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Iredell Jenkins

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RUDOLF VON JHERING

IREDELL JENKINS*

I

It is often the fate of the giants of thought to have their names live on while their doctrines are neglected, and even for their reputations to wax as their influence wanes. Indeed, this happens at some periods to the work that all such men leave behind them; it is esteemed but not appreciated, acknowledged but not cultivated. The precise reasons for this fall into oblivion vary with every individual case, but there is one factor that is common and constant: the prominence within the work of these men of ideas that push inquiry beyond the comfortable limits that are conventionally accepted. These ideas raise problems that upset complacency, they ask unexpected questions, they propose investigations never hitherto undertaken or even contemplated, and they require a radical effort of assimilation. The very characteristics that make such work great, and compel our attention and admiration, at the same time threaten our established modes of thought and challenge us to a thorough reconsideration of facts and doctrines that we had thought to have settled. So it is not surprising that, while such work commands the respect of all, it often fails to win the dedicated allegiance of any. The contributions that it makes are gladly accepted, and its influence is felt in a diffuse way; but it does not inspire even its adherents to insist on the questions that its author felt most urgently, or to press further the insights that he regarded as his most significant.

The case of Rudolf von Jhering is a particularly tragic—and withal instructive—instance of this phenomenon. The quality of Jhering's work was recognized from the first; his personality made him one of the leaders of the juristic life of his time; and his writings were widely read and discussed, not alone in Germany but throughout the western cultural community. Jhering undoubtedly exerted a very strong influence, not only on those individuals and schools whose ideas obviously derived from his thought, but also on all who have since dealt with the problems of jurisprudence. As Julius Stone has put it, no later legal theorist has been "able to write as if the *Scherz und Ernst* and *Zweck im Recht* had not been written."¹

Indeed, the impact of Jhering was greater than that of many men of commensurate stature because he was such a many-sided thinker;

* Professor of Philosophy, University of Alabama. The author gratefully acknowledges assistance from the University of Alabama Research Committee which supported the work of which this article forms a part.

1. STONE, THE PROVINCE AND FUNCTION OF LAW 314 (1946).

he himself absorbed many influences and held them in unstable solution, so he in turn influenced diverse movements which had little else in common. I think—and shall later argue—that Jhering failed to achieve a successful synthesis of his acute insights into the nature and the workings of law; he penetrated deeply and variously into his subject, but he never worked through it to a complete and lucid vision. Yet just because of this partial failure, he was able to give impetus and direction to many different lines of inquiry and to play a leading part in the development of several divergent schools of thought. The best known aspect of his work is, of course, the doctrine that law is a means to an end, an instrument of human purposes; it is this emphasis that has been developed into—and by—the jurisprudence of interests. But there are numerous other strands of Jhering's thought that, while not so well known, have also been influential. His definition of the state as essentially a locus of power and an agent of compulsion contributed greatly to the imperative theory of law, and aligned him with the broad movement of legal positivism. But his steadfast insistence that law must remain sensitive and subordinate to values that are prior to it and speak through it associates him with the current of legal idealism. His earlier work in the tradition of legal conceptualism—which culminated in *Der Geist des römischen Rechts* (*The Spirit of Roman Law*)—and his continued emphasis on the need for clarity and precision in legal concepts, contributed to the growth of analytical jurisprudence. His strong sense of the relation between law and history, and his demand that law be appropriate to its setting, served to extend and amplify the school of historical jurisprudence, and helped to create the sociology of law. His insistence that the life of the law is a constant struggle, and that law must realize purposes as well as merely reflect them, encouraged the movement of legislative reform and stimulated the work of the legal realists. Jhering put his mark indelibly upon each of these facets of legal thought and practice, with the result that his work has borne a rich fruit; and the fact that this has sometimes involved some rather startling mutations of the original seed-ideas is not cause for surprise—or even necessarily for regret.

But despite this varied and pervasive influence, I think it is nevertheless the case that those insights that are the most profound and suggestive in Jhering, and to which he himself attached chief value, have either been neglected by later thought or have been radically subverted from the direction in which he intended them to carry. This is a thesis to which I shall return at the conclusion of this essay, there to argue it in some detail. Very briefly, the contention I would urge is this: Whereas Jhering sought to turn inquiry toward the foundations of the legal order, and to understand law as

a coherent element within a total human and cultural setting, his successors have been content to confine their attention to the operations of the legal apparatus, and to trace the relations of law no further than to political and economic forces.

When the first volume of *Der Zweck im Recht*² was published in 1877, Jhering was a man of almost 60, with a substantial life's work already achieved. In the preface to that work he has told us of the chain of thought that led to it; and he has described, almost apologetically, the manner in which an apparent digression to an historical analysis gradually developed into a radical theoretical reconstruction. The account of this genesis is so revealing that it is well to let Jhering speak for himself. The preface begins in these terms:

The book, of which I herewith present the first half to the public, is an offshoot of my work on the Spirit of Roman Law ("Geist des römischen Rechts"). The last volume of that treatise (Part III, division 1), which appeared in 1865 in its first edition, concluded with the establishment of a theory of "rights in the subjective sense." In it I gave a definition differing from the prevailing one, by putting Interest instead of Will at the basis of law. The further justification and illustration of this point of view was reserved for the succeeding volume. In the course of its development, however, I soon went beyond this point of view. The concept of Interest made it necessary for me to consider Purpose, and "right in the subjective sense" led me to "right in the objective sense." Thus the original object of my investigations was transformed into one of much greater extent, into the object of the present book, *viz.*, Law as a means to an end.

...

The fundamental idea of the present work consists in the thought that Purpose is the creator of the entire law; that there is no legal rule which does not owe its origin to a purpose, *i.e.*, to a practical motive.

...

[This] problem . . . placed me in a domain where I am a dilettante. If I ever deplored the fact that the period of my development came at a time when philosophy was in discredit, it was in connection with the present work.

