idea of a new, historical as well as systematic, science of positive law. The only major difference concerned the material they studied.

But this harmony did not last. At the root of the conflict to come lay one fundamental disagreement. Most Germanists took the idea of law as custom of the people seriously in a traditional, popular sense, while Savigny and his disciples understood it in their own peculiar, elitist way.[122] This caused friction in several respects. The Germanists believed that if the law was an expression of the Volksgeist, the German, rather than Roman, sources should of course be the main object of German legal science. Thus, Savigny's continued exaltation of Roman law alienated many Germanists. Moreover, if law was the custom of the people, it should, at least to some extent, be administered by the people. Many Germanists therefore entertained romantic notions of lay justice and were hostile to Savigny's

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[120] For a more complete description of the Germanist branch of the historical school, see STINTZING/LANDSBERG III. 2 (1910), *supra* note 22, at 495–560.

[121] On Eichhorn see KLEINHEYER/SCHRÖDER, *supra* note 22, at 72–75; STINTZING/LANDSBERG III.2 (1910), *supra* note 22, at 253–77; F. WIEACKER, *supra* note 20, at 403–04.

[122] See *supra* note 67 and accompanying text.

idea of the rulership of academically trained, scientific jurists. And finally as custom, law would indeed evolve continuously. Consequently, the Germanists as a group had more interest in the historical method than the Romanists, and correspondingly less interest in building a system.[123] As long as Savigny's towering authority held the historical school together, these tensions were latent. Open conflict broke out, however, when Puchta abandoned all historical efforts in favor of a system of exclusively Roman law, and particularly when he argued that the law of the people counted little today while the law of the jurists should dominate.

The conflict was essentially political. To some extent, it was the clash of populist with elitist views of law. This clash became visible in Georg Beseler's attack on Puchta.[124] In his book *People's Law and Jurists' Law*,[125] Beseler denied the jurists' claim to leadership and defended the right of lay people to develop their German law in the traditional ways. Roman jurisprudence, full of intricacies that no layperson could hope to penetrate, had estranged the law from the people, and its reception was a "national disaster."[126] Julius Hermann von Kirchmann launched similar attacks in his famous speech *On the Worthlessness of Jurisprudence as a Science* in 1848.[127] Kirchmann argued that legal science was not only methodologically pointless,[128] but actually highly harmful because its abstractness destroyed the feeling for justice.[129] He expressed the widespread anti-elitist sentiments poignantly: "The nation is tired of the scientific jurists."[130]

The Germanists also openly denounced Roman jurisprudence as a tool of political oppression. In their national-romantic mood, they saw Justinian's law as the regime of a despotic ruler, adopted in Germany during the rise of absolutism by the princes and by the learned jurists as their officials. This law had helped to destroy the

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[123] *Cf. infra* note 134 and accompanying text.

[124] On Beseler see B.R. KERN, GEORG BESELER, LEBEN UND WERK (1982); KLEINHEYER/SCHRÖDER, *supra* note 22, at 29–32; STINTZING/LANDSBERG III.2 (1910), *supra* note 22, at 507–19; F. WIEACKER, *supra* note 20 at 408–10.

[125] G. BESELER, VOLKSRECHT UND JURISTENRECHT (1843).

[126] "Nationalunglück." *Id.* at 42.

[127] J. H. VON KIRCHMANN, DIE WERTHLOSIGKEIT DER JURISPRUDENZ ALS WISSENSCHAFT (Meyer-Tscheppe ed. 1988) (1848). Von Kirchmann is generally not considered a "Germanist" himself, but the views expressed in his pamphlet are closely related to those of the more romantic Germanists.

[128] See *infra* notes 173–74 and accompanying text.

[129] J. VON KIRCHMANN, *supra* note 127, at 39–41.

[130] "Die Nation ist der wissenschaftlichen Juristen überdrüssig." *Id.* at 45.

traditional rights and freedoms that the German people had enjoyed during the middle ages.[131] The Germanists' research in medieval law was an attempt to revive this tradition. It is thus not surprising that the 1848 revolution saw the Romanists and the Germanists on opposite sides—Savigny and his school closely allied with the Prussian crown, Beseler and the Germanists among the fighters for a constitution and basic rights.

Jurisprudentially, in contrast, many Germanists continued to share the Romanists' methods and goals. They saw nothing wrong with legal science as such. They only wanted to apply it to the German sources. A scientific treatment of these sources should prove that German law contained its own fundamental principles and logical order. Thus, German law was not only politically preferable but also intellectually equal to the Roman law. Already Eichhorn, the co-founder of the historical school, had worked in this spirit earlier in the century. In the 1840s, when Savigny wrote his *System of Modern Roman Law*, the systematic method became increasingly popular among the Germanists as well, and Beseler himself published a system of common German private law.[132] Some Germanists even followed Puchta's conceptual path. When Puchta's disciple, the Germanist Karl Friedrich Wilhelm Gerber joined Jhering as the editor of the new *Yearbooks for the Dogmatics of Modern Roman and German Private Law*,[133] the Germanists united once more with the Romanists, now under the banner of conceptualism. Since the middle of the century, Gerber and others competed with the Pandectists in designing a logical order of concepts.[134] They hoped to convince their contemporaries that it was not necessary for legal science to resort to alien sources in order to create a modern legal system.

Despite these ambitions, the Germanists' endeavours did not end the Romanist predominance in legal academia and practice. The Germanists, however, generated important contributions to legal doctrine. Particularly in areas not covered by the classical

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[131] In particular, it had replaced oral procedure in open court before lay judges with a clandestine, written procedure before an inquisitorial official. The Germanists' demand for a return to trial by jury aimed at the protection of the individual from the state authorities, represented by the Romanist jurists and their despotic law. *See* F. WIEACKER, *supra* note 20, at 409–12.

[132] G. BESELER, SYSTEM DES GEMEINEN DEUTSCHEN PRIVATRECHTS (3 vols. 1847–55).

[133] JAHRBÜCHER FÜR DIE DOGMATIK DES HEUTIGEN RÖMISCHEN UND DEUTSCHEN PRIVATRECHTS (K. Gerber & R. von Jhering eds. 1857).

[134] *See* K.F.W. GERBER, SYSTEM DES DEUTSCHEN PRIVATRECHTS (2 parts, 1848–49).

Roman sources, such as commercial enterprises, corporations, insurance, and admiralty, the Germanists established whole fields of law, much of which later entered the Civil and the Commercial Codes.[135] "Rechtswissenschaft" also showed impressive results when applied to the tradition of indigenous German law.

These results were much admired in the common law orbit as well. For many Anglo-American scholars, the most impressive demonstration of the power of a Germanist legal science was Otto von Gierke's[136] magisterial treatise *The German Law of Association.*[137] Gierke traced the idea of an association through German history, presenting it as one of the fundamental institutions of German private law. In his work, historical research was directly employed for the establishment and characterization of an essential legal concept from which modern rules and principles could be derived. Gierke's work also contained a political element. He considered the association an expression of the collectivist character of German law in contrast to the rampant individualism of the Roman law, and indeed as an antidote to it. When Romanist individualism turned out to pervade the draft of the Civil Code, Gierke became one of its most ardent and influential critics.[138] In the end, Gierke and his fellow Germanists prevented a purely Romanist codification and preserved the tradition of indigenous German law throughout the nineteenth century, and for the twentieth century.

B. *The Historical Dimension: Roman and German Legal History*

With all their energies invested in the pursuit of Savigny's ultimate goal of a scientific order of law, Romanist as well as Germanist conceptual jurists gradually forgot the other half of Savigny's original theory—the historical character of law. Not only did they neglect historical studies, they also presented their systems as constructions of timeless logic. But the historical heritage of Savigny lived on in the work of a different group of scholars who focused on the facts of the past rather than on the theories of the present.

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[135] *See* ALLGEMEINES DEUTSCHES HANDELSGESETZBUCH of 1861 (Deutscher Bund); HANDELSGESETZBUCH 1897, in force 1900 (Deutsches Reich).

