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Recommended Citation

George H. Sabine, *Rudolf Stammler's Critical Philosophy of Law*, 18 Cornell L. Rev. 321 (1933)
Available at: <http://scholarship.law.cornell.edu/clr/vol18/iss3/1>

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CORNELL LAW QUARTERLY

VOLUME XVIII

APRIL, 1933

NUMBER 3

RUDOLF STAMMLER'S CRITICAL PHILOSOPHY OF LAW

GEORGE H. SABINE*

INTRODUCTION

Who is Rudolf Stammler and why does the Cornell Law Quarterly publish an account of his philosophy? The answer is that Rudolf Stammler is a figure in one of the present-day phases of legal education, namely the study of law abstractly, philosophically, and indeed critically under the heading of "Jurisprudence".

At Cornell the subject is taught under the inspiration of Roscoe Pound, to whose lifetime labors jurisprudence in America is deeply indebted. For years, at the Harvard Law School, Pound has been treating the topic in a manner truly Olympian. Analyzing the juristic ideas of primitive times and medieval times and modern times, he traces the schemes whereby societies of different times and places impact upon the individual the interests of other individuals and of the group. He ranges over savage law, barbaric law, and civilized law, ancient and modern. Greek Law and Roman Law, Civil Law and Common Law are all made to pass as in a panorama, and as the scroll unrolls, great figures in the history of human thought find places upon it—Aristotle, Plato, Cicero, St. Augustine, Justinian, Accursius, Bartolus, St. Thomas Aquinas, Suarez, Grotius, Hobbes, Locke, Rousseau, and Thomas Jefferson. With Kant and Hegel, Pound carries the stream of ideas down to the nineteenth century where Bentham, Austin, and von Ihering and Savigny are brought into it, and so on to the present day, still graced by Holmes and illumined by Cardozo. Making the nineteenth century a dividing point in the current, Pound splits the subject in that century into schools,¹ the historical, the analytical, the metaphysical, according to the mental slants of such men as Maine, Austin, and Hegel, who respectively approached juristic philosophy from the different angles indicated by the names of the schools. He then notes the recent rise

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¹Isaacs, *The Schools of Jurisprudence* (1918) 31 HARV. L. REV. 373.

of new schools which accent the social implications of law, among them the NeoKantians, of whom he makes Rudolf Stammler the chieftain. Then he uses Stammler, among others, to personify the ideals of a transition period introductory to Pound's own offering of sociological jurisprudence,² the contribution of the twentieth century. Thus is Stammler placed in Pound's scheme of things.

Pound credits Stammler with turning legal philosophy away from its habit of relating morals and ethics to merely abstract legal rules, and turning it toward relating them to the problem of justice in the administration of the law in concrete cases. Rules which are abstractly just may not give actually just results in application, and it is the achievement of concretely just results, which seems to Stammler to be the objective in law. Since Stammler felt that the criterion of justice was some social ideal, Pound puts him among the social philosophical jurists of the transition stage.³

Stammler's writings and the writings of others which Stammler's writings have provoked appear in Professor Sabine's footnotes and will not be referred to here. Stammler was a professor of jurisprudence at the University of Berlin until he became emeritus a few years ago. Born in 1856 he is still living at the time this issue goes to press.

Professor Sabine's paper follows.

G. H. ROBINSON*

From the very beginning of political philosophy, men have dreamed of an exact science of government and law, a science which should teach not mainly the more efficient use of means but more especially the wiser and more foresighted choice of ends. One thinks naturally of Plato, who could find no just ground for the authority of man over man except the greater intellectual excellence of the ruler and who defined the wisdom of his philosopher-king as chiefly a knowledge of the Good. An intellectualist to the core, he found in human nature no radical evil which prevented men from pursuing a good once clearly perceived, but rather a blindness which made them grope vaguely for a good only half perceived. Accordingly, Plato looked to education, and especially to a professional education in mathematics and logic, to produce that clarity of insight, sureness of grasp, and

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²Pound, *The Scope and Purpose of Sociological Jurisprudence* (1911) 24 HARV. L. REV. 140, (1911) 25 HARV. L. REV. 591.

³Pound's discussion of Stammler is to be found in (1911) 25 HARV. L. REV. at 147.

methodical skill upon which alone, as he believed, a true understanding of political and social values could be built. When all allowance has been made for difference of time and place, the underlying purpose of Rudolf Stammler's philosophy of law is not substantially different from that of Plato, nor is this comparison merely fanciful, for the German philosophy which Stammler has tried to follow owed its inspiration in no small degree to the study of Plato. For Stammler as for Plato, the hope of the law is that it may be, so nearly as human frailty permits, an "impersonal reason" and that reason may give it a firm grasp, reinforced by a scientific method, upon the ultimate end to be attained in human cooperation.

It was for this reason that Stammler, from the beginning of his professional career, was convinced that an historical or an analytical method in jurisprudence overlooks an indispensable element of the subject^{2a}—a standard by means of which the law as it is can be criticised and valued. Not that he doubted the need for analysis and historical study, but only that he thought them insufficient. Possibly Stammler's criticism of historical jurisprudence is less than just—he believes that it stands or falls with the romantic hypothesis of the *Volksgeist* and has proved nothing except that all positive law is dependent upon historical conditions^{2b}—but he stands here upon a simple principle: no tracing of the steps by which anything has come to be can show that it ought to be. Consequently, while a knowledge of the way in which a law has taken shape may be indispensable for understanding what it now is, the history does not justify it, and if the final question to be answered concerns its justice, both historical study and juristic classification must be secondary to criticism—the estimation and valuation of a particular law in the total aim and plan of the law—and to this question jurisprudence must address itself.

Perhaps the time was ripe, in Stammler's early years, for someone to restate this ancient position. The controversy over the German Civil Code, between the publication of the first draft in 1887 and the adoption of the final revision in 1895, was in some sense a defeat for the historical school, with its preference for case-law. In any case Stammler's studies as a Romanist had convinced him that the crowning achievement of the Roman Law was the effort of the great jurists of the classical age to make the law an *ars boni et aequi*. They had, indeed, lacked a sure scientific method for accomplishing this, and it

^{2a}Stammler's earliest professional work was a criticism of historical jurisprudence: *Über die Methode der geschichtlichen Rechtstheorie* FESTGABE ZU BERNHARD WINDSCHEIDS FÜNFZIGJÄHRIGEN DOKTORJUBLÄUM (1888).