...

I must be prepared for readers who will judge the value of the work only by the particular views contained in it. It is the usual standard of the jurist in judging works of his profession. In a work which, like the present, pursues no practical or dogmatic purpose, but takes for its task the presentation of the whole connection of law, such judgment would show the lack of all understanding for the meaning of the problem (pp. liii-lvi).

2. The English translation by Isaac Husik was published as JHERING, *LAW AS A MEANS TO AN END* (1913). All citations are to this edition and, for the convenience of the reader, are given in the text, in parentheses, after the passages quoted.

This passage raises several points that are of capital importance and that represent a clear progression in the direction and intention of Jhering's thought. First, there is the shift from Will to Interest as the basis of law. This in turn leads on to the concept of Purpose, which is recognized as the objective source and justification for the subjective rights that Interest asserts. This means that real Purposes are to be the criteria for evaluating and judging actual Interests. This shifts attention from the presently established body of legal concepts to the array of situations and goals with which law deals. This entails a theoretical consideration of the legal order as a whole, and not a mere solution of discrete and limited legal issues. And this, finally, is recognized as requiring a philosophical manner of treatment: *i.e.*, one that seeks to place law within an inclusive metaphysical and moral framework.

All of this sums up to the fact that Jhering was embarking on an extraordinarily ambitious undertaking. He meant to make the foundations of the legal order far broader and deeper than they had hitherto been, and to relate law to the whole of man's physical and spiritual life. But—and this is the crux of my thesis—I think it abundantly clear that this has not been the outcome of his work. His impact, paradoxically, has gone rather in the opposite direction. All of the earlier mentioned schools that have felt his influence have tended, in their various and private ways, toward a narrow conception of the basis of law and a limited view of its functions. The evidence is overwhelming that Jhering consciously intended another "Copernican revolution," though one moving toward quite another conclusion than that wrought by Kant. But, in the process of being absorbed, his work was shattered into fragments; and the different schools that built separately upon these were at one in treating law in largely technical rather than philosophical terms. They looked for the meaning of the law in the uses to which it was actually put rather than in the ends that it should ideally serve. They emphasized the notions of subjectivity, interest, practice, and technique, while they neglected those of objectivity, purpose, theory, and value.

This radical reversal of Jhering's intention is seen with special force in the work of the school of *Interessenjurisprudenz*, which derived most directly from him. Such men as Rümelin, Oertmann, Heck, Binder, Isay, and the others who contributed to the formation of this school all acknowledged their debt to Jhering. With certain reservations in some cases, but always with enthusiasm, he was hailed as the man who had exposed the futility of conceptualistic jurisprudence, had rescued law from logic and returned it to experience, and had for the first time made law clearly conscious of its mission as an instrument through which men assert and protect

their interests. In short, Jhering is regarded by his successors as the inventor of what Rümelin calls the "teleological method" in jurisprudence and what Heck calls the "genetic theory of interests." But this chorus of praise, which was clearly deserved, hides a common misunderstanding which largely vitiates it. For all of these jurists, with the possible exception of Binder in some of his writings, failed signally to grasp—or at least to exploit—those ideas that Jhering regarded as most significant and far-reaching.

This misunderstanding centers around the exact nature and status of the goals that law seeks—of the ends to which it is a means. As it develops, it issues in two components, one going to matters of substance, the other to matters of procedure. I think it is clear from the passage quoted earlier—and I will later introduce more evidence on this point—that Jhering thought of the "purposes" or "ends" of law as grounded in the real character of man and the world; they are integral to the general human situation, and hence quite independent of the desires and preferences of individual men and of the interests that these men assert. Furthermore, he thought that these purposes, and particularly the systematic whole that they form, could be reached only by a philosophical analysis that went toward the metaphysical basis of these purposes and the moral values that they furthered. In sum, Jhering conceived of purposes in objective terms, and he assigned them priority over subjective interests. *Interessenjurisprudenz* rejected both of these insights, and pushed its inquiries in other directions by other methods. This difference, which seems quite clearly to have been the result of a conscious and deliberate choice, is brought out very sharply in an address by Philipp Heck in which he traces the development of this school and gives full credit to Jhering for having expounded its seminal ideas. Having made this acknowledgement, Heck then goes on to criticize Jhering on the grounds that he "did not draw the consequences of his theory" and "did not sufficiently analyze . . . the effects of law on actual life."³ Heck makes his objections explicit in these terms:

He [Jhering] emphasizes the protection of interests, and characterizes it as the object of legislation; "Purpose in Law" is the title of his most important later publication. To my mind, however, it is not sufficient to consider the purpose of law. The fundamental truth from which we must proceed is that each command of the law determines a conflict of interests; it originates from a struggle between opposing interests, and represents as it were the resultant of these opposing interests. Protection of interests through law never occurs in a vacuum. . . : If we confine ourselves to an examination of the purpose of a law we see only the interest which has

3. Heck, *Interessenjurisprudenz* in *THE JURISPRUDENCE OF INTERESTS* 35 (Schoch transl. 1948).

prevailed. But the concrete content of the legal rule, the degree in which its purpose is achieved, depends upon the weight of those interests which were vanquished. . . . Therefore, the teleological jurisprudence of Jhering is not sufficient. It needs to be deepened with the aid of an analysis of interests, or, in other words, the theory of conflicts. For each rule of law the conflict of interests which underlies it must be analyzed.⁴

The doctrines embodied in this passage, which summarizes the outlook of the jurisprudence of interests and forecasts its outcome, represent a complete inversion of Jhering's mature intentions. Law is here regarded as a technical, not a theoretical, science. Emphasis is placed upon private conflicts rather than public policy. Jhering stated perfectly explicitly, on several occasions, that he was eager to effect a reformulation of the classical Natural Law doctrine that would preserve the breadth and depth of its vision while eliminating its dogmatic and regressive features. That is, he meant jurisprudence to be focused on what is ultimate, latent, and ideal in the life of the law. His successors focused it on what is immediate, obvious, and actual.