[136] On Gierke see KLEINHEYER/SCHRÖDER, *supra* note 22, at 93–98; STINTZING/LANDSBERG III.2 (1910), *supra* note 22, at 912–16; E. WOLF, *supra* note 47, at 669–712.

[137] O. VON GIERKE, DAS DEUTSCHE GENOSSENSCHAFTSRECHT (4 vols., 1868–1913).

[138] O. VON GIERKE, DER ENTWURF EINES BÜRGERLICHEN GESEZBUCHES UND DAS DEUTSCHE RECHT (1889). There were also various socialist critiques of the civil code, the most important of which is A. MENGER, DAS BÜRGERLICHE RECHT UND DIE BESITZLOSEN VOLKSKLASSEN (1890).

The meaning of historical studies, however, had changed significantly since the early days of the historical school. For Savigny, legal science had been historical in nature, but not an exercise in legal history. Historical research had been only a tool to reveal the innermost and fundamental ideas of law as the bases for the system then to be built. But when the bulk of this work had been done around the middle of the century, historical studies could gradually free themselves from this subordinate function. The systems of modern law were then in place, and it became possible to look at history solely for the sake of knowledge about the past. Legal history in its own right was born when it was no longer directly necessary for practical purposes. As a result, the purely historical branches of German legal science made comparatively few contributions to legal practice.

But the generation of legal historians after Savigny no longer considered such contributions its foremost task. Whether they were Romanists or Germanists, they saw themselves more as historians who specialized in law than as lawyers with an interest in history. Professionally, they were closer to Ranke and Burckhard than to Puchta and Windscheid. Their scholarship was a major branch of the historical science that had flourished in Germany since the early decades of the century and that was recognized worldwide in its second half. The legal historians benefited from, and contributed to, this reputation.

As befit true scientists, the legal historians emphasized the establishment and interpretation of factual truth. Accordingly, they worked predominantly in two fields. They gathered and edited original sources, and they wrote comprehensive treatises on legal history.

On the Romanist side, Savigny himself had already begun to explore the stock of original manuscripts when he had spent years hunting for them in the European libraries. But his contemporary Barthold Georg Niebuhr made the most important find. Niebuhr was a kindred spirit of Savigny in his classicist attitude, his conservative bent, and his later career as a statesman for the Prussian crown. Following Savigny's intuition, he discovered an almost complete manuscript of Gaius' Institutes in a library in Verona in 1816. The palimpsest was not only a full copy of one of the most important classical Roman texts of which little had been known, it was also the first and only text originating directly from the classical period. The writings of other classical jurists were preserved only in the form of excerpts in the sixth century compilation of Justinian's Digest. Niebuhr and Savigny cooperated in the edition of the text. Two

years after Savigny had founded the historical school and called for a return to the original sources, his program had already borne more fruit than anybody could have hoped for.

Niebuhr's discovery boosted the reputation of the Romanist historical school enormously at home as well as abroad. And it encouraged the Romanist historians to persist in their efforts to print reliable editions of original sources. Particularly later in the century, the scholars combined historical research with advanced philological methods. This combination bore rich fruit of which Theodor Mommsen's[139] critical edition of the Digest and Otto Lenel's edition of the Edictum Perpetuum[140] are the most noteworthy examples.

Where a reliable factual record had been established on the basis of the original sources, the writing of scientific historical treatises became possible. Niebuhr gave an impressive early example with his *Roman History*.[141] The book was complex and inaccessible, but it showed that an accurate description of the past was possible through careful attention to hard data, that is, through a truly scientific approach. Two generations later, Mommsen's *Roman Constitutional Law* demonstrated that German Romanist historiography had reached a level of sophistication unsurpassed anywhere in the world.[142]

For the Germanist legal historians, philological research was even more important than for their Romanist colleagues. Lacking the advantage of a single, authoritative source such as the Corpus Juris, they were in dire need of reliable editions of the original texts of German legal history. Already in 1819, Karl Freiherr vom Stein launched the Monumenta Germaniae Historica, a project to collect sources of German legal history. Among the first sources printed were the Germanic tribal laws from the early middle ages. Savigny's disciple and friend Jakob Grimm[143] published his *Germanic Ancient Legal Elements*[144] and his "*Weisthümer*."[145] In their footsteps, Germanists continued to print collections of historical texts.

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[139] DIGESTA IUSTINIANI AUGUSTI I, II (1868–1870). On Mommsen see F. WIEACKER, *supra* note 20, at 417–19. In contrast to Niebuhr, Mommsen was a lawyer by training.

[140] O. LENEL, DAS EDICTUM PERPETUUM (1883).

[141] B.G. NIEBUHR, RÖMISCHE GESCHICHTE (3 vols. 1828–32).

[142] T. MOMMSEN, RÖMISCHES STAATSRECHT (1887).

[143] On Grimm see KLEINHEYER/SCHRÖDER, *supra* note 22, at 105–07; STINTZING/LANDSBERG III.2 (1910), *supra* note 22, at 277–86; F. WIEACKER, *supra* note 20, at 405–06; F. WIEACKER, GRÜNDER UND BEWAHRER 144–61 (1959).

[144] J. GRIMM, DEUTSCHE RECHTSALTERTÜMER (1828).

[145] J. GRIMM, WEISTHÜMER (4 vols. 1840–63).

These critical editions became the bases for the Germanists' scientific historical studies. Scrutinizing the original texts, but also drawing on archeological discoveries, they began to replace speculation about historical facts with their ascertainment. Scholars like Amira, Gierke, Heusler, Maurer, and Sohm established in their treatises new knowledge about Germanic and medieval legal institutions.[146] Their scholarship even broke new ground in some areas of English legal history. Brunner's work on the origins of the jury[147] or Nasse's study of early agricultural communities[148] were praised and emulated by common law historians.[149] Like their Romanist colleagues, the Germanist legal historians set the standards for scientific historiography on an international scale.

All of these branches of scholarship—the Pandektenwissenschaft, the systematic science of modern German law, Roman and German legal history—were part of the historical school as the mainstream of German legal science in the nineteenth century. In reality, the diversity of the picture was even greater than here presented because each of these branches consisted of many individual scholars with different styles and particular interests. In addition, many works fit several categories at the same time, like Gierke's historical as well as systematic scholarship, while others fit none of these categories at all, like the programmatic writings of Savigny, Thibaut, Beseler, or von Kirchmann.

And yet, tracing their development from the turn of the eighteenth to the nineteenth century has shown that these branches of scholarship were not entirely separate and independent phenomena. They were connected through a common core of underlying ideas around which all of them revolved. This common core was the concept of legal science itself.

III. The Concept of Legal Science

At first glance, the concept of legal science was elusive. There was no generally accepted standard definition, and its meaning kept changing throughout the nineteenth century. Modern German legal

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[146] *See* Stintzing/Landsberg III.2 (1910), *supra* note 22, at 495–561.

[147] O. Brunner, Die Entstehung der Schwurgerichte (1871); *see also* F. Liebermann, Die Gesetze der Angelsachsen (3 vols. 1903–16); F. Liebermann, Über das englische Rechtsbuch Leges Henrici (1901); F. Liebermann, Über die Leges Anglorum Saeculo XIII (1894); F. Liebermann, Über die Leges Edvardi Confessoris (1896).

[148] E. Nasse, Agricultural Communities of The Middle Ages (H.A. Ouvry transl. 1871).