^{2b}*Fundamental Tendencies in Modern Jurisprudence* (1923) 21 MICH. L. REV. pp. 646-654; *LEHRBUCH DER RECHTSPHILOSOPHIE* (1921; 3. Aufl., 1928), § 16.

became the ambition of Stammler's life to supply such a method, but they had felt their way with true inspiration in this direction. "This, in my opinion, is the universal significance of the classical Roman jurists; this, their permanent worth. They had the courage to raise their glance from the ordinary questions of the day to the whole. And in reflecting on the narrow status of the particular case, they directed their thoughts to the guiding star of all law, namely, the realization of justice in life."^{3c}

Certainly it was true that during Stammler's formative years the rapid industrializing of Germany, under strong state-guidance, was introducing social changes not readily to be controlled by the historical law, and also changes in the law not very obviously related to its spontaneous growth. The very effort of the government to stand sponsor for the social changes required by this new industrial order had served to make an intelligent public more conscious of the problems. By 1890, twelve years of experience had proved that Bismarck's effort to repress the Socialist Party was a failure, while his legislation to "dish" the Socialists had taken most advanced ground on the question of social responsibility for individual welfare.⁴ It was almost at this juncture that Stammler and his friend Paul Natorp, the distinguished neo-Kantian and student of Plato in the so-called Marburg School of philosophy, came forward with a revision, amounting to a complete reversal, of the Marxian philosophy which formed the official creed of party-socialism in Germany. Like Hermann Cohen, the founder of the School, Natorp felt a deep sympathy with the humanitarian purposes of socialism and held a social philosophy which he would have been glad to call socialism, but he was utterly at odds with the theories of economic determinism and of class-struggle, as well as with the metaphysical materialism of the Marxians. His social philosophy was in fact developed around the ideal of a thoroughly socialized moral education,⁵ and the fundamental idea in it was Platonic—a three-fold division of social functions. This was qualified, however, by the Kantian idea of unlimited progress toward a moral end, which Plato would hardly have ac-

^{3c}DIE LEHRE VON DEM RICHTIGEN RECHTE (1902; Neue Aufl., 1926), Bk. I C. v. Sect. 5. Referred to hereafter as RICHTIGES RECHT. I have quoted the English translation, THE THEORY OF JUSTICE (1925) p. 127.

⁴Sickness insurance, 1883; accident insurance, 1884; old age insurance, 1889.

⁵First put forward in RELIGION INNERHALB DER GRENZEN DER HUMANITÄT (1894) and enlarged in SOZIALPÄDAGOGIK (1899; 5. Aufl., 1922). The latter was dedicated to Stammler and Stammler's WIRTSCHAFT UND RECHT NACH DER MATERIALISTISCHEN GESCHICHTSAUFFASSUNG (1896) to Natorp. Stammler had been professor of law at Marburg earlier.

cepted. "Social life, whatever stage it may reach, never becomes static; it must be conceived as continually in process. For this reason its moral order becomes an eternal problem, its virtue becomes an ideal, that is, merely the reference-point of an infinite development."⁶ The directing force in human society is intelligent construction (*bildendes Tätigkei*t) and the chief means is the socializing of the will through education. Of all social theories, socialism is least able to dispense with an ethical point of view. If it knew what it were about, it would see that materialism is an utterly incongruous philosophy upon which to build its social policy.

In this it is easy to recognize an ideology characteristic of the last two decades of the nineteenth century. In England and America, it produced both an enthusiasm for Spencer's evolutionism quite unsupported by scientific evidence and also the revulsion against naturalism which made the Oxford idealism for the time being the prevailing form of academic philosophy. This English and American idealism was not wholly unlike the German movement "back to Kant", of which Cohen and Natorp were in 1890 the most distinguished protagonists, though a long immersion in a sensationalist tradition made Hegel more palatable to English thinkers than he could be to Germans. In social philosophy it produced, in the person of Thomas Hill Green, a kind of social idealism not incomparable with that of Natorp and Stammler, if due allowance be made for differences of terminology. In both cases the proposition that man is by nature a social being—vague and trite as it may appear to us—came with the force of a discovery, and in both, despite a technical dependence upon Kant, a return to the classical tradition of Plato and Aristotle was a real motive. In England the criticism of political and economic individualism had a significance which it necessarily lacked in Germany, where Marx was perhaps the natural object of attack. But in both countries, there was ample reason why a newly-awakened sense of social responsibility should have called forth the thesis that society is fundamentally a spiritual phenomenon from which an ideal dimension can never be fully eradicated.

In the partnership of Natorp and Stammler, however, it fell to the part of Stammler to make an extended analysis of the theory of socialism, in his brilliant work on the relation between jurisprudence and the materialist interpretation of history.⁷ In this extremely acute criticism of the Marxian philosophy the most substantial

⁶SOZIALPÄDAGOGIK (1922) p. 179.

⁷WIRTSCHAFT UND RECHT NACH DER MATERIALISTISCHEN GESCHICHTSAUFFASSUNG (1896; 3. Aufl., 1914).

elements of all Stammler's later work are to be found. The conclusion of the criticism is that the economic interpretation of history—or, more specifically, the thesis that changes in law and government follow causally or logically from changes in technology—is vague and ill-developed. So far is it from being a fact that law adjusts itself automatically to changes in the mode of producing goods, that the class-struggle upon which the socialist theory depends is due precisely to the failure to make such adjustments. The technology changes and the law does not, but remains a legal anachronism which throws the whole system out of adjustment. The materialist theory is a bad figure of speech: if society readjusted itself to every change as the stresses and strains are redistributed in a moving physical system, there would be no lag and no conflict.⁸ The economist tries to cover his bad theory by some such saving clause as that the law adjusts itself “in the long run” to the new economy, but as Stammler rightly points out, this phrase is worse than meaningless if the changes in question form a closed mechanical system. Social conflicts like the class-struggle indicate a lack of fitness in the law to the social arrangements which it ought to regulate; the essence of the socialist position is that private ownership of goods produced is a suitable arrangement in a handicraft-society and is not suitable in a capitalist society. But fitness or suitability, and their opposites, are teleological conceptions referring not to causes and effects but to means and ends. They cannot possibly be defined unless it be recognized that law tries to regulate the co-operative efforts by which men produce goods, to protect the interests that appear in such co-operation, and to adjust the human relationships involved for some socially valuable end. The practical efforts of party-socialism always do surreptitiously introduce such valuations of social maladjustment, even while in theory it asserts that there is nothing in society except a system of material forces. “One does not organize political parties in favor of eclipses of the moon.”⁹ The confusion here, according to Stammler, is ultimately an ambiguity in the conception of necessity. Social necessity affects the will; it is the necessity of a means for the sake of an end and it applies to a human agent who “must do something about” the matter in question. In a causal series, on the other hand, if all the conditions for a result are factually present, it is nonsense to talk about doing anything; the result merely happens and that ends the matter.