It is a commonplace that a thinker cannot control the course of the ideas that he has fathered. Nonetheless it is unusual for an author who expressed himself with such explicitness and power as Jhering to have his insights so blunted and his intentions so distorted as they were. This was due in part, no doubt, to the temperaments and interests of the men who took up and cultivated his ideas. It was certainly due far more to the legal and social conditions that held at the time; these brought certain issues and problems to the fore, and so fostered the development of doctrines and techniques that promised to be effective in dealing with these matters of primary import. But even these factors taken in conjunction, influential as they may be, are not adequate to account for the extreme metamorphosis that Jhering's doctrines underwent. In addition, one is led to suspect a critical failure somewhere in Jhering's own development of his theory, with the result that basic ideas that were intrinsically sound and fruitful did not carry conviction, and so were neglected, while other more superficial aspects of this theory were given an undue prominence. I think that this is indeed the case. Furthermore, I think that the problems to which Jhering was calling attention, and the approach to them that he sought to establish, remain of vital significance to the life of the law. So as I trace the line of Jhering's argument, I shall be concerned to detect, if possible, the flaws that made it miss its mark.

4. *Id.* at 35-36.

II

The argument that Jhering set out to develop in *Law as a Means to an End* is complicated and incomplete. When Jhering interrupted his work on *The Spirit of Roman Law*—which he had hitherto regarded as the crowning achievement of his career—in order to explore his new conception of “law as a means to an end,” he expected this to be a relatively straightforward task that could be accomplished in a brief interlude. After all, as he tells us, he had in mind but one “fundamental idea,” which appeared quite simple and obvious: “that there is no legal rule which does not owe its origin to a purpose.” (p. *liv*) And the book that he planned was to be devoted solely to “the establishment of this principle, and to the detailed exposition and illustration of it in connection with the most important phenomena of law.” (p. *liv*) To a man with Jhering’s vast and intimate knowledge of the law, both as an historical occurrence and as an actual technique, the second part of this undertaking—the “exposition and illustration” of his principle—must indeed have presented itself as an easy exercise. Unfortunately, Jhering never got to it. For the prior task of “establishing” his principle soon led him to the realization that “a book which intends to make purpose the foundation of the entire system of law must give an account of the concept of purpose.” (p. *liv*) The rest of Jhering’s effort was to be spent in discharging this obligation, as the seemingly limpid and self-evident truth that law is a creature of purpose gradually disclosed itself to be a mass of unresolved ambiguities and untested assumptions. The attempt to clarify and justify his newly-won conception of law thus prevented Jhering from ever applying this systematically to an analysis of legal phenomena. It seems probable that Jhering himself realized only gradually the extent to which his inquiry was being bent from its original intention; and then he accepted this fate unwillingly, and continually fought to counteract it by anticipating and elaborating the mature legal consequences of the primitive roots of the law with which he became increasingly involved. Thus the exposition of the thesis of purposiveness in *Law as a Means to an End* is extremely disconnected and repetitive, and the chief difficulty in summarizing it is to disentangle its various strands and present them as steps in what is actually, underneath its surface disorder, a closely-knit logical argument.

It is perhaps as well to begin at the end. The “exhaustive definition” of law at which Jhering finally arrives is this: “*Law is the sum of the conditions of social life in the widest sense of the term, as secured by the power of the State through the means of external compulsion.*” (p. 380).

This definition contains two principal elements, each of which—

as we shall see—is itself complex: there is a system of purposes, and there is a system of force through which these are realized. These purposes, as they are usually conceived by jurisprudence, issue from the various interests that are urged by individuals and groups within society; similarly, the agency through which these interests act, and that serves and protects them, is conceived as the established body of substantive and procedural law. So it is the frequent habit of juristic thought to accept these two elements—human interests and the legal order—as primitive data upon which to base inquiry and build theories. Jhering, to the contrary, treats these elements as the sophisticated outcomes of complex processes, and his concern is to identify their sources and trace their genesis. In brief, the questions with which Jhering is fundamentally concerned, though he nowhere asks them explicitly, are: Why and How is Law?

In any inquiry of this sort, which goes toward origins, the starting point is of the utmost significance. Jhering is very consciously cutting behind a great deal of what is assumed in most legal studies. But like any thinker engaged in a similar quest, he must make certain assumptions of his own; and some of these will almost certainly be unconscious and hence unexamined.

The foundation on which Jhering rests his argument is the principle of Sufficient Reason, which holds that “nothing ever happens of itself (*causa sui*), for everything that happens . . . is the consequence of another antecedent change. . . .” (p. 1) He maintains that this Law of Causality is both “postulated by our thinking, and confirmed by experience” (p. 1) and so constitutes as firm a basis as any that theory can hope to secure. This is a sound contention, for rational inquiry is futile unless there is an objective order and connection that supports our observations and inferences. Furthermore, reliance upon this principle has the great advantage of asserting the unity of man and nature—of regarding man as a coherent part of a larger panorama—and so opens the way for the study of man in other than only psychological and social terms.