[149] *See* Adams, *Book Review* 114 N. Am. Rev. 196 (1872); Pollock, *In Memoriam Frederic William Maitland*, 23 L. Q. R. 137 (1907) (praising Brunner).

historians and theorists have therefore by and large refrained from attempts to isolate a uniform concept of legal science for Savigny and the generations of his successors. Instead they have characterized legal science differently for the various phases of nineteenth century jurisprudence.[150]

But in the generations after Savigny, German jurists themselves talked and wrote about "Rechtswissenschaft" as if there was really one, shared concept of it. It is unlikely that they used this term indiscriminately for whatever approach they currently had in mind. In contrast to their Anglo-American brethren, they were all trained in German jurisprudence and were especially familiar with Savigny's original historical theory of law. Of course, "Rechtswissenschaft" did not always mean exactly the same thing to all scholars at all times. But the common and persistent use of the term reflects that they shared a set of basic ideas. Indeed, the fact that virtually all of them subscribed to "Rechtswissenschaft" in one form or another was perhaps the most important factor that united them as an academic culture despite all personal rivalries, political disagreements, and jurisprudential disputes.[151]

This shared, basic concept of legal science consisted of several interacting notions. As a result, the meaning of "Rechtswissenschaft" had many dimensions and was complex, but it was not therefore unspecific or vague. Because it had its roots in Savigny's historical theory of law, it is best approached from the perspective of his ideas. These fundamental ideas were the notions of law as a product of history ("Geschichte"), of law as a system ("System"), and of the combination of both these notions in a science of positive law. All major versions of jurisprudence after Savigny and until Jhering were variations on these basic themes. In order to understand the concept of "Rechtswissenschaft," one must therefore first grasp the meaning of "Geschichte" and "System," and then understand their interaction.

A. *The Elements of "Rechtswissenschaft": Analysis of "Geschichte" and "System"*

Savigny's original conceptions of "Geschichte" and "System" were themselves not monolithic. Instead, they already had a variety

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[150] *See, e.g.*, K. LARENZ, METHODENLEHRE DER RECHTSWISSENSCHAFT 11–38 (5th ed. 1983); F. WIEACKER, *supra* note 20, at 348–513.

[151] A notable exception was von Kirchmann. *See infra* notes 173–74 and accompanying text. Thibaut also questioned the blessings of legal science. A.F.J. THIBAUT, *supra* note 56, at 72–73.

of dimensions. Savigny's successors used each of these dimensions as a basis for further developments.

In Savigny's notion of law as a product of "Geschichte," at least three intertwined but different elements can be isolated. They all express, in one form or another, Savigny's deeply felt conviction that law was a cultural phenomenon. Therefore, they were all reactions against the old natural law jurisprudence, the most elementary flaw of which had been its blindness to this fundamental truth.

First, the historical character of law simply meant that law as a cultural phenomenon was subject to change over time, and that the present was the product of history.[152] This can be called the plainly "historicist element" of Savigny's idea. It was not Savigny's insight but had already been emphasized by Vico, Montesquieu, Hugo and others. Here Savigny was reacting against the ahistorical rationalism of the natural law age and its belief that law could be created purely by means of reason. This historicism was part of the general rise of history as the "*regina scientiarum*" during the nineteenth century. The historical bent of the age fostered classicist attitudes of which Savigny's enthusiasm for Roman law was an example, and a romantic mood as expressed by the Germanists' love for an idyllic medieval past.

The veneration of history had normative potential. Savigny did not advocate a simple return to the past, nor did he ever maintain that legal rules and institutions became better with age. In fact, according to his theory, much of the old legal materials had to be discarded because they were not part of the organic growth of the law. But because present law had its roots in history, present jurisprudence had to use the past as its reference point. It was only a small step then, to consider the past a model for the present, at least in the form of a recommendation. Among the historical jurists, there was no agreement as to which part of the past to look to, the classical Roman period or the medieval Germanic tradition. But for the early Romanists as well as the Germanists, history not only inevitably determined the present, but also provided arguments to shape it in a particular way.

This "historicist" view of law had practical implications for the goals of legal science. Because law was a product of history, it was senseless to try to create it through reason by an act of will. Thus codification, as exemplified by the Prussian, French and Austrian

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[152] von Savigny, *Über den Zweck dieser Zeitschrift*, ZEITSCHIFT FÜR GESCHICHTLICHE RECHTSWISSENSCHAFT 1–5 (1815).

codes, was a folly. In order to understand the law, it was necessary to pay more attention to its historical background and to the legal tradition of the culture.

Much of German legal thought developed out of this first, rather simple and unoriginal, historicist element. In general, the result was a heightened awareness of the law's historical dimension and a renewed belief in the necessity and dignity of historical studies. In particular, legal history as a discipline in its own right was established later in the century, fully devoting itself to the exploration of legal traditions.

Second, the law was not only subject to change, it was also the result of evolution. This can be called the organicist element in Savigny's notion of "Geschichte." Here, Savigny absorbed, consciously or unconsciously, Lamarck's early ideas of evolution, which were much discussed in his day.[153] To be sure, this form of evolutionism was not empirical, that is, it was not based on concrete observation. It was an idealistic belief in the gradual unfolding of ideas. In other words, it was more Hegelian than Darwinian.[154]

While also a reaction against the rationalism of the eighteenth century, this organicism was more specifically a protest against the arbitrary disruptions of the historical process in the previous age, be it the abrogation of old law through codification or the abolition of the traditional social structures through the French Revolution. In an age threatened by rapid social, political, and intellectual change, it expressed a yearning for continuity that was shared by many contemporaries in Germany and abroad. In this respect, Savigny's jurisprudence fit particularly well with the strongly conservative mood of the German aristocracy after the Napoleonic wars. And Savigny, himself a nobleman who loathed and feared radical innovation,[155] became a symbol for the preservation of traditional structures.

This "organicist element" was indispensable for a science of positive law to be possible at all, for an epistemological and a practical reason. Epistemologically, it was needed because science was seeking to recognize the internal order in the external facts. It was therefore looking for the regularities in their relationship with each other. After the view of the world as a mechanical universe had

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[153] *See* J. STERN, THIBAUT UND SAVIGNY 25 (1914).

[154] See *infra* note 188 and accompanying text.

[155] *See* F. WIEACHER, GRÜNDER UND BEWAHRER 119–21 (1959); E. WOLF, *supra* note 47, at 507.

been abandoned, it was primarily the organicist element that justified the hope that such regularities indeed existed. Organic growth of law promised ordered development according to principles that science could perceive, instead of erratic change of rules before which it had to capitulate. Practically, the belief that the growth of law followed organic principles made it possible to fill gaps in the knowledge of the past. Understanding these principles and thus the patterns underlying legal development, the scientist could hope to extrapolate yet unknown facts from those already established. Thus, the inevitable incompleteness of the historical record was no serious obstacle because once the scientist knew enough from the sources to perceive the organic principles, logical conclusion could supplement the remainder.[156]

This organicism was the predominant theoretical reason for the historical school's hostility towards legislative lawmaking.[157] If the law grew organically, then such growth must not be disturbed or arrested. Legislation, however, always threatened to do one or the other, or both. Where it was innovative, changing existing rules, it was likely to deviate from the organic development. It thus violated the higher laws governing the growth of the law, and caused a disturbance that must be avoided. It was an exercise of human volition, but organic growth left no room for conscious choice. Even where legislation avoided innovation and contained only well-established rules, it was potentially harmful because it cast those rules into hard statutory form that tended to impede further growth. Progressive codification like the French civil code combined both evils and became anathema.

Later branches of German legal science developed out of this "organicist element" by understanding it in a biological way. For Savigny, the idea of law as a product of organic growth was primarily a cultural notion. But already Puchta considered legal concepts "living beings." Later on, Jhering and others described legal concepts as live, procreating organisms. Here, organicism led to notions of a "biology of law."[158] Of course, these terms were used only metaphorically. But when evolutionism became fashionable later in the century, law could be seen as just as much an evolution-

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[156] Here, Savigny's ideas were closely related to Niebuhr's. *See* F. SCHNABEL, 5 DEUTSCHE GESCHICHTE IM 19. JAHRHUNDERT 56 (1965).

[157] *See* SAVIGNY, BERUF, *supra* note 61, at 105–08, 126.

[158] J.E. KUNTZE, DER WENDEPUNKT DER RECHTSWISSENSCHAFT 90 (1856) ("Biologie des Rechts").

ary phenomenon as life itself, and legal science could be considered equal to the natural sciences. Savigny's organicism allowed his disciples to see Darwin as a kindred spirit. They could boost their confidence in the accomplishments of their discipline by likening them to the pathbreaking discoveries published in *The Origin of Species*.