This confusion, Stammler believes, has prevented the socialists from analysing adequately the concept of society, and hence from

⁸WIRTSCHAFT UND RECHT § 72. I have used the first edition.

⁹*Ibid.* § 77.

understanding social conflict and social change and the relation of law and economics in society. When this analysis is supplied the social materialism of Marx is replaced by a social idealism. Social economy, as Stammler uses the term, applies to any cooperative effort for the satisfaction of needs and therefore to interchanges of goods or services of any sort, whether physical or spiritual.¹⁰ The attempt to set aside a special class of economic needs as lower leads only to confusion.¹¹ Now wherever co-operative effort takes place, it must be regulated, that is to say, it cannot be left merely to inclination. There must be some sort of rule or standard to govern human conduct toward other human beings in the process of acting together and living together. And wherever such a regulating standard exists there is a society and the society is created by the existence of the standard. In fact, there are several types of such social standards—rules of morality, of custom, of law, and even of etiquette.¹² This does not mean that there is necessarily a state, for the state, where it exists at all—and Stammler regards it as relatively a recent institution—is itself an association within society and therefore the creature of law.¹³ The root of the matter is that men do satisfy their needs co-operatively—the conduct of one is a means to the ends of another and in turn the conduct of that other is a means to the ends of the first—and this requires binding rules subjecting the wills of the various co-operating parties to the ends to be achieved by cooperation. The existence of such rules is what makes a society.

From this it follows that economic conflicts and economic pressure take place *within* the social circle created by common standards of conduct. Apart from such standards generally accepted as binding, there are no institutions, such as marriage, property, or crime, and therefore no economic institutions. For institutions are not simply events or facts but are rather states of will; they consist altogether in the fact that there are certain socially approved ways of behaving and that such standards are admitted as properly binding. Economic pressure or economic conflict, therefore, can exist only as they affect the will and the rules by which it is regulated; they are discrepancies between the rules and the end sought. The thesis that economic arrangements make law is at least confused, and in one sense it is quite false. Unless there were law, institutions, binding standards of behavior, there would be no economy at all. Stammler's fundamental

¹⁰Natorp, following Plato, had offered a three-fold classification of social services, *Ernährung, Regierung, Bildung*, though each involves aspects of the others. *SOZIALPÄDAGOGIK* § 17.

¹¹WIRTSCHAFT UND RECHT § 29.

¹²*Ibid.*, §§ 16–17.

¹³THEORIE DER RECHTSWISSENSCHAFT (1911; 2. Aufl., 1923) C. v. § 10.

thought at this point is not in principle very different from what was later called institutional economics, though he never developed it in the direction of an empirical study of institutions. He is interested mainly in showing that it is false to look at society as if it were divided between economics and law, or to regard law as a mere superstructure upon a system of economy. They are in fact two sides of the same thing, *viz.*, cooperative effort to satisfy needs and the regulation of such effort in the light of the end sought. Obviously Stammler might go as far as any socialist in admitting that, at a given time, law does work badly as a regulator of social conflicts and that the maladjustment follows a change of technology. He could consistently go any length in advocating legal reform to gain a more effective adjustment of interests and a larger satisfaction of needs, though unfortunately this side of the question interested him little.¹⁴ His contention against Marxism is that the conflict and its adjustment both take place in the region of human conduct, or human will. A physical change, such as a new technical process, cannot affect law except as it influences volition and makes necessary a new regulation of volition, and in such a case the necessity is that of a means to an end.

We can now understand the enormous importance which Stammler attaches to the economic interpretation of history and the great effects that his criticism of it had in forming his own social philosophy. With some exaggeration he asserts that Marxism is the first and only attempt to find a single law or principle for the explanation of social phenomena.¹⁵ In its purpose it was right, though a faulty analysis of concepts—in this case that of society especially—led it to a wrong conclusion. By such a criticism, carried through as he believes with greater thoroughness, Stammler arrives at the "social idealism" sketched above. In order to understand the later development of his thought, we must note carefully both what he professes to do and the method by which he proposes to do it. The method is analysis of concepts; Stammler professes to deal always with a thought-apparatus and not with the objects conceived. Similarly his results profess to present only the use of concepts. His examination of socialism, for example, is singularly free from any judgment whatever upon the specific ends or policies of the party; the book centers in the concept of a society and its use in the understanding of social

¹⁴According to Professor V. G. Simkhovitch Stammler's criticism of socialism in *WIRTSCHAFT UND RECHT* really did influence the reformist wing of the German Socialist Party. *Rudolf Stammler* (1904) 27 *EDUCATIONAL REVIEW* pp. 250 f.; quoted by John C. H. Wu, *Stammler and his Critics THE THEORY OF JUSTICE* (1925), Appendix II, p. 565.

¹⁵*WIRTSCHAFT UND RECHT* § 5.

change and social conflicts. To this notion of his task all Stammler's later work conforms.

If we turn back now to Stammler's early dissatisfaction with historical and positivist jurisprudence, we are in a better position to see the problem as he sees it. The history or the analysis of positive law offers no means of criticising the law in the light of just results, and this amounts to the omission of a major fact about the law. For as a matter of fact justice is recognized, more or less vaguely, as an end which the law ought on the whole to realize, and this recognition has its place in law itself, witness such conceptions as equity, good faith, good morals, or the rule of reasonableness. But Stammler is not at all content to insist upon a fact. As he himself very well knew, there was nothing novel about the idea that law is a means to an end. In itself this opinion would not distinguish him from Ihering. But Ihering, he feels, was a sort of impressionist; he had no adequate method to support the proposition or to bring the consideration of ends within the scope of a scientific jurisprudence.¹⁶ Any merely factual or psychological mitigation of strict law in behalf of justice is insufficient;¹⁷ Stammler has never believed that jurisprudence could accomplish anything by appealing to a natural feeling of right or sense of justice, because there is no presumption that popular opinion is more validly just than the positive law itself. Neither has he much trust in judicial discretion or in what is called "free decision", for he believes that a well-made code is in general more reliable.¹⁸ Nor can we arrive at a valid definition of justice by improving the economic and social education of practitioners.¹⁹ Finally, the question is not to be turned over to ethics or philosophy in the pious hope that someone else has a light not vouchsafed to jurists.²⁰ The problem belongs to law. Good faith or good morals, as the jurist appeals to them, are legal rather than ethical conceptions.