The next step in this argument is the identification of the type of causality that operates in the human context. What factors govern human action? Jhering answers this by drawing a sharp distinction between matter and life, physical nature and the human will. The principle of Sufficient Reason holds equally in both of these realms; but the type of causality is radically different in the two cases. Physical nature exemplifies only mechanical or efficient causes. The will knows only psychological or final causes. Matter reacts to the past. Life reaches toward the future. The animating force of life is the will; and that which gives direction to the will is purpose. In sum, “life is the practical application, by way of purpose, of the external

world to one's own existence" (p. 6); and "purpose is the idea of a future event which the will essays to realize." (p. 7)

There are two points to be noticed about this phase of the argument. In the first place, it disrupts the continuity that Jhering had first seemed to establish between man and the rest of nature. Human behavior is now referred to a distinctive principle, and the human situation—as regards both its structure and its end—is treated as unique. It is doubtful if Jhering fully realized this outcome of his argument, for he continues to personify "Nature" and to speak of "her" intentions and arrangements for man. But the inherent limitations of this position nevertheless made themselves felt: they imposed upon Jhering an anthropocentric outlook that confined and distorted his later efforts to grasp the "system of human purposes" and narrowed his view of the "conditions of life" that are the proper concern of law. I shall return to this matter, and deal with it more fully, at the conclusion of this essay.

The other point is of more immediate importance. The argument sketched above leads to the conclusion that "will means the maintenance of one's own causality over against the external world." (p. 17) To accept this conclusion without qualification is to espouse the doctrine of egoism, which asserts "the exclusive tendency of the will to one's own self . . ." (p. 24) and holds that the living creature always and inevitably "does everything for its own sake." (p. 23) Jhering was very conscious of this problem; he returned to it over and over again, as he encountered it in different contexts and from different points of view; and the terms in which he conceived the issue and sought to resolve it are of fundamental importance, as they exerted a strong influence on his theory of law.

It is as difficult as it is important to be clear on this matter, for Jhering's treatment of it vacillated between different interpretations, and his final doctrine contains elements of each of these without achieving a reconciliation of them. The clue to unraveling this confusion lies, I think, in the recognition that Jhering dealt with the problem, on different occasions, on two quite distinct levels of analysis. In some places, the approach is abstract and logical, and the solution proposed is cast in technical philosophical and psychological terms. In other places, the approach is concrete and empirical, and the solution is cast in historical and politico-legal terms. Finally, the occasions on which the first of these manners of treatment is employed are by far the more explicit and prominent, and are commonly accepted—as seems to have been Jhering's intention—as representing his final conclusions on the subject. This, I think, is a mistake that has hindered a just understanding and appreciation of Jhering's thought. For, I would argue, it is the second manner of dealing with

this issue that Jhering employed most of the time—especially in his legal analyses—and that really embodies his mature views.

Jhering's explicit theoretical solution of this issue is simple and straightforward, and has become famous. This consists in positing a "system of human purposes" that contains two main poles: egoism, or individual self-assertion, on the one hand; self-denial, or ethical self-assertion, on the other. Purposes of the first kind are those "by which he [the individual] holds in view solely himself, and not society, *i.e.*, any other person or a higher purpose." (p. 44) Purposes of the second kind consist in "the feeling on the part of the agent of the ethical destiny of his being, *i.e.*, his feeling that existence was given to him not merely for himself, but also for the service of humanity." (p. 45) This is to say that men are motivated by two radically different, and quite separate, types of purpose, one of which is self-seeking while the other is self-denying. This in turn is to say that men can be moved by two distinct sorts of psychological force, each of which appeals to one of these types of purpose. And this, finally, means that there are two different lines along which the effort to organize men—to unite these separate individuals in peace and order—can proceed. One of these works on the egoistic motives of men, seeking to convince them that each can best serve his private interests if they agree on certain common purposes. This effort culminates in the State and in Law. The other approach works on the altruistic motives of men, seeking to persuade them that their true happiness lies in the cultivation of the higher sentiments of Duty and Love. This effort culminates in Morality.

This is the logical schema that serves as the ostensible framework for Jhering's theory of law. And while there is no doubt that its tenets exerted a strong influence on the development of certain of his doctrines, an analysis cast too rigidly in these terms would yield a seriously narrow and distorted account of his theory as a whole. For he often qualifies the stark abstractions of this thesis; and he far more often simply neglects them, as his attention is centered on the tasks of tracing the actual course of legal development and then applying the insights thus gained to an understanding of mature law. The theory sketched above asserts a series of dichotomies: between two forces within every man, between man and man, between men and the group, and between human institutions. It treats the components of these various dyads as though they were radically distinct and sharply separated, and so as suffering no inter-action. It issues, finally, in the view that law is exclusively an instrument of compulsion, appealing only to man's selfish purposes, and using the power of this appeal to impose upon men the restraints and to gain from men the acquiescences that are deemed necessary to a life in com-

mon. In short, law is here interpreted as merely "the politics of force" (p. 187), "the intelligent policy of power." (p. 283)

Such a tidy and uncomplicated theory has undoubted attractions; it even has a certain heuristic value. But it is also a tissue of abstractions, and its superficial clarity is a false gloss of the profound complexities of the human situation. That is, this theory is a large-scale case of what Whitehead has called "the fallacy of misplaced concreteness," which consists in mistaking categories of thought for aspects of reality.⁵ Now, despite his continued flirtations with this fallacy, Jhering never really succumbed to its temptations: rather, he exploited these abstractions for the structure and stability they could give to his argument, and then he drew their sting by dissolving them in the flux of historical and legal events. What saved Jhering here was partly his intimate acquaintance, and close contact, with the actual institutions and operations of law. What saved him even more was his vivid sense of society as prior to the state, coeval with human existence, and exerting a pervasive influence on the characters and sentiments of men. This theme is stated prominently at the commencement of Jhering's exposition: "Society must accordingly be defined as the actual organization of life for and by others and (since the individual is what he is, only through others) as the indispensable form of life for oneself; society is therefore really the form of human life in general. Human life and social life are synonymous." (p. 67) This theme recurs constantly, and joined with it is the explicit rejection of those schools of thought that "wish to isolate the individual, separating him artificially from his historical connection with society, and then to present over against such merely theoretical being-for-himself of an individual, his actual life in society and being-for-others." (p. 44) Holding such views as these, Jhering obviously could not adhere strictly and steadfastly to the dichotomies that his theory demanded. This unresolved tension sometimes leads to logical inconsistencies; and there are occasions when it blurs connections that would otherwise be obvious. But this is probably more than compensated by the fact that it gives to Jhering's work a combined explicitness of structure and richness of detail that are rare among legal theorists.