Third, to look at law as a historical phenomenon meant to consider its positive, as opposed to its metaphysical, side. This can be called the "positivist element" in Savigny's historical theory. Here, "history" did not refer to tradition, but to legal facts. Facts are by their very nature "historical" in the sense that all data are: as something that is already given and thus already part of the past. Already in his early work, Savigny had pointed out that "[a]ll knowledge of objective data is called historical knowledge, thus the whole character of legal science must be historical . . . ."[159] This notion was a reaction against the metaphysical (i.e. fact-independent and thus ahistorical) speculation of the age of reason and was tied into the rise of positivist science in the nineteenth century. In an age that was increasingly turning away from speculation and towards facts, history had to succeed philosophy as the queen of the humanities, and jurisprudence had to become historical as well.

The methodological implication of this "positivist element" was that philosophy was no longer considered a necessary part of jurisprudence. Savigny was convinced that even "as merely preliminary knowledge, philosophy is not at all necessary for the jurist."[160] Its speculative or normative potential promised no help in performing the essential task of the legal scientist, the understanding and systematization of positive law.

"Positive law" now had a new meaning. For the natural lawyers, the metaphysical side of law was immutable, while its "positive" side (the law of the actual lawgiver) was by its very nature arbitrary. For Savigny, and the historical school, it was the other way around.

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[159] SAVIGNY, METHODENLEHRE, *supra* note 61, at 14. "Alles Wissen von einem objektiv Gegebenen nennt man historisches Wissen, folglich muß der gesamte Character der Gesetzgebungswissenschaft historisch sein." *Id.*

[160] *Id.* at 50. "[Aber] auch als bloße Vorkenntnis ist die Philosophie dem Juristen durchaus nicht notwendig." *Id.* Savigny must not be misunderstood to have looked down upon philosophy. Quite to the contrary, he took it so seriously that he found jurists as dilettante philosophers unbearable. "Who does not feel driven to philosophy, should leave it alone. Its study requires not only half a year, but a whole life" ("Wer nicht zur Philosophie getrieben wird, der lasse sie liegen. Ihr Studium erfordert nicht bloß ein halbes Jahr, sondern ein ganzes Leben."). *Id.* In contrast to the natural lawyers, Savigny saw philosophy and legal science as independent disciplines that required different approaches and skills.

Metaphysical jurisprudence was mere speculation and thus arbitrary, while the "positive" law actually found in history was, at least in its relevant parts, the expression of the spirit of the people and thus historically necessary. "Positive" now meant existing, not arbitrarily made. Since true science must deal with historically existing facts (be they the facts of nature or the data of positive law), not with human arbitrariness, it had to be positivist and thus historical. In this sense, a science of positive law, and a historical science of law were the same.

This "positivist element" pervaded nineteenth century German legal science.[161] Conceptualist jurisprudence under Puchta and Jhering, the Pandectists, and even most of the Germanists strictly adhered to the program of a science of positive law. Where they abdicated on historical research, their method became ahistorical in the sense that they disregarded the historical background of law, but it remained "historical" in the sense of positivist. This explains how German legal science, even after the demise of Savigny's original program around the middle of the century, could still be considered "historical" by many scholars in Germany and abroad.

The "historical" characteristic of German legal science could thus have very different meanings. It could signify a more or less classicist or romantic veneration of the past, a belief in the organic nature of historical development, or it could constitute the postulate for a positivist form of science.

The goal of all historical work, however, was the scientific order of law, the "System." Because for Savigny law was only the invisible line that limited private spheres of freedom,[162] the system presented the overall network of these lines. Its substance was therefore the logically coordinated totality of private entitlements. This network had, like Savigny's notion of "Geschichte," several characteristics on which his followers could build. There are, again, at least three dimensions.

First, the system was the inherent order of positive law. This meant that it was to be vastly different in character from its natural law predecessors. Wolff's system had been an artificial creation of an external order superimposed on law. Based on speculative reasoning, it was subjective and thus unscientific. Savigny's system was the organic recreation of the internal order already contained in

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[161] See *infra* notes 185–87 and accompanying text.

[162] See *supra* note 81 and accompanying text.

law. Based on positive, historical material, it was objective and thus truly scientific.

The idea of such an internal order became one of the pillars of "Rechtswissenschaft." The German jurists claimed not to create the system, but to bring to light a hitherto invisible coherence of the principles. Even when in Puchta's or Jhering's systems everything was logic and nothing experience, this logic was considered to be already inherent in the law, only awaiting discovery.

Second, the system was perfect and complete. This was not accomplished through detail: that would have been well-nigh impossible. But Savigny pointed out that

> there is certainly a perfection of a different kind, which may be illustrated by a technical expression of geometry. In every triangle, namely, there are certain data from the relations of which all the rest are necessarily deducible: thus given two sides and the included angle, the whole triangle is given. In like manner, every part of our law has points by which the rest may be given: these may be termed the leading axioms.[163]

The scientific system would thus be gapless in the sense of containing the building blocks needed to deduce the rules not already spelled out. Jhering explained it in terms of chemistry when he wrote that legal science could provide

> the simple reagents for the infinitely complicated concrete cases in life. Whoever wanted to decide those only through legal rules, would be at a loss forever, because the potential for combinations in life is so inexhaustible that even the richest casuistry of a code would seem inadequate. With those few reagents, however, we can solve every case.[164]

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[163] VOCATION, *supra* note 61, at 38–39. "Allein es giebt allerdings eine solche Vollständigkeit in anderer Art, wie sich durch einen Kunstausdruck der Geometrie deutlich machen läßt. In jedem Dreyeck nämlich giebt es gewisse Bestimmungen, aus deren Verbindung zugleich alle übrigen mit Nothwendigkeit folgen: durch diese, z.B. durch zwei Seiten und den zwischenliegenden Winkel, ist das Dreyeck gegeben. Auf ähnliche Weise hat jeder Theil unsres Rechts solche Stücke, wodurch die übrigen gegeben sind: wir können sie die leitenden Grundsätze nennen." SAVIGNY, BERUF, *supra* note 61, at 110.

[164] R. JHERING, GEIST I, *supra* note 93, at 40–51. "[D]ie einfachen Regenzien für die unendlich komplizierten konkreten Fälle des Lebens. Wer letztere nur mit Rechtssätzen in der Hand entscheiden wollte, würde in unaufhörlicher Verlegenheit sein, denn die Kombinationskunst des Lebens ist so unerschöpflich, daß die reichste Kasuistik eines Gesetzbuches ihren ewig neuen Fällen gegenüber dürftig erscheinen würde. Vermöge jener wenigen Reagenzien hingegen lösen wir jeden Fall auf." *Id.*

The assumption of the perfection and inherent completeness of the system became the basis for conceptual jurisprudence, Romanist and Germanist alike. In its exaltation of the logic of the system, most extreme in Jhering's natural-historical method, conceptualism provided the methodological foundation and jurisprudential dogma of the "Pandektenwissenschaft."

In this respect, the system reflected the heritage of the natural law age. To be sure, Savigny, Puchta and Jhering insisted that their system was internal and organic, instead of external and formal, but it was undeniable that the idea of a logically perfect and complete system as such came from the law of reason. The same is true for the method of logical deduction within the system, though the nineteenth century jurists refined it extensively. The Pandectists even adopted the concrete structure of their "Pandektensystem" from Wolff's disciples.[165]

The temptations of logical perfection and systematic completeness were strong. The system promised to master the legal chaos that prevailed in nineteenth century Germany where the modern Roman law, highly complex and frequently uncertain in itself, coexisted with a multitude of indigenous German institutions, the legislation of several dozen principalities, and a bewildering mass of local customs. Where the system was embodied in the Pandectist treatises, they were followed like guides through a wilderness.

Third, the system was not static and sterile but flexible and organic. Because it was built out of organically growing principles, it partook of their evolutionary nature. According to Savigny, "one must take the system as a whole and think of it as progressing, i.e., a history of the system of jurisprudence as a whole is what really counts."[166] The legal concepts that form it can arise, change, or disappear, "independent from accident and individual arbitrariness"[167] and according to the "spirit and need of the time."[168] The system even had the potential for producing new law out of itself:

> Through the scientific form of the material, however, which strives to reveal and to perfect its internal unity,

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[165] *See* F. WIEACKER, *supra* note 20, at 373.