The problem, then, belongs to jurisprudence, to a critical examination of the concept of law itself, and the vital question is one of validity. It is quite true to say that Stammler's works deal almost wholly with modes of legal reflection, with the way to think about and to decide legal questions, but this statement needs to be properly understood. Stammler himself would say that he considers legal reflection from the point of view of a legal logician and not from the

¹⁶(1923) 21 MICH. L. REV. pp. 782-785; cf. RICHTIGES RECHT, Concl., § 1.

¹⁷RICHTIGES RECHT, Bk. I, C. v.

¹⁸Legislation and Judicial Decision (1925) 23 MICH. L. REV. pp. 362 ff.

¹⁹RICHTIGES RECHT, Intro., § 1.

²⁰WIRTSCHAFT UND RECHT § 87. Cf. the distinction between law and ethics in RICHTIGES RECHT, Bk. I, C. ii.

point of view of a psychologist. That is to say, the question is not how judges do decide cases—the sort of self-examination that largely makes up a book like Mr. Justice Cardozo's *Nature of the Judicial Process*—but how they ought to decide them if the decision is to be objectively just. What Stammler has tried to supply is the norm or standard to be used in criticising and weighing the results of the judicial process and not biographical facts about judges and the way they think. On the other hand, it need not be supposed that Stammler is indifferent to the actual results. Quite the contrary. There can be no doubt that it has always been a major purpose with him to combat the legal technicians, who treat the "workshop of the law" as if it were an end in itself. It is just this narrow professionalism that is responsible for legal formalism and that brings the law into bad repute among laymen.²¹ But the only sure way to combat it is to prove scientifically that objective justice can be defined and used as a jurist's tool. Unless there be a standard above the preference of an individual or a class, there can be no valid defense of a legislative policy or a judicial decision. Unless the standard of justice can be discovered by critical examination and stated as a principle, it cannot be used in testing positive law as a means to an end. Stammler's problem as he saw it was to state the end of law, to show that the statement really is sound, and to discover a method which would enable him to do these two things.

This aim of Stammler—to prove that the principle of justice can be stated in such a way as to guide juristic thought—is the reason why he has properly been counted among the proponents of a revived natural law. He himself gave currency to this view of his work by inventing the much quoted phrase, "Natural law with changeable content".²² Perhaps his popular success frightened him; at all events he has allowed this catch-word to fall into disuse. However, it was never Stammler's intention to revive natural law in anything much like its historic form. He never believed in the existence of an ideal or perfect law over and above the positive law, nor has he ever held that any legal rule is unchangeable or free from the conditions of historical time and place. Just law is a part of positive law. All positive law "tries" to be just, though it may not succeed, and for this reason as a whole it is never purely positive or factual. It has, so to speak, an ideal dimension that projects it toward an unrealized end, but this effort toward the ideal is a phase of positive law itself. Over and above the rules at any time formulated, there is nothing except a

²¹RICHTIGES RECHT, Intro., § 1.

²²WIRTSCHAFT UND RECHT § 33, title; changed in the second edition.

point of view which makes it possible to criticise the law as it is in terms of its success or failure in approximating its own end, *viz.*, justice. In Stammler's Kantian terminology, justice is exclusively methodological or regulative. It has no content and lays down no rule but is purely an "Idea" to be used in guiding legal thought.²³

After this brief survey of the ideas which shaped Stammler's earlier work, it is possible to sum up the main purposes that he has had in view. In the first place, he set out from a feeling of dissatisfaction with positivist and historical jurisprudence, founded upon the conviction that it results in treating the formulation and technicalities of the law as if they had a value of their own, whereas they are really means to an end, a social agency by which action in concert is regulated and directed toward the social ends co-operatively sought. In order to show effectively the presence and the validity of an end in law, it is necessary, in the second place, actually to formulate the principle of justice and to show how it can be used by jurists in criticising and evaluating the technical rules of the law. Stammler therefore undertakes to exhibit an ideal principle implicit in actual law and, by stating the principle explicitly, to make it a better instrument of criticism and guidance. It was obviously not sufficient for his purpose, however, to offer merely a verbal definition of justice which can be taken or not as one chooses. In the third place, therefore, and with growing emphasis, Stammler addressed himself to the problem of proving scientifically that his definition of justice really presents a necessary and indubitable aspect of law. It is upon the methodology of jurisprudence, accordingly, that Stammler's emphasis has fallen most heavily and it is quite impossible to present his work as he himself sees it unless this emphasis be preserved. Whatever value the future may put upon his work, he claims to have introduced into jurisprudence a "critical" method, modeled upon the critical philosophy of Immanuel Kant, which makes possible a valid theory of legal knowledge, as he believes that Kant's philosophy first made possible a theory of the knowledge attained in the natural sciences. It is by his success or failure in this project that Stammler would choose to be judged. Difficult and forbidding as the subject may be to any but a technically trained student of philosophy, the canon of scholarly accuracy forbids us to seek for any other center about which to gather Stammler's teaching. It is of course possible that his importance in the long run—if he achieves a long-term importance in the history of legal science—may consist in some-

²³*Ibid.* §§ 32-33; RICHTIGES RECHT, Bk. I, C. iii; RECHTSWISSENSCHAFT, Einl. § 7.

thing different from what he supposes, but in his own estimation his one service has been the creation of a legal logic, or theory of knowledge, on a Kantian model.

II

The ideal of a critical science of legal methodology has continually grown upon Stammler as his thought matured. In his earliest important work, his *Wirtschaft und Recht*, it is largely implicit. Most of his characteristic ideas already appear in this work and in a form not substantially different from their later form, but the rigor of method which he later affects is not yet there, unquestionably to the great advantage of the style. In this work, he is mainly concerned with formulating and maturing his own theory of social idealism through a criticism of the social materialism of the Marxians. In his next important work, the *Richtiges Recht*, he singles out for special treatment the definition of justice and the description of its use as a guiding ideal, doubtless because this problem had emerged from his earlier work as the chief constructive idea in his jurisprudence. Naturally, therefore, the theory of just law has been the idea most characteristically attached to Stammler's name. From the point of view of Stammler's system, however, just law is a conclusion rather than a premise; it requires an elaborate critical apparatus to give it scientific support. This he supplied in his *Theorie der Rechtswissenschaft*. Here the theory of just law appears in its proper place, as the concluding step in a science of juristic logic, modeled conscientiously on an analogy with Kant's *Critique of Pure Reason*. In this book Stammler formulates what he calls "pure" jurisprudence, a logical analysis of the concept of law, designed to exhibit the indispensable elements of that concept, and quite without reference to the analysis of historical or actual law.²⁴ We must now try to describe briefly how Stammler envisages this science and the method by which its validity is proved.