With this background, we can return to the line of Jhering's argument. We left him at the point where he drew the distinction between egoistic and social motives, and stated his (theoretical) intention of treating law as issuing from and concerned with only the first of these. Accepting this analysis, the central question that arises from it is this: "How can the world exist under a regime of egoism, which

5. WHITEHEAD, *SCIENCE AND THE MODERN WORLD* chs. 3, 4 (1939); WHITEHEAD, *PROCESS AND REALITY* 11 (1929).

desires nothing for the world, but everything for itself alone?" (p. 25) When the problem is posed in these terms—and it must be remembered that this is largely a heuristic device, adopted as a means to isolate the phenomena of legal development in order that they may be more conveniently studied—there is only one way in which it can be solved: "the world exists by taking egoism into its service, paying it the reward which it desires." (p. 25) This problem presses upon humanity from its beginnings, and long prior to the emergence of any such institutions as law and the state, nature solves it through the agency of pleasure and pain: man is simply so constituted that those acts that further the survival of the individual and the species are on the whole pleasurable, while those that threaten this are painful. Jhering enunciates this doctrine in terms of a personified Nature that purposely arranges matters so; contemporary thought enunciates it in terms of evolution and adaptation. But these stipulations come to the same thing, and both are really tautologies: man survives because he is equipped for survival. Men assert their private interests through egoism. It is for the same reason exactly that they cooperate with one another and pursue what appear to be common goals: each has his own interests exclusively in mind, and "the co-operation of a number of people for the same purpose is brought about only by the converging of all the interests upon the same point. No one perhaps has in view the purpose as such, but every one has his own interest in view, a subjective purpose which is quite different from the general objective one, but the coincidence of their interests with the general purpose brings it about that every one in taking pains for himself at the same time becomes active for the general purpose." (p. 28)

As societies grow in size and complexity, this primitive and spontaneous solution of the problem of egoism proves inadequate. The breakup of the immediate face-to-face group, the division of labor, the interdependence of peoples, the scope of men's undertakings—all of these require a more explicit organization. As Jhering puts it, all of the arrangements of civilized life depend upon the presupposition that "society shall always find hands and brains ready for all needs and purposes. . . ." (p. 66) Men must be assigned and kept to tasks; order and continuity must be preserved; the work that is necessary must be done without interruption or conflict. So, at the more sophisticated level of Jhering's concern, the basic problem is this: "What guarantee does society possess that everyone will do his share in realizing the principle upon which her whole existence depends, namely that the individual exists for society?" (p. 70)

The answer lies in the fact that there is a "social mechanics . . . by which society sets the will in motion for her purposes." (pp. 72-73)

Society acts upon individuals through the two basic motives of egoism and altruism, which Jhering now calls "levers of social motion." The egoistic levers are two: *reward* and *coercion*. The altruistic levers are also two: the *Feeling of Duty* and *Love*. These latter belong to the province of morality, whose function it is to develop and train them to the service of mankind. That is, morality is the science of cultivating the inherent capacities of men for love and duty, and then of using these for the purposes of general human and social betterment. Of the egoistic levers, reward is operated by *commerce*. All men act to the end of gaining reward for their effort: they wish to further their interests and realize their purposes. Commerce uses this motive, or lever, to promote social organization and to assure the satisfaction of human wants. This is accomplished by a complex set of arrangements that brings it about that men will be able to attain their own separate goals just to the extent that they contribute what society needs of them. That is, commerce is a gradually evolved and continually developing system that encourages men to exchange their goods and services, to pool their talents, and to concentrate their efforts in such ways as will most effectively promote the common interest. The account that Jhering gives of commerce, tracing this from the untutored efforts of men to secure their primitive needs to the highly organized economic systems of the present, is a fascinating one. And it is perhaps in this treatment that one feels and regrets the most keenly the contradiction between Jhering's theoretical commitments and his empirical convictions. His theory dictates the view that commerce has largely "evolved independently" of law and the state. His experience teaches him otherwise and better. The former controls in this case, and as a consequence, though Jhering frequently touches upon and illuminates the relations of law and commerce, he never treats of them systematically or even explicitly.

The second lever that society has available to act upon men is that of coercion. And the organization of coercion culminates in the state and law. By coercion, Jhering understands "the realization of a purpose by means of mastering another's will." (p. 176) He who coerces another says in effect: "I have the power to do such-and-such—e.g., kill or enslave or impoverish you—but I will refrain if you will in turn subordinate your will to mine, accede to my directions, and contribute to my undertakings." He who submits to coercion sacrifices some of his purposes in order to preserve others that he regards as more vital. Coercion thus represents a victory of intelligence and foresight over force: it embodies a compromise in which each party's interests are better served than they would be by the unrelenting extremes of victory and defeat that follow the use of

blind power.

Having established this definition, Jhering sets out to trace the various forms that coercion takes—the modes of organization through which it is at once exerted and controlled—until it arrives at the concepts of the state and law. Among the principal steps in this development with which Jhering deals in detail are slavery, peace by treaty, protection of person and property, the family, contractual obligation, partnership, and association. The constant direction of this process is toward “the social organization of coercion.” (p. 218) The problem that underlies this process, and to which it seeks a solution, is everywhere the same: it is that “of bringing the preponderance of force on the side of right.” (p. 218) The danger that men in society always face is that power will fall into the hands of a minority group and will be used to further its interests without measure, with a disregard for the proper claims of other interests. The organized effort to prevent this has two sides:

the establishment of the external mechanism of force, and the setting up of principles to regulate its use. The form of the solution of the first problem is the *State force*, that of the second is the *Law*.