[166] SAVIGNY, METHODENLEHRE, *supra* note 61, at 32. "Man muß das System im ganzen nehmen und es sich als fortschreitend denken, d.h. als Geschichte des Systems der Jurisprudenz im ganzen, hierauf kommt alles an." *Id.*

[167] SAVIGNY, SYSTEM I, *supra* note 61, at 17. "[U]nabhängig von Zufall oder individueller Willkühr." *Id.*

[168] *Id.* at 18. "Sinn und Bedürfnis der Zeit." *Id.*

> new organic life comes into being which in turn affects the material, so that also from science itself a new kind of law creation irresistibly arises.[169]

Here Savigny combined his organicism with his belief in the responsibility of legal science for the development of the law at advanced stages of civilization.

This productive aspect of the system was further developed by Puchta, who assumed that new principles could be created through the combination of old ones so that the system could not only be perfected, as Savigny had said, but even expanded from within itself.

> I call it the genealogy of concepts which means that one must not see this hierarchy as a mere arrangement of definitions. Each of these concepts is a living being, not only a dead instrument . . . . Each is an individuality, distinct from the individuality of his progenitor.[170]

From his naturalist perspective, Jhering asserted that legal science could work like chemistry—with basic elements. This enabled the legal scientists not only to analyze existing matter, but also to create new compounds. And like biology, jurisprudence studied an "organism."[171] Jhering saw procreative processes at work. "The concepts are productive, they mate and conceive new ones."[172] In one form or another, the system's productive power became the underlying creed for systematic German legal science.

For the legal scientists, this productive power had important advantages. It promised deliverance from the necessity of undesirable legislative lawmaking. Where solutions to new problems were already contained in the system or could at least be construed from it, there was no need to go outside of legal science and to resort to legislative acts of will. And where such acts of will could not be prevented, the productive potential of the system could at least

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[169] *Id.* at 46–47. "Indessen entsteht durch die dem Stoff gegebene wissenschaftliche Form, welche seine innewohnende Einheit zu enthüllen und zu vollenden strebt, ein neues organisches Leben, welches bildend auf den Stoff selbst zurückwirkt, so daß auch aus der Wissenschaft als solcher eine neue Art der Rechtserzeugung unaufhaltsam hervorgeht." *Id.*

[170] G.F. PUCHTA, CURSUS DER INSTITUTIONEN 101 (2nd ed. 1845). "Ich nenne dies eine Genealogie der Begriffe, darin liegt, daß man diese Leiter nicht als ein bloßes Schema von Definitionen betrachten darf. Jeder dieser Begriffe ist ein lebendiges Wesen, nicht ein todtes Werkzeug . . . Jeder ist eine Individualität, unterschieden von der Individualität seines Erzeugers." *Id.*

[171] JHERING, GEIST I, *supra* note 93, at 26.

[172] *Id.* at 40 ("Die Begriffe sind produktiv, sie paaren sich und zeugen neue.").

safeguard against their arbitrariness. If the system even created new answers through logical conclusions, there was really, at least in theory, no room for choice or disagreement. The logic of the system provided a reliable guide for all situations.

Thus, like "Geschichtlichkeit des Rechts," "wissenschaftliches System" was an idea with various dimensions. It signified the order inherent in the overall pattern of private rights, the logical perfection in the complete coherence of its principles, and the power of scientific law to grow and procreate.

The various dimensions of "Geschichte" and "System" interacted when Savigny postulated the combination of historical method and systematic goal as the hallmark of a true science of law. The concept of "Rechtswissenschaft" was therefore the product of the all these ingredients. As such it was rich in perspectives but also marked by internal tensions between several of its aspects.

B. *The Gist of "Rechtswissenschaft": Synthesis of "Geschichte" and "System"*

The combination of "Geschichte" and "System" presented an enormous methodological challenge because elements of "Geschichte" conflicted with elements of "System." Savigny overcame this conflict by recurring to another element, one that was shared by both concepts and could thus reconcile them.

The deep conflict between "Geschichte" and "System" was one between positivist method and systematic result. On one hand, the method of jurisprudence had to be historical. In its positivist dimension, this meant that it had to refrain from speculation and instead look to the positive law found in the actual historical sources. On the other hand, its result had to be systematic. That meant that it had to organize the positive material into an order according to the internal logic of the material itself. This combination could succeed only if the positive material indeed contained such a systematic order, albeit yet undetected. The problem was that there were strong reasons to believe the contrary. These reasons were theoretical as well as practical.

From a theoretical perspective, it was simply hard to see why there should be an internal, logical system within positive law. Positive law consisted in large parts of acts of human volition, legislative and judicial. Often this volition was not exercised logically. Instead legal choices responded to changing needs, depending on the times and circumstances, or simply expressed momentary personal pref-

erences, biases, or moods. For some of Savigny's contemporaries, this made positive law outright improper as an object for legal science. Von Kirchmann vociferously lamented that "through positive law jurisprudence is turned from a priestess of truth to a maid of the accidental, the error, the passion, the irrational. Instead of the eternal and absolute, the accidental and flawed becomes her object."[173] Furthermore, legal science was pointless because positive law could always overrule any result science accomplished. "Three corrective words from the legislature," von Kirchmann exclaimed, "and whole libraries become wastepaper."[174]

The situation in the real world amply confirmed these doubts. Positive law varied vastly over time and space. In the patchwork of early nineteenth century German jurisdictions alone, legal traditions, statutes, codes, and judicial decisions conflicted everywhere. A look at earlier times or to other countries suggested even more that disorder reigned supreme and that an internal order of positive law was an illusion. To make matters worse, the lawgiver frequently arrogated to itself the power to overrule legal science and even to forbid the judges to pay any attention to it.[175]

The consequence seemed to be that the historical method of looking at positive law, and the systematic goal of an internally logical order, were fundamentally at odds. The jurist could have one or the other—a positivist method ending in the recognition of chaos, or a logical system built, independently from positive law, on reason—but not both at the same time.

Still, the desire to have both has been strong in the history of legal thought. Though perhaps not consciously recognized as such, both elements are expressions of human needs. Particularly after the disillusionment with metaphysical speculation, the need to look at the actual historical facts was great. But the chaos they presented was also frightening and triggered a strong longing for order. Thus, when Savigny proceeded to face the historical facts and yet to find

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[173] J. VON KIRCHMANN, DIE WERTHLOSIGKEIT DER JURISPRUDENZ ALS WISSENSCHAFT 27 (Meyer-Tscheppe ed. 1988) (1848). "Aus einer Priesterin der Wahrheit wird sie durch das positive Gesetz zu einer Dienerin des Zufalls, des Irrtums, der Leidenschaft, des Unverstandes. Statt des Ewigen, Absoluten, wird das Zufällige, Mangelhafte ihr Gegenstand." *Id.*

[174] *Id.* at 29 ("drei berichtigende Worte des Gesetzgebers und ganze Bibliotheken werden zu Makulatur").

[175] *See* H. CONRAD, 2 DEUTSCHE RECHTSGESCHICHTE 384–85 (1966). The Prussian General Land Law (Allgemeines Landrecht) of 1794 was also skeptical towards the "opinions of the learned jurists" ("Meinungen der Rechtslehrer"). Allgemeines Landrecht für die preußischen Staaten, Einleitung (Introduction) I. art. 60; *see also* SAVIGNY, BERUF, *supra* note 61, at 148–49.

a system in them, he promised to satisfy both the need to look at the real world, and the hope to find it in order.

Savigny offered a solution to the conflict between historical method and systematic goal on both the theoretical, and the practical level. This made his legal science a powerful intellectual model, the fascination of which few contemporaries escaped.