The starting-point is one that is common to all philosophies derived from Kant—a radical distinction between *Sein* and *Sollen*. To an English-speaking person it is perhaps easiest to translate these words by Fact and Value.²⁵ The distinction amounts to this: The question whether anything exists or is real as a part of nature is one thing;

²⁴RECHTSWISSENSCHAFT, Intro., § 7. Stammler has summarized his whole philosophy in his *LEHRBUCH DER RECHTSPHILOSOPHIE* (1921, 3. Aufl., 1928).

²⁵For special reasons Stammler objects to the word *Wert*, used by other Kantians, e. g., Heinrich Rickert; *RECHTSWISSENSCHAFT* C. vi, §§ 17-18. The objection does not invalidate the comparison for understanding the distinction of *Sein* and *Sollen*.

the question whether anything is as it ought to be, or whether it is good or bad, is another. In terms of human faculties the first question belongs to perception, the second to desire or will. The two represent broadly different attitudes or approaches to the world. The first takes things as it finds them, being concerned only to know what they are and what they do. When it is developed, this attitude issues in the conception of nature as a system of causes and effects within which every event can be explained through its spatial, temporal, or causal relations to other events. In the world thus conceived there is neither good nor bad, nothing has value, and it is meaningless to say that anything ought to be other than it is. The second attitude, on the contrary, looks at the world as the theater of human action; it consists of tasks to be done, of results to be realized or avoided. Its constituents are means and ends, and this is a radically different relation from cause and effect since it projects itself beyond the fact and envisages a future state as the ground or reason for the present act. Cause and effect is a factual dependence of consequents upon antecedents, looking from the present backward; means and end is an ideal dependence of antecedents upon consequents *for the sake* of which they are chosen, looking from the present forward.

Assuming this distinction, more or less shared by all Kantians, Stammler next proceeds to take a long step beyond Kant, though he carefully preserves the analogy with Kant. Corresponding to the distinction between *Sein* and *Sollen*, he supposes that there should be two radically distinct types of science, a science of nature (*Naturwissenschaft*) in terms of the relation of cause and effect, and a science of ends (*Zweckwissenschaft*) in terms of the relation of means and end.²⁶ The ground for this supposition is that in both fields we do in fact take for granted that valid (that is, not merely personal or subjective) distinctions can be drawn. In the realm of fact we assume the distinction between true and false; in so far as any proposition claims to report what is actually in the world, it must be correct or incorrect. But equally we go on the supposition that there is a real difference of values. In so far as anyone asserts that one act is good and another bad, that a law is unjust and should be repealed while another is right and should be enforced, he is professing to appeal to a

²⁶For Kant there is no science of ends, partly because his ethics is directed from the start toward the metaphysical postulates—God, freedom, and immortality—and so is not empirical, and partly because he is convinced that all science must be of the type of mechanics. Stammler might plausibly argue that both these reasons had more to do with Kant's personal convictions than with the logic of his philosophy.

valid standard of right and wrong. There are then, Stammler argues, two types of valid standard, the standard of truth and the standard of right, and on each it should be possible to erect a science (or class of sciences). For a valid standard presupposes regularity (*Gesetzmässigkeit*) or conformity to general laws. The character of the laws will, of course, be different in the two classes of science: in natural science they will be laws of causation; in the sciences of end they will be teleological. As natural science works in the light of complete causal explanation as its goal, so teleological science must presume an ultimate end or an ultimate right toward which less ultimate ends contribute.

Now Stammler is fully convinced that Kant has shown regularity or conformity to law in natural science to depend upon a certain structure or form in scientific concepts, because unless we assumed that all empirical events will in fact have this form, we should not be able to find any regularity at all among such objects. Thus, for example, we cannot, in general, find any uniformity except as things arrange themselves in such great types of order as time, space, or causality, and every specific scientific law, like gravitation for instance, is merely a statement of what we find by experience that the behavior of objects is in terms of these most general and indispensable kinds of order. Such orders Stammler, like Kant, calls forms; they are scientifically indispensable because without them there is no way of discovering regularity in nature. Nature in fact is nothing except a space-time-causal framework in which every possible empirical event must be assumed to fall. Their scientific indispensability is the ultimate logical justification for believing them to be true.

Mutatis mutandis Stammler now proposes to apply exactly the same reasoning to his supposed class of telic sciences. Every desire or need or inclination must be supposed to occur within a framework or order of means and ends. If this were not the case, there would be no difference of value or rightness between different inclinations but all would be on the same level of subjective feeling. As we have seen, Stammler assumes that this is not the case; he assumes that the distinction between mere inclination and justified will is as unavoidable as the distinction between mere opinion and truth. This distinction being granted, all that is involved in making the distinction must be granted too. It must be supposed, therefore, that there are forms or orders as pervasive of the world of ends as time, space, and causality are of the natural world. Such formal factors must be involved in every actual case of volition, and they are the conditions which make it possible to assign a specific end to a place

in an objective system of means and end. It is of course true that the forms by themselves do not enable us to say what actually is the right or justified means to a given end, any more than the law of causality permits us to say what does in fact cause malarial fever. But if we work in the light of the causal hypothesis we can isolate the regular collocations of events in the particular case, and if we work in the light of the hypothesis that means are regulated by ends, we can place a particular purpose in its proper relation of value to other purposes. Every actual case of means and end is of course empirical; it occurs in a historical context and concerns individual persons who are actuated by desires of a subjective and personal sort. Nevertheless, all cases conform to a general type of relationship and must so conform if they are to be united in the system of means and ends, just as all causes must illustrate the principle of causality if they are to be united in the system of nature.

Now Stammler's "pure jurisprudence" (*reine Rechtslehre*) professes to isolate these pure forms of telic relation, or at least those involved in law; had he chosen to do so, he might have named his book the "Critique of Pure Juristic Reason". Following the analogy of Kant again, he supposes the pure forms of volition to be of two sorts, which he calls respectively concepts (*Begriff*) or categories and idea (*Idee*). The concepts are necessarily present in every individual case of law; together these factors form the "essence" (*Wesen*) of law and hence in the absence of any of them law itself would vanish. The idea (possibly we should translate "ideal", to avoid the psychological connotations of our English word) represents the goal of a completely systematic explanation in terms of means and end. Completeness is, in fact, never attained, but the effort in that direction is a necessary guiding or "regulating" ideal in using the categories. Stammler's meaning may be illustrated by the parallel distinction between cause and effect, which characterizes every natural event, and the uniformity of nature, which characterizes no single event but represents a goal of complete scientific explanation such that all events whatsoever are gathered into the net of a single causal system. In Stammler's usage the "idea" is equivalent to what he had already described as just law, since justice is the ideal principle or goal toward which all positive law strives, though it is actually attained in none. Justice in jurisprudence has, therefore, the same logical standing and use that the uniformity of nature has in natural science; we never know what it means in detail because every new detail adds to it, but as a working hypothesis it is present in every scientific operation.