...

The State is society as the bearer of the regulated and disciplined coercive force. The sum total of principles according to which it thus functions by a discipline of coercion, is *Law*.

...

Both concepts stand in the relation of mutual dependence: the State force has need of the law, the law has need of the State force. (pp. 231, 233)

Jhering treats only briefly of the means by which force is effectively concentrated in the state. He regards this as “the proper technique of the political art” (p. 237), and so contents himself with remarking that it depends on two factors: “the organization of power in the hands of the State force, and the moral power which the idea of the State exerts.” (p. 236) The state maintains its supremacy because it commands both fear and respect.

Jhering is now prepared to deal with the problem of law. As his point of departure, he takes the then current view that defines law as “the sum of the compulsory rules in force in a State.” (pp. 239-40) Analysis of this definition discloses two essential elements: “that of rule, and that of the realization of it through coercion.” (p. 240) The latter of these, since it concerns the “State Force,” is handed over to the “political art,” and Jhering does not deal with it further. The first element in turn has two aspects, one having to do with the form of such rules, the other with their content. So Jhering’s treatment revolves around two questions. What is the *formal structure* of the

legal rule, which distinguishes it from all other modes of coercion? What is the *content* of the legal rule; *i.e.*, what are the purposes that law serves?

The formal character of law is determined by its being a particular sort of *norm*. Jhering's discussion of this concept is, as so often, a mixture of linguistic, juristic, and historical analysis; so I will make no attempt to follow all the intricacies of his argument, but will only summarize its principal steps. There are four of these. First, a norm is "a proposition of a practical kind, *i.e.*, a direction for human conduct." (p. 247) Second, norms are binding, *i.e.*, they are *imperatives*, whether commands or prohibitions; this distinguishes them from maxims, which are merely advisory. Thirdly, norms may be either *concrete* or *abstract*, depending as they designate conduct in a particular case or a *type* of conduct for all cases of a kind. Legal rules are abstract norms. Fourthly, the distinguishing feature of laws is that they are abstract norms that are addressed primarily to state authorities, directing them as to what they are to do. In sum, laws are abstract imperatives for human conduct, issuing from certain organs of the state and addressed to other organs, and obligating these to carry out its directions by means of external compulsion if necessary.

This mature form of the legal norm is what Jhering calls the *bilaterally binding norm*: it requires "that the authority of the State itself should respect the norms issued by it" and so entails the "self-subordination" of the state to its laws. (p. 267) Such a norm develops only gradually from *individual commands*, which are concrete, and then from *unilaterally binding norms*, which obligate only those to whom they are addressed and not the State authorities who issue them. The great significance of the bilaterally binding norm lies in the fact that it is the only agency through which coercion can be exerted and still can be prevented from becoming arbitrary. Such norms are the most reliable means that men have found for promoting the great purposes of order, equality, and personal rights. In sum, the concept of the legal norm as bilaterally binding supplies the theoretical terms for the solution of the problem of justice.

But there remains the practical problem: How can this subordination of the state authorities to the laws issued by them be assured in fact? Jhering deals with this central issue at length, discussing it under three heads: (1) the *motives* that the state has for submitting itself to its own norms; (2) the measures that serve as *guarantees* of this self-subordination; (3) the *limits*—if any—beyond which the state should be left free to act unilaterally.

(1) The question of motive is briefly disposed of: it is the same

that "suffices to determine a person to self-control, viz., self-interest." (p. 282) If the authorities have "insight to understand the teachings of experience, and moral strength to practise them," then "they make use of the law because they are convinced that their own interest properly understood demands it." (p. 282) For it is only by such self-subordination that the State can hold the respect of its citizens, can win their willing obedience, and can muster their best efforts behind its purposes.

(2) The guarantees of this policy are two-fold. One is internal and rests upon the *feeling of right* in citizens, which keeps them alert and sensitive to any falling-away on the part of authority. A society of free men keeps perpetual watch on its governors, thus stimulating them toward the right while at the same time warning them against transgressions.

The other of these guarantees is external, and consists in the *administration of justice*. To this, Jhering devotes a long and careful analysis. He first notes that there are two important factors that distinguish the judiciary from the other branches of the State's activities: "the *inner peculiarity of the purpose*, and the *outer peculiarity of the means and forms* by which it is carried out." (p. 289)

As regards the first, the judicial function is exclusively that of realizing the law; for the judge, the law is an end in itself, to be faithfully administered as it is. To ask him to correct the law—that is in the light—however gained—of what the law-ought-to-be, is to ask him to encompass a logical contradiction: for the fact that the law *is*—i.e., has been properly promulgated—constitutes proof that it is what it *ought to be*, namely, a bilaterally binding norm and hence one that binds him absolutely as its servant. The executive branch of the state must also certainly respect the law; but still this remains for it a means to an end, and hence always to be administered with a view to the purposes that it is intended to serve and its adaptability to further these. This latter attitude is, of course, even more characteristic of the legislative function, for which the law is primarily purposive and only secondarily formal; though the legislature must obviously be bound by constitutional provisions and its own procedural rules.

It is precisely at this point that *Interessenjurisprudenz* made one of its sharpest breaks with Jhering's doctrine. If my argument in the first section of this paper was correct, the reasons for this are not far to seek, and they cast an additional light on this matter. Jhering's successors were unwilling to follow him in his attempt to effect a thorough reconsideration of the law as a whole, with a consequent reformulation of its entire corpus. That is, they hung back from

the effort to recreate the legal order as a coherent purposive system, consciously based upon a survey of human and social values. But they did recognize the need to bring the legal order into closer touch with actual human and social concerns. Jhering's intention would require that this be done by constitutional and legislative reform, carried out in the light of philosophical and scientific investigations of "the system of human purposes" and "the conditions of social life." *Interessenjurisprudenz* was more modest: it was content to throw the problem into the laps of the judges, requiring them to make all of their decisions in the light of the various economic and political interests at issue. In short, instead of a single major and carefully planned reform we are to have an infinite series of discrete *ad hoc* adjustments.