Theoretically, he solved the dilemma between history and system on the basis of an all-encompassing organic view of the world. Savigny admitted that the totality of historical material was indeed chaotic. But he maintained that not all of it was worthy of scientific treatment. The scientifically relevant material must be filtered out, the rest discarded. The test for scientific relevancy was whether certain material was an integral part of the organic whole, or whether it was a disturbance—whether it was, as Savigny called it, "necessary" or "arbitrary." In order to perform this test, the jurist must understand the organic whole of law. This understanding could be reached by studying the development of positive law over time. According to the "strictly historical method," the legal scientist must "trace all given material to its roots" and thus discover its organic principle.[176] Legal evolution disclosed to the eyes of the legal scientist the nature of the organic whole and thus enabled him to decide which material is part of it, and which is foreign to it. Thus, the jurist could distill the leading principles from the mass of positive law. These leading principles, not the mass of rules, were the concern of science.

In the totality of the leading principles there was, finally, an inherent order. At the core of Savigny's historical theory of law lay the conviction that the principles were all internally consistent because they were all part of the same organic whole of one true law for the entire (cultural) nation.[177] They were all part of the same organic whole because they were all expressions of the same spirit of the nation. This was because the legal principles reflected basic patterns of the common legal consciousness. The scientific jurists had only translated and condensed them into the logical form.[178] Thus, the common root of all the principles in the Volksgeist ensured that they were all cut from the same cloth. They stemmed from the same spirit, the spirit that determined the internal order

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[176] SAVIGNY, BERUF, *supra* note 61, at 166 ("jeden gegebenen Stoff bis zu seiner Wurzel zu verfolgen").

[177] *See* SAVIGNY, SYSTEM I, *supra* note 61, at 9–10.

[178] *See id.* at 14, 16, 46.

of the scientific system. In this manner, Savigny solved the conflict between the positivist nature of the historical method and the logical demands of the system by reconciling them through the underlying element that both "Geschichte" and "System" shared: the organicism resulting from the Volksgeist.

This approach was intentionally selective. Savigny's organicism required that the factor responsible for disturbance and chaos—the erratic nature of human volition—be eliminated. Savigny attempted that by declaring the will of the individual lawmaker (legislator, judge, or scholar) irrelevant. Of course, such an individual could create rules in blatant violation of the fundamental principles. But those arbitrary rules were just disturbances, not part of the organic process and would thus be weeded out by legal science. They could never threaten the scientific system because they could never be admitted to it.

As a whole, Savigny's reconciliation of history and system smacked of tautology: there is order in positive law, but only that part of positive law counts that does not disturb the order. His solution, however, may also be viewed as the expression of a sophisticated view of law and legal science. The totality of existing rules consists in part of manifestations of basic cultural traits of a people. Here, the rules rest on principles, which in turn reflect cultural habits and values. These cultural habits all stem from the character of the people and are thus consistent. Because legal principles reflect these habits, the principles are consistent as well. Thus, this part of law is characterized by a concealed internal structure. A scientific approach can bring the principles and their structure to light. But the totality of rules also contains many elements that are only the result of arbitrary legislative decisions. Legal science must discern and then discard those elements. They are not expressions of the people's culture but only of ad hoc legislative choices. As a result, the proper function of legal science is to isolate and put into ordered form the culturally grounded parts of a people's law in order to preserve them as its true long-term tradition.[179] It must keep this tradition free from disturbances by legislation without lasting value.[180] Thus, it can defend the harmony between positive law and the character and culture of a people against erosion through short-sighted rulemaking.

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[179] Savigny called it "das Wahre." *Id.* at XII (Vorrede).

[180] *Id.* (das "Unächte").

For Savigny, the criteria applied in this separation of the wheat from the chaff were not at all purely intellectual, but quite practical. In the "Volksgeistlehre" lies the belief that the organically grown parts have so grown because they reflect practical needs. The people and their common consciousness do not—as may a legislator—create law out of a momentary desire, but only out of real practical necessity. This is ensured by the collective and unconscious character of the organic process.[181] Thus, respecting the organic institutions and rules virtually ensures the practical utility of law.[182] All this, of course, rests on an "invisible hand" view of the legal process, according to which the law will work out best if left to itself.

Savigny's approach sounded plausible in an age in which romantic notions of national culture and organicism, the belief in the evolution of ideas in history, and an "invisible hand" attitude towards law and the state were widely shared. But it was a theory only, and in light of the practical chaos in law, the claim that the Volksgeist held it all together looked doubtful. Savigny, however, demonstrated in practice that the historical method could indeed isolate leading principles and connect them in a systematic fashion. The readers of his major works had to be impressed with the thoroughness with which he treated the sources, the facility with which he found the principles, and the elegance with which he interconnected them. It seemed indeed as if his method could find the order hidden in chaos.

But in fact, this success was possible only because Savigny and his Romanist successors carefully limited their material to Roman law. To be sure, Roman law had been the common law of Western Europe since the middle ages. But it was not this medieval *ius commune* that really mattered for Savigny. His classicist attitude led him to focus on the classical Roman sources. In his admiration for the ideas and methods of the jurists of ancient Rome, he considered their work clearly superior to that of the medieval glossators.[183] Thus he wanted to purge legal doctrine of its medieval elements and to return to the original text of Justinian's Corpus Iuris as well as, after their discovery, to the Institutes of Gaius.

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[181] In a sense almost reminiscent of modern psychology, Savigny thus trusted unconscious human activity more than conscious decisions.

[182] *See* SAVIGNY, SYSTEM I, *supra* note 61, at 14–16.

[183] The Roman jurists were practically minded, and Savigny admired that they always worked on concrete problems. But his real interest was in the law as an intellectual enterprise and in the evolution of legal concepts. See *infra* note 188 and accompanying text. Believing that law was essentially custom cultivated by the jurists, he cared little for either Roman legal practice, including courts and cases, or for Roman legislation.

A closer look at the classical Roman law reveals that it was not all that surprising to find coherent principles in the Digest and the Institutes. The classical Roman jurists all worked in a highly similar mode. They were a small, self-recruiting elite who shared the same cultural background, social environment and intellectual interests. They continuously debated legal issues and built on each other's ideas. It could only be expected that their work would all express the same intellectual spirit of their culture and that therefore, the principles underlying their analyses would be culturally coherent.

Nor was it surprising that these principles could be put into a logical order. A striving for logical consistency marked the reasoning of the classical Roman jurists themselves. They wasted little time pursuing theories of substantive justice and instead worked on the refinement of logical analysis and synthesis. In other words, the very nature of Roman law favored a logical ordering of its concepts. It allowed the extraction of abstract principles as building blocks that could, if put together skillfully, form a coherent system.

Thus, the systematization of classical Roman law proved actually very little beyond the synthetic skills of Savigny and his successors and beyond the sophistication of the Roman jurists themselves. It demonstrated only that Savigny's assumption of a cultural coherence and logical order of principles was true for a law that stemmed from a highly homogeneous and elitist legal culture that had itself already emphasized logical consistency. But the success of the Romanists did not at all mean that a similar logical order could also be found in other instances. Particularly where legal cultures were more diverse, more popular, and less concerned with overall consistency, the compatibility of "Geschichte" and "System" remained unconfirmed.

C. *The Character of "Rechtswissenschaft": Positivism, Idealism, and Formalism*

Nineteenth century German legal science followed Savigny in all essential regards. It looked only to positive law. It was interested mainly in its organic essence and considered only carefully selected data. And finally, it was determined to find and to develop the logical structure in law. This made "Rechtswissenschaft" a peculiar mixture of positivism, idealism, and formalism.

Its positivism resulted from Savigny's original conception of law as a cultural phenomenon. This positivism manifested itself in several ways. It based legal science on (legal) data, namely the

positive rules found in actual historical sources; as an expression of culture; law, like language, needed to be observed and described, but not created and prescribed.[184] Thus, it excluded from legal science metaphysical speculation as well as moral judgments. It required that the law be accepted as historically given material without changing its substance according to the rules of reason. These postulates went hand in glove with the substantive, rather than procedural, view of law to which "Rechtswissenschaft" subscribed. Seeing law as custom predating the application of its rules by officials,[185] or as a logical system detected by the legal scientists,[186] meant that law was not the child of disputes but of their preexisting substantive solution. It was applied to, not made in, conflict.