What Stammler now proposes to do is to buttress the idea of just

law by showing the formal factors in all law, or in other words to discover a table of legal categories (the analogy with Kant's table of categories is explicit and obvious) necessarily present in every case where the concept of law is used. It is an intrinsic part of his methodology that this investigation should be in no way dependent upon an inductive examination of laws, because induction could never prove that any factor was necessary or universal. The method to be followed must consist in what Stammler calls a "critical" analysis of the conception itself, without reference to the empirical content which must be included in every actual instance of law. The concept of law must have its own essence (*Wesen*), that is, its own peculiar constellation of factors without which it could not subsist. The gist of the critical method, therefore, is this: Think away meanings which attach to the concept of law until you find those meanings which, if removed, would destroy the concept itself. When you have reached the irreducible minimum whose absence would cause the conception of law to vanish, you will have reached a definition not merely verbal but whose constituents are intrinsic and necessary. This will give you the underlying (or constitutive) principles which all jurisprudence must use in its further examination, whether analytic or historical, of the positive law. The crux of Stammler's juristic methodology lies in his belief that such criticism reaches demonstrable results; or otherwise stated, that criticism thus understood is a logical method, distinct from either induction or deduction but, scientifically, at least upon a parity with them.²⁷

When we examine the results which Stammler claims to reach by the use of this critical method, we find that they are in fact very similar to those reached in his earlier works with less pretense of logical rigor.²⁸ The meeting or cooperation of wills as mutually a means to one another is the formal characteristic of any society, and a society is constituted only by the existence of a binding or relating (*verbindend*) will distinct from the subject-wills united by it. Such a will sets a rule or standard above subjective inclinations and also distinct from moral standards of character or internal perfection. All such will, however, is not law. The law is distinguished from other ways of regulating social cooperation by the fact, first, that is binding in its own right (*selbstherrlich*), in the sense that, unlike convention, it does not have to claim assent to what it enjoins. Secondly, it differs

²⁷RECHTSWISSENSCHAFT, C. i, § 2; cf. RICHTIGES RECHT, Bk. II, C. i, § 1; C. iii, § 1; WIRTSCHAFT UND RECHT § 3.

²⁸Stammler's analysis of the concept of law is to be found in RECHTSWISSENSCHAFT C. i, §§ 9-15; cf. RECHTSPHILOSOPHIE §§ 31-47.

from arbitrary power, which may of course be actually compelling or even right in its purposes, in the sense that it is self-perpetuating (*unverletzbar*). It may be violated but its right persists and, in general, the law itself provides the conditions for its own termination or continuance in force, though, as a matter of historical fact, something which begins as arbitrary force may later get this property of inviolability. Accordingly, Stammler concludes that all law involves four formal conditions: (1) It is a will, (2) which stands outside and regulates subordinate wills in a cooperating community of subordinate wills, (3) which is intrinsically or autonomously binding, and (4) which is inviolable and in general self-perpetuating or self-terminating.²⁹ This definition is alleged not to be dependent on usage or a product of induction, but to be demonstrated by the critical analysis of the concept itself. If we mean less than this, we should not mean law.

Upon the foundation thus laid, Stammler next proceeds, by a further elaboration of his method, to present what he calls the "categories" of law,³⁰ by which he means not kinds or classes of law but the lines of thought necessarily followed where the concept of law is used. Stammler puts it as follows: "The processes of thought here described are necessary, fundamental concepts for any scientific critique of any legal will. They signify an ordering process in all cases indispensable if the details of content in a legal will are to be defined in a unified manner. For all consideration of any legal question consists fundamentally in positing and pursuing ends by the use of right means. But since every particular end that a legal will adopts may in turn be regarded as a means to a further end, it is necessary for the sake of systematic understanding to keep firm hold on the concept of a final end and therefore on the definition of something intrinsically capable of serving as the conditioning final term of a legally ordered series of ends."³¹ Corresponding to the four elements of the conception of law there are four pairs of correlative modes of reflection about any law, or points of view under which the consideration of any legal problem may be subsumed. The completeness of this list is said to be guaranteed by the inevitableness of the definition of law. First, there must always be something that is taken as the end and something as the means to that end; second, there is a combination of

²⁹Stammler's formula runs as follows: law is "das unverletzbar selbstherrlich verbindende Wollen"; RECHTSWISSENSCHAFT C. i, § 16. Cf. the definition in WIRTSCHAFT UND RECHT § 87: "Recht ist die ihrem Sinne nach unverletzbar geltende Zwangsregelung menschlichen Zusammenlebens."

³⁰RECHTSWISSENSCHAFT C. iii, §§ 4-8.

³¹*Ibid.* § 5.

several wills for a common purpose and consequently a relation in which these several wills stand to each other as contributing to that purpose; third, there is the subordination of wills bound to a cooperative purpose in a lasting union to realize that purpose; and fourth, there is always the possibility of disharmony between the controlling will and the wills which it should direct and guide but which possibly it does not.³²

The categories of law thus developed have no particular reference to justice; they are marks or characteristics of every law, whether just or not. In the very relation of means and end, however, there is implicit, according to Stammler, the thought of a final end, a reference-point toward which the whole series is directed. In the days when he wrote a somewhat more florid style Stammler could even call this the "guiding star" of human progress. It is quite true that this end exists purely by implication. No society will ever reach it, and still less can it ever be identified with any specific attainable end. In detail it cannot be defined because we cannot even picture in imagination what concretely it would be like. It is possible, however, by means of the critical method to develop a formula for it, and it is possible also to use this formula in evaluating positive law. The reference-point gives us a direction and we can say, more or less precisely, whether a given law is a step in that direction or not. The formula follows, so it is held, merely from the conception of the will and from the conception of the law as a binding will which constitutes a community of cooperating wills. The wills bound by the law must still remain wills and so in a sense free,³³ because will differs from desire in setting before itself an end whose choice may be justified or the reverse. Its freedom consists in its escape from subjectivity, from the status of merely personal inclination or passion. Since law is a binding will setting objectively valid ends, it ought to be possible for everyone to acquiesce in the ends it sets. As an ideal, therefore, the community which the law creates ought to be of such a kind that everyone can freely cooperate with everyone else. The

³²Stammler's terms are as follows: 1. *Rechtssubjekt—Rechtsobjekt*, corresponding to *Wollen*; 2. *Rechtsgrund—Rechtsverhältnis*, corresponding to *bindendes*; 3. *Rechtshoheit—Rechtsunterstelligkeit*, corresponding to *selbstherrlich*; 4. *Rechtsmässigkeit—Rechtswidrigkeit*, corresponding to *unverletzbar*. Beyond these four simple categories there is a very elaborate system of complex categories obtained by considering two categories in conjunction; RECHTSWISSENSCHAFT C. iii, §§ 9 ff.