The second factor that distinguishes the administration of justice is its mode of organization. This contains four essential features:

- (a) An established body of material, or substantive, law.
- (b) An independent and impartial judiciary to whom this law is handed over to be exclusively applied by it.
- (c) The presence of two parties who stand in a position of legal equality to one another and of legal subordination to the judge—and this even when the state is one of the parties.
- (d) A fixed and prescribed mode of procedure, in accord with which litigation is carried on and a decision reached.

It is only to the extent that these four elements are effectively present and readily available that the rule of law can be assured.

(3) The question of the limits beyond which the state should not be bound by its laws is one that Jhering treats in purely practical terms. He acknowledges that he can see no way toward a theoretical solution of the problem, and he even confesses that to admit such limits is to contradict the definition of the legal norm. If the state can unilaterally withdraw from its commitments, default on its promises, and change its abstract rules with concrete cases, then the concept of the bilaterally binding norm has been at least seriously weakened. Yet Jhering insists that the state must in fact have the discretionary power to indeed thus disregard its edicts. So long as the future defies precise anticipation, and power cannot predict the conditions it will meet or the challenges it may encounter, so long must the state be both free and prepared to cast off the bonds of its past declarations and to act as the present requires. That is, our ultimate confidence must be in ourselves as men, for law is but the creature of others like us; and we cannot legitimately put off our responsibility upon them. This, it must be emphasized, is in no sense a counsel of expediency. It is merely a reminder that while the virtue of law resides

in its formal elements, its value springs from its contents. The law is a system of purposes before it is a system for their realization.

III

This brings us to the final matter to be considered: the *content* of law, or the human and social purposes that it is the function of law to serve. This, as Jhering very well recognizes, is the crux and climax of his undertaking; and in discussing it I want to return explicitly to certain suggestions that were made at the commencement of this paper. I there proposed a two-pronged thesis: first, that Jhering's most important insights, and especially the questions that he felt to be the most pressing, have been largely neglected or subverted from the direction in which he meant them to lead inquiry; second, that the cause for this must be sought in some inadequacy or incompleteness in Jhering's doctrine that prevented it supplying the necessary support and guidance for such inquiry.

Jhering commences his examination of the content of law by drawing attention to certain distinctions that he regards as essential to a clarification of the question here at issue. It is frequently charged, he notes, that this is "an insoluble problem," since "this content is ever changing, it is one thing here and another there, a chaos in unceasing flux, without stability, without rule." (p. 325) Jhering deals with this objection by distinguishing sharply between science and knowledge on the one hand, action and practice on the other. The end of the former is "truth, the agreement of the *idea* with that which *is*." (p. 327) So truth when found is "always one" and "remains forever." (p. 326) The end of action and practice is quite other. These aim at what is "right, *i.e.*, appropriate to the purpose." (p. 326) So the standard of practice is correctness, which "denotes the agreement of the *will* with that which *should* be." (p. 327) All of this, of course, simply re-emphasizes Jhering's basic contention that law is a means to an end: since this is the essence of law, its criterion is effectiveness.

As the next step in his argument, Jhering amplifies this conception by defining law, "in reference to its content," as "the form of the *security of the conditions of social life*, procured by the power of the State." (p. 330) The key phrase here is "the conditions of life," and this immediately has ascribed to it two important characteristics: it is both a *relative* and—at least in part—a *subjective* concept. The conditions of life change with time and place and circumstances: what is vital here may be trivial elsewhere; problems that press urgently at one time may not even arise at others; arrangements that succeed magnificently in some situations fail as dismally in others.

Since law is a practical discipline, a set of directions for human conduct, it must be sensitive to these changes and keep its content appropriate to them. So "law cannot always make the same regulations, it must likewise adapt them to the conditions of the people, to their degree of civilization, to the needs of the time." (p. 328) And again: "a universal law for all nations and times stands on the same line with a universal remedy for all sick people." (p. 328) In addition to this obligation to be appropriate to changing external circumstances, law must also be appropriate to the varying subjective judgments that a people make regarding these, and, especially, to the varying preferences and interests that a people assert. Societies have different value systems, they do not attach the same significance to the various goods of life, they disagree as to which goals they will insist upon and which they will sacrifice. If law is to be true to its function, it must vary with the ends proposed to it for realization and the circumstances in which these are to be realized.

With these qualifications and refinements established, Jhering is ready to proceed to the heart of his problem. He has so far, it must be borne in mind, been concerned only to note certain important characteristics of the actual contents of law and of the ends to which law is directed: namely, that these are relative to circumstances and are determined by subjective acts of choice and will. Now, it must be insisted that these characteristics do not preclude the possibility that there are some purposes that law must always serve and some conditions that it must always satisfy. It is quite conceivable that it be of the very essence of law—as a means to an end—that it have a certain general orientation and content. Then the differences that are introduced by time and place and circumstance, and are reflected in actual bodies of law, are but variations on a common theme. This is a perfectly reasonable view, which has been frequently held. And it seems clear beyond question that Jhering himself held it. For, having made the distinctions and qualifications just discussed, he addresses himself to what he declares to be the central question of his inquiry. He poses it in these terms: What are the "conditions of social life," the "requirements upon which the existence of society depends?" (p. 337)