This sort of positivism pervading nineteenth century German jurisprudence must be distinguished from two related forms.[187] First, it was radically different from the positivism accepting all law simply because it was "posited." Such a "legislative positivism" recognizes as law the commands of the proper lawgiver. In contrast, German legal science denied recognition on this ground and indeed considered much of the legislatively made law arbitrary and therefore scientifically irrelevant. Savigny and his successors accepted only the scientific law. This "scientific legal positivism" recognized law not because of its origin in official authority but because of its basis in leading principles and its logical consistency.

Second, it differed from the scientific positivism of Comte and his disciples. They wanted to reduce science to the observation of physical, social or psychological facts. In contrast, German "scientific legal positivism" analyzed intellectual constructs—legal rules and principles. These constructs were not facts in the Comtean sense but data of intellectual evolution. Scientific positivism sought order in the external world, but German legal science believed in an order in the evolution of legal ideas.

As a result, German legal science was not only positivist but also idealist in a peculiar sense. This idealism was the result of Savigny's notion of "Geschichte," particularly of its "organicist element." Only the assumption of an organic wholeness inherent in the apparently chaotic positive law had made the connection between history and system possible. Therefore, the search for this

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[184] See *supra* note 62–68 and accompanying text.

[185] SAVIGNY, SYSTEM I, *supra* note 61, at 14–15.

[186] See *supra* notes 86–89 and accompanying text.

[187] The following distinctions build on F. WIEACKER, *supra* note 20, at 431–32.

organic wholeness became the lodestar of "Rechtswissenschaft." German legal science was not interested in the historical data as such, but in the higher truth contained in them. The individual rules were contingent on time and space, but they were only manifestations of generally valid principles because in their endless variety there was always the unity of the Volksgeist. Positive data were the external form of ultimate ideas. In this idealization of reality, Savigny stood in the tradition of Schelling, Herder, and Hegel and their belief that history as a process unfolds ideas and unveils the absolute.[188]

This idealism pervaded German legal thought throughout the century. The belief that "Wirklichkeit" (reality) expresses "Wahrheit" (truth) took on a variety of forms. For Savigny, the historical sources contained the cultural truth of the Volksgeist. For Puchta, positive law was marked by the logical truth of the concepts and their system. For Jhering, the leading concepts demonstrated a quasi-biological organic truth of the law. For the Germanists, the essence of the medieval sources was the ideal of popular liberty and lay justice. They all looked to positive data, but only because they saw them as expressions of absolute ideas.

But despite its underlying idealism, this positivism was also formalist in its practical execution. This formalism was twofold. Legal science had a formal concept of law as its basis, and it employed formal logic as its method.

The formal concept of law underlying "Rechtswissenschaft" stemmed from Kant and was endorsed by Savigny. In his attempt to overcome the muddle of natural law theory, Kant had separated law from morals and had limited it strictly to the regulation of external acts. Thus, Kant had defined law as the conditions under which the freedom of one individual can coexist with the freedom of other individuals.[189] Adopting this view, Savigny saw the law as "the limit" determining the boundaries of individual spheres of freedom.[190] The function of law was the protection of one individual's freedom against another's, not the implementation of any sort of substantive morality or policy. Law was therefore not concerned with notions of substantive justice or with the implementation of social goals. It did not consider equality of bargaining power or

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[188] *See* J. RÜCKERT, IDEALISMUS, JURISPRUDENZ UND POLITIK BEI FRIEDRICH KARL VON SAVIGNY 232–36, 240–41, 406–14 (1984).

[189] I. KANT, *supra* note 27, at 230–31.

[190] SAVIGNY, SYSTEM I, *supra* note 61, at 331 ("die Gränze").

group interests. It was only a formal and abstract determination of the boundaries "inside of which the existence and activity of the individual enjoys a secure and free space."[191]

With this credo of liberalism, Savigny and his successors reacted against the paternalism of the princes during the preceding centuries.[192] Casting the morality of natural law into legislative form, the absolutist monarchs had tried to employ law for the enforcement of ethical standards, economic programs, and political goals.[193] When German jurists now postulated that "ethical, political [and] economic considerations" were "not a concern of the lawyer as such,"[194] this did not necessarily prove their blindness to the importance of these factors for social life. It was also an expression of their liberalism according to which ethical, economic, and political decisions should be left to the individual instead of being prescribed by the law. Of course, this liberalism reflected the interests of the increasingly powerful bourgeoisie. If law should not infringe upon individual freedom more than necessary for mutual protection, individuals must be free to contract and to use their property as long as the identical freedom of others was not legally infringed. Thus, the formalist concept of law yielded support for economic laissez-faire.

Savigny must, however, not be mistaken for a political liberal. In contrast to Kant, he was concerned only with the protection of private activity against state interference, not with the guaranty of political rights against public authority. The freedom he had in mind was the freedom of the *bourgeois*, not that of the *citoyen*. It was the Germanists who fought for the latter, and they found themselves in political opposition to Savigny.

Savigny's formal concept of law was also highly individualist because it considered law a question of personal liberty to act, not an issue of the relationships within social structures. This stood in marked contrast to collectivist elements in Savigny's historical theory of law. While the origin of positive law lay in collective consciousness, its function was the protection of individual freedom. From

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[191] *Id.* at 331–32 ("innerhalb welcher das Daseyn, und die Wirksamkeit jedes Einzeln einen sichern, freyen Raum gewinne").

[192] This paternalism had manifested itself particularly in the highly detailed rules of the Allgemeine Landrecht für die Preussischen Staaten (Prussian General Land Law) of 1794.

[193] For a study of the paternalism of the earlier Police-Ordinances (Polizey-Ordnungen), see K. MAIER, DIE ANFÄNGE DER POLIZEI-UND LANDESGESETZGEBUNG IN DER MARKGRAFSCHAFT BADEN (1984).

[194] B. WINDSCHEID, GESAMMELTE REDEN UND ABHANDLUNGEN 112 (1903).

this perspective, the emphasis of legal science on private law was only logical. Public regulation threatened to impose limits on individual freedom in the interest of the collective.[195] That was perhaps inevitable in many instances, but it was not the true purpose of law and surely not the true concern of legal science.

Savigny put this abstract and formalist concept of law into practical effect when he made the approach of the classical Roman jurists the model for nineteenth century German jurisprudence. From Labeo to Papinian, they had focused on the abstract, formal rationality of the rules that had constituted the private and individualist law of the owning class in ancient Rome. Savigny never really explained why the Volksgeist of the Roman culture applied to his own times. But such an explanation was as theoretically difficult as it was practically superfluous. It seemed obvious at least to the German Romanists that their era needed a law that was private, individualist, and formal. Like the Roman law, it had to provide a sophisticated scheme for the coordination of increasingly complex private affairs, without getting involved in the political battles of its time. In that sense, the spirit of classical Roman law was indeed highly congenial to the needs of the nineteenth century German bourgeoisie.

As a method, the formalism of German legal science had its roots in Savigny's notion of "System." From existing principles and rules within the system, he had argued, new ones could be deduced in quasi-mathematical fashion.[196] In this regard, he was not reacting against, but rather continuing the natural law tradition. When conceptual jurisprudence and Pandektenwissenschaft pushed the systematic approach further and saw legal reasoning predominantly as logical operation, legal science presented formalism in an extreme form, expressly excluding from legal method everything but logical and systematic conclusions.[197]

Thus, nineteenth century German legal science was positivist in its focus on historical sources and in its renunciation of the search for normative standards. It was idealist in its belief that the historically contingent rules contained timeless principles and in its assumption that in reality there is reason. And it was formalist in its

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[195] Already Savigny complained about the trend "to govern everything, and to want to govern ever more" ("alles zu regieren, und immer mehr regieren zu wollen"). *Stimmen für und wider neue Gesetzbücher*, 3 ZEITSCHRIFT FÜR GESCHICHTLICHE RECHTSWISSENSCHAFT 1 (1816), *reprinted in* H. HATTENHAUER, THIBAUT UND SAVIGNY, *supra* note 61, at 250 (1973).

[196] See *supra* note 163 and accompanying text.