³³Stammler has always disclaimed any metaphysical meaning of freedom. Like any Kantian he holds that the relation means-end is in a different universe of discourse from cause-effect. There is no uncaused event, but such a phrase as 'caused end' would unite a term from each of two quite different relations; a sort of logical mixed metaphor. Cf. WIRTSCHAFT UND RECHT § 65.

formula for just law is a "community of freely willing men" and toward this all positively law contributes, in so far as it is just.³⁴ In so far as anyone is really justified in willing anything, everybody ought to be able to will the same, just as a true proposition is one which everyone ought to be able to accept. The technique for using this formula in the criticism of positive law, as we have seen, had been one of Stammler's purposes from the first and to it he had devoted his best known work.

We have now before us the chief features of Stammler's critical method in jurisprudence, and it is upon this that he himself would base his claim to having contributed to the progress of the science. He would claim moreover that it is really a science, scarcely less rigorous than mathematics, so far as its general formulas are concerned. The substance of this claim lies in the contention that the critical analysis of concepts exhibits not merely factors of usage, but factors which must of necessity be used in the understanding of the empirical realities conceived by means of them. They are actually constitutive elements of things as known (or in Stammler's case, of ends as justified). Consequently critical analysis is a logical operation at least³⁵ on a parity with deduction and induction and therefore as certainly valid as either of these. In short, Stammler assumes the success of Kant's critical philosophy in dealing with the natural sciences and he claims to have done the same thing for jurisprudence. A critical estimate of Stammler's work presents great difficulties. To try to separate his jurisprudence from the philosophy in which it is imbedded violates every canon of historical criticism, because it falsifies the author's purpose at the start, and it is logically inconclusive, because it amounts to using the term jurisprudence in a sense quite different from Stammler's. On the other hand, it is impossible to meet Stammler on his own ground without taking some sort of position relative to the success or failure of the Critical Philosophy as a whole, and this question obviously cannot be settled in a few paragraphs. What I shall try to do is to make a few general statements about Kant's critical method upon which I believe there would be a considerable amount of agreement and which, in any case, will serve to make clear the view that I am myself obliged to take of Stammler's jurisprudence.

At no time since Kant published the *Critique of Pure Reason* a century and a half ago has there been anything like general agree-

³⁴RECHTSWISSENSCHAFT C. vi, §§ 7-9; cf. WIRTSCHAFT UND RECHT § 99.

³⁵I say "at least" because I suppose Stammler would in fact regard criticism as logically more fundamental than either deduction or induction.

ment about what constituted its major results. On the contrary, the influence which Kant exerted has always been extraordinarily various. Consequently Stammler was taking a great deal for granted when he assumed that there was a body of demonstrated Kantian conclusions about natural science which could form the analogue of his own conclusions about jurisprudence. He was depending here upon the finality of certain main conclusions of the Marburg School which were a good deal more plausible in the '90's than they are now. The progress of the exact sciences has been definitely unfavorable to the Kantian belief that necessary forms of scientific thought could be isolated by analysing scientific conceptions. Kant's procedure resulted substantially in sanctifying Newton's mechanics and Euclidean geometry as inevitable conditions of physical and mathematical research—which they certainly are not. At the same time, the most important developments in logic itself have owed little or nothing to Kant and have quite abandoned the idea that there are logically necessary forms of empirical existence.³⁶ In short, the not inconsiderable contribution of Kant (and also of the Marburg School) to the study of scientific methodology will almost certainly turn out to be not at all in the supposedly rigorous derivation of the necessary forms of thought but rather in certain side-issues. Thus Kant's philosophy undoubtedly did call attention to the importance of working hypotheses in science and to the presence in induction of presumptions for which no rigorous demonstration is forthcoming. It also stimulated the historical study of the postulates actually used by scientists. But the deductions which Kant labored to make most rigorous would be counted today by a great and a growing number of his critics as among his most disastrous failures. Stammler was led by one of life's little ironies to tie his jurisprudence to precisely that aspect of Kantianism which seems least likely to prove of lasting importance. The erection of a new critical (or transcendental) logic beside deduction and induction has not occurred and so far as can be seen will not occur. The isolation of a limited list of categories which must always make up the arsenal of scientific thought in its attack upon empirical reality is less plausible than ever before, and even if there were such categories it is most unlikely that they could be discovered and defined by merely analysing conceptions.

³⁶The logical rigor of this procedure depends on a formalism much more thorough-going than that of Kant or Stammler, *viz.*, the possibility of getting on quite without empirical contents, either of perception or will, and hence of dispensing with any—or any but the most general—reference to the existence of the entities dealt with. The reader will find an excellent elementary description of this type of logic in R. W. Eaton's *GENERAL LOGIC* (1931).

If this be true of the Kantian theory of natural science, it is true *a fortiori* of Stammler's "pure jurisprudence" which is supposed to develop by analysis the "necessary" factors in the concept of law. The inevitable deficiencies of the method are shown sufficiently well by the result. Stammler gets out of the concept exactly what he has first put into it. Avowedly, he is merely analysing the concept of a will and exhibiting its necessary constituents.³⁷ Under pressure the concept yields social coöperation and its regulation, substantially as these had appeared in Stammler's earlier study of the relation of law to the social economy. This earlier study had convinced him that law is best to be understood as the regulation and adjustment of wills necessary to make cooperative social interchange effective and that such regulated intercourse is the underlying fact that constitutes a social group. Having reached this conclusion he imports the meaning into the concept of will and then by so-called critical analysis extracts it from the concept. That the critical analysis would ever have led to this result unless Stammler had known beforehand where he meant to come out is utterly unlikely. In short, critical analysis as Stammler uses it, and as Kant used it before him, is a pseudo-method which discovers nothing but baptises as *a priori* whatever its user is sufficiently convinced of in advance.