As I have argued earlier, I think that Jhering, in setting forth his purpose and program in *Law as a Means to an End*, intended that his inquiry into these questions should be broadly philosophical, and that his answers should be cast in metaphysical and moral terms. It was his evident conviction that the pressing need in jurisprudence was to conceive the legal order in broader and deeper terms than had hitherto prevailed, and to establish law in close relationship with the whole of human life, in its intellectual and spiritual aspects as well

as its physical and economic. It was Jhering's crowning insight that law reflects and serves all of the human enterprise, and that this enterprise is itself grounded in the objective structure of human nature and the human situation. Here, one must guard carefully against misunderstanding. This does not mean that law can be based and built upon any "absolute" truths that are known independently of reason and experience; it does not mean that there are explicit and detailed categoricals that all bodies of law must embody just as such; it does not mean that all actual legal systems are imitations of some supernal code. It simply means that the "conditions" and "requirements" of life, which are at once the beginning and the end of law, are determined by the real nature of man and the world. Their precise content varies with time and place. Men must grasp and interpret them before they can deal with them, and in this effort they make mistakes. But these general conditions and requirements of life are independent of circumstance and preference. They represent the universal necessities of man's actual lot and the objective goals of his ideal fulfillment. The human situation being what it in fact is, there are certain essential requirements that must be met, and certain essential purposes that must be attained, if the human potential is to be realized. It is these requirements and purposes that constitute the framework of all law and define its functions. So it is the primary obligation of legal theory to elucidate these basic and pervasive elements. In sum, the ultimate concern of law must always be with the real conditions of man's being and well-being.

This is the direction in which Jhering clearly wishes to push legal theory: toward a consideration of those human and social, those metaphysical and moral, conditions that are prior to and independent of the institutions of law, and that define the functions and the goals of this. Now, if his work is actually to have this impact, then it is incumbent upon him to sketch the lines that such inquiry is to follow. That is, he is obliged to identify the extra-legal sources and goals of law, and to indicate the methods by which these are to be investigated. But this is precisely what Jhering never does. Instead, when he proceeds to answer his central question, regarding the conditions and requirements of life, his inquiry is cast in strictly legal terms. He does not move toward the problems that give rise to law and continue to press upon it, the purposes that animate law, and the values that law seeks to embody. But the analyses that he offers are directed solely toward the concepts and techniques that law develops and employs in dealing with these issues. Whereas we expect to be taken backstage, so to speak, and shown the human materials, both actual and ideal, from which the plot of the law evolves, we in fact see these only as they are reflected in the highly artificial arrangements of

mature legal systems.

Throughout the long discussions of this matter, which stretch through a hundred pages, one has the feeling that Jhering is striving desperately to escape from the legal context and make his way to those realms—whatever they may be—that underlie law and explain it. This feeling derives particularly from the manner in which Jhering continually shifts the terms and the direction of his analysis. He does not develop, cohesively and consecutively, a single line of argument. Instead, he starts to classify and interpret the contents of law—the conditions that give rise to law and the purposes law serves—in one way, develops this slightly, appears to find it unsatisfactory and so drops it, starts on quite another tack, and repeats this several times.

He first distinguishes the requirements of life by “reference to the attitude of the law toward them . . .” (p. 337); this leads to the familiar classification of the extra-legal, the mixed-legal, and the purely-legal conditions of society, where these distinctions depend upon the extent to which the activities and purposes in question require the support of the law. Then he shifts to a consideration of the *subjects* that the law recognizes as bearers of rights: this issues in the distinction of individuals, associations, Church, State, and society as persons whose purposes the law undertakes to secure. He then appends to this an analysis of the “three fundamental concepts” of Things, Obligations, and Crimes. From this he returns, as though from an interruption, to a further consideration of the vital requirements of these subjects, which he identifies as the *physical, economic, and ideal* conditions of life. Finally, he refers back to two earlier analyses of the “substantial element” in law, or the “highest purposes” to which law is devoted: these are at once placed identified as Order, Equality, and Subjective Right (pp. 263-267), at another as Independence, Equality, and Justice (pp. 170-175).

I do not at all mean to imply, by this foreshortened and seemingly sardonic account, that these discussions of Jhering's are either trivial or irrelevant. To the contrary, they are replete with perceptive insights into the working of law and constructive suggestions for its improvement. Jhering was at once too learned and too imaginative for his thoughts on any legal subject to be superficial or sterile. But I would argue that this discussion of the content, or substance, of law fails altogether in its announced intention of clarifying the objective conditions and purposes that give rise to law and define its functions. It does this because Jhering is never able to penetrate through and behind the legal order, which he knew so intimately, and to see clearly either the primitive beginnings from which law arose or the ideal goals to which it aspires.

The source of Jhering's power as a jurist lies in his profound and balanced recognition at once of the distinctive character of law and of its close association with other modes of social organization. It was this that enabled him to grasp so effectively the notion that law is a particular means—one among many—for the attainment of ends that it often shares with other segments of the human enterprise. Further, Jhering had a magnificent sense of both the capacity and the limitations of law as a means: his analyses and evaluations of its effectiveness as a vehicle for the furthering of various human interests are always acute and discriminating. But he did not have a corresponding grasp of the ends to which law is properly to be directed: his view of the purposes of law never became a complete and coherent vision. This can perhaps be put most accurately by saying that Jhering's outlook always remained provincial. I use this term, not with any pejorative overtones, but in the strict sense, to indicate that he seemed unable to conceive human and social matters save in sophisticated legal terms. He could not escape from the context of law because, though he was compellingly aware of other realms, he could not clearly envisage them.

It is for this reason, I think, that Jhering failed to focus the attention of his contemporaries and followers on the legal problems that he regarded as central, or to persuade them to approach law in the very broad terms that he advocated. He did not convince them on these matters because he could not point the way, or pose the terms, for the accomplishments he had in mind: less adventurous spirits than himself, they were content to cultivate ground where his ideas could promise them immediate fruit. One can only hope that this failure is temporary. For Jhering's convictions and intentions on these points were sound, and law will not rest on a secure and fruitful theoretical base until it returns to Jhering's questions and deals with them seriously.