[197] See *supra* notes 116–19 and accompanying text.

definition of law that excluded substantive considerations and in its adherence to deductive logic.

"Rechtswissenschaft" was therefore a concept full of tensions. But its fusion of the real and the ideal, the historical and the logical, the organic and the systematic, promised to resolve conflicts hitherto believed unresolvable. Historical change and eternal truth were reconciled because the former only expressed the latter in successive stages. Contemporaneous diversity and all-encompassing unity went hand in hand because the one was only the multitude of variations on the other. Organic growth and systematic perfection coexisted because evolution developed the seed of timeless logic. And collective consciousness and individual freedom were harmonized because the law stemmed from the Volksgeist but protected the liberty of the individual.

As a result of its amalgamation of positivist, idealist, and formalist elements, "Rechtswissenschaft" could even reconcile legal theory and practice under the banner of legal science in peaceful cooperation.[198] Jurisprudence remained linked to practice because it took the ultimate ideas from positive law and then gave them back to it as a formally logical system. Legal practice, in turn, was linked to jurisprudence because it derived the positive rules it applied to concrete cases from the system of principles through formal logic. Thus, "Rechtswissenschaft" provided for a functional diversification among the legal actors and at the same time ensured an underlying jurisprudential theory common to all.

IV. The Perception of Legal Science: The Anglo-American Perspective

From an Anglo-American perspective, both the variety of its external branches and the methodological promises implicit in its underlying ideas made German legal science an intriguing phenomenon. Its diversity of scholarship allowed common law jurists to identify it with many different things. And its fundamental concepts deeply appealed to their innermost beliefs.

The diversity of its branches explains the bewildering variety of perceptions of German jurisprudence by Anglo-American scholars that we encountered in the introduction.[199] They talked about

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[198] Savigny, Beruf *supra* note 61, at 171–74; Savigny, System I, *supra* note 61, at XIX–XXVIII.

[199] See *supra* notes 7–11 and accompanying text.

the "historical school" (or about German legal science in general) as if this phenomenon were monolithic, and as if everybody knew and agreed on what it was. At the same time, each of these scholars really had only one or another of the many different aspects of German legal science in mind. In other words, Anglo-American jurists shared the terminology but not always its meaning.

Often they referred to the historical school only in a narrower sense, i.e., to Savigny's original program of 1814–1815 and its immediate predecessors and followers.[200] The characterizations still differed, but there was at least an implicit agreement about the subject matter. Even this original program was, of course, so ambiguous that both scholars of medieval history and analytical jurists could see Savigny as a model—as a profound historian or as a great dogmatic and systematic thinker.[201]

In other instances, Anglo-American scholars thought of the historical school in a wider sense altogether, i.e., including the later developments that Savigny's program had triggered. Here, sometimes flatly contradictory views were maintained. Roscoe Pound saw in the historical school a pernicious "jurisprudence of concepts"[202] but also praised it as a "force for unity, for system, for a reasoned body of principles"[203] while James Bryce lauded the historical school as giving "the best crop" of all forms of jurisprudence because "it may at least be relied on to give us facts."[204] Similarly, Munroe Smith could chastize German legal science for its abstractness and generality, while Holmes praised its love for detail.[205]

All of these perceptions were incomplete, but none of them was therefore incorrect. In fact, they were all reconcilable given that their authors had different aspects of German legal science in mind—the broad conceptualism of Puchta and Jhering or the meticulous research of Brunner and Heusler, the systematic treatises of Vangerow and Windscheid or the editions of original sources by Mommsen and Amira.[206]

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[200] This is true for most of the works on the historical school cited *supra* note 12.

[201] See *supra* notes 75–76 and accompanying text.

[202] Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605, 613 (1908).

[203] Pound, *Taught Law*, 37 A.B.A. REP. 975, 996 (1912).

[204] J. BRYCE, STUDIES IN HISTORY AND JURISPRUDENCE 624 (1901).

[205] See *supra* notes 7–8 and accompanying text.

[206] In large part as a result of the German influence, the late 19th century American "historical school" was similarly diverse. It has therefore meant different things to different scholars. When Pound complained about "its exclusive reign in American juristic thought in the past fifty years," he was critical of its emphasis on *a priori* principles and of its hostility towards legislation. R. POUND, THE SPIRIT OF THE COMMON LAW 155–56 (1921). Thomas C.

The diversity of its branches thus made German legal science a useful, but also a dangerous, resource for arguments. Common law jurists could see in German jurisprudence a variety of qualities, good or bad, depending on one's perspective, and thus derive from it arguments in support of sometimes opposite agendas. The downside, however, was that without clarification these different meanings also became a source of terminological confusion and thus miscommunication.

But German jurisprudence was intriguing not only because its diversity provided a rich arsenal of weapons in jurisprudential battles, but also because the German idea of legal science itself, with its notions of history, system, and, above all, their combination, was deeply attractive to many Anglo-American scholars. It is unlikely that they fully understood the concept of "Rechtswissenschaft" in its complex interplay of ideas, but that was not necessary to feel its appeal more or less consciously.

Its aspect of "Geschichte" was fascinating in all its three elements. The historicist element resonated with the common lawyers' sense of tradition and search for guidance in the past. In fact, Savigny was probably closer to their hearts than to those of many nineteenth century German jurists. Its organicism and emphasis on growth of legal ideas rang true to many late nineteenth century believers in evolution. Of course, with his emphasis on peaceful and silent development, Savigny was no Darwinist at all, but the writings particularly of later German jurists could be read to suggest that law and biology were closely related. And finally the emphasis of "Geschichte" on the exploration of (historical) facts sounded right to those who subscribed to the new positivist concept of science. Again, Savigny's notion of data was far from identical with that of late nineteenth century positivists, but to discern the difference required greater familiarity with his work than most Anglo-American jurists ever had or desired.

Also, the notion of a "System" was seductive in many ways. The idea of a logical arrangement of law attracted many late nineteenth century Anglo-American lawyers who were tired of the common law's lack of systematic coherence. They were frightened by the

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Grey, in contrast, identified it mostly with James Coolidge Carter and the view of law as custom, Grey, *Langdell's Orthodoxy*, 45 U. PITT. L. REV. 1, 30 (1983), while Robert Gordon used the term to describe the "institutional-evolutionary studies in legal history" of Holmes, Bigelow, Thayer and Ames at Harvard in the 1880s and 1890s. R. W. Gordon, *J. Willard Hurst and the Common Law Tradition in American Legal Historiography*, 10 LAW AND SOC. REV. 9, 15 (1975).

increasing chaos of case law, which had become glaringly apparent after the abolition of the forms of action. The idea that such a system could be complete was captivating to those who longed for a closed legal order that could handle all social issues with mechanical ease. Not many Anglo-American jurists before Holmes and Pound recognized it as a grand illusion. And the notion of an organic, self-reproductive system appealed to the believers in the autonomy of the common law who wanted to see it in the hands of the lawyers and not of the democratically elected legislatures. Such a system could be developed from within so that lawmaking from without was an unnecessary disturbance.[207]

Last, but not least, the prospect of a grand reconciliation of the actual historical record, reflecting the spirit and needs of the people, with a systematic order for the learned jurists was attractive to everyone who could make himself believe in it. It promised to overcome the old dichotomy of logic and experience by making the life of the law both at the same time.[208]

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[207] An important representative of this group was Savigny's American disciple James Coolidge Carter. *See* Reimann, *The Historical School Against Codification*, *supra* note 5, at 114–18.

[208] There were, of course, other factors that attracted Anglo-American scholars to 19th century German "legal science," but they must be left for separate studies. Prominent among these factors were the institutional implications of "Rechtswissenschaft," i.e. the connections between the jurisprudential concept and the status of legal academics, the quality of legal education, and the university system as a whole.

It is arguable that German legal science never really fulfilled its grand promise of reconciling history with logic, even in the codification that it generated. This question is not my concern here. It should be pointed out, though, that American legal scholarship turned away from, and often outright against, German jurisprudence around the time of World War I when the elite of American scholars began to abandon classical legal science in favor of sociological jurisprudence and legal realism.

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