A second main feature of Stammler's methodology is his belief that there is a special class of teleological sciences (*Zweckwissenschaft*), using the relation of means-end and requiring a distinct critical analysis or logic of their own. While this conclusion was not adopted from Kant, it is closely related to the critical procedure and to the supposition that means-end is a unique sort of category belonging necessarily to the will as cause-effect belongs to the data of sense-perception. An acquaintance with the very doubtful status of causation as a category in the natural sciences might have warned Stammler that it would not be easy to set up means-end as the foundation of another type of science, but that phase of the question may be passed over. The truth seems to be that there is no logical peculiarity whatever about the relation of means and end. There are, of course, hundreds of relations known to logic, means-end among the number, and each is unique in the sense that it is itself and not any other relation. But relations, like objects, have certain structures and are classifiable. Whatever is true of the class will be true of any re-

³⁷RECHTSWISSENSCHAFT C. I, § 9. In passing it may be remarked that Stammler's use of the word "necessary" is always baffling. Whatever the word properly means—and there is little agreement among logicians—it certainly has no reference to an empirical subject-matter, whether perceptual or voluntary.

lation in the class, and whatever the structure of the relation implies will hold good for all cases of that relation—all of which is true of means-end as it is true of other relations. But there is no peculiar logic for means and ends or, to broaden the question, for any value whatever. A logical inference about ends or values is exactly like a logical inference about anything else, and in this very general sense sciences that have to do with ends are just like other sciences. In fact, logic is much more abstract than Stammler, with all his devotion to abstractions, supposes it to be, since it is quite indifferent both to facts and to values. Its implications are wholly hypothetical. If something is given as a fact or as a value, something else may logically follow as a fact or value, but there is not the least reason for supposing that logically any fact or any value has to be given.

This is of course in no sense a disproof of the contention, advanced by Stammler and other jurists, that law is most properly to be understood as a means to an end. It does not even disprove the value of the end which Stammler sets before law, *viz.*, the realization of a society of freely willing men. From the point of view of method, the question here is the same as the question about the critical analysis of concepts generally. Can analysis prove that the mere concept of will necessitates a given formula for its ultimate end, even though this end be admitted to be wholly lacking in empirical content? The objections on this point are substantially identical with those already made to his effort to derive the categories of law from the mere concept of will. Stammler's formula is in fact merely the re-statement in other words of his underlying postulate that there is a validity in the case of ends analogous to the truth of a proposition which alleges a fact. The truth is something which, ideally at least, every competent mind ought to be able to recognize, if it will fulfil the conditions needed to make such recognition possible. Similarly in a world of perfectly socialized beings Stammler supposes that ends would be recognized as obligatory with the same sort of objective validity, and his ground is simply the assertion that, without this supposition, there is no validity at all in the case of the ends which law and social institutions seem to be designed to reach. We must choose between all or nothing: either there is a single ultimately valid end or all ends are in the class of personal whims and caprices. The strength of Stammler's position is derived wholly from the fact that no man in his right mind fails to discriminate between ends that are important and those that are merely capricious, or between ends that are socially valuable and those for which he himself has a merely subjective preference.

The question is whether this fact, which clearly cannot be denied, warrants Stammler's all-or-nothing postulate. We may pass over the analogical part of the argument, *viz.*, that we do presume a criterion of this sort in the case of truth, though some would doubtless contest it. But must we make the parallel assumption in the case of ends, provided we apply any criterion at all in their choice? At all events the conclusion is not self-evident, as Stammler virtually assumes. Let us assume for a moment the exact opposite, *viz.*, that ultimately there is nothing to be said for an end except that someone does in fact prefer it and that it is this purely subjective preference which gives the end all the value it has. There is obviously no reason why another person, or any number of persons, might not share this liking. At least a good many human beings are pretty much the same in their preferences, even if no preference is shared by all of them. And it is hard to see why jurisprudence might not get along, even if it had to content itself with some very rough average of this sort determined in a purely inductive fashion. Stammler's contention that induction itself is impossible unless we assume an absolute underlying regularity overlooks all the uses of the calculation of probabilities, for whatever order probability requires certainly has nothing to do with means and ends. Moreover, as we have seen, means and ends are no more outside the scope of logic than any other relation. If two ends are mutually incompatible, they are in that respect like any other incompatibles, and a contradiction is as disreputable in jurisprudence or politics as anywhere else and for the same reasons. Finally, the realization of ends requires certain factual or causal conditions which are objective in exactly the same way when an end is in view as they would be if no one proposed to make use of them. So far as these physical or objective conditions are concerned, the end may be quite irrelevant, but the objective conditions cannot be irrelevant if the end is to be chosen and pursued.

Is there, then, anything which obviously prohibits a jurist, or indeed any social scientist, from proceeding under the hypothesis that these three types of objectivity or of mutual agreement are the only ones which his science is obliged to postulate? In some unspecified degree—possibly far short of universality—human preferences are alike; at least, men's judgments in such matters will classify like other variable material with some degree of probability. For the rest, he will define his concepts and draw his inferences as exactly as he can, according to the same logical rules of inference that anybody else uses, and where he appeals to objective conditions, psychological or physical, he will use the same body of facts and the same

causal principles that he would have to use if no end were in question. I am quite unable to see that such a view involves any absurdity and I strongly suspect that it provides all the objectivity that anyone is warranted in assuming in a subject-matter which includes human ends. Nor do I see that a person who takes such a view is logically committed to the practical absurdity that all ends are on the same level of whimsicality. If the view is tenable there is no need whatever to accept Stammler's radical distinction between natural sciences and teleological sciences, since all science is of a piece at least so far as logic and fact are concerned. Equally, of course, there is no objection to including ends wherever these are relevant, since it is as easy to draw conclusions about ends as about anything else that is equally complicated.

The conclusion to which I am forced, therefore, is that Stammler's elaborate "criticism", by which he hopes to raise jurisprudence to the level of a special kind of teleological science, is a failure. Criticism, either in Stammler or in Kant, does not make good its claim to provide a logical method distinct from and in a sense underlying deduction and induction. The attempt to lay down in advance a necessary form within which jurisprudence must fit is certainly not more successful, but probably less so, than the same attempt for physics. There is little if any reason to suppose that there are any necessary forms that must always be taken by a factual subject-matter, or that are intellectually indispensable for scientific understanding. In so far as there are relational factors in knowledge that permit us to speak of logical implications, they are not dependent upon factual exemplification and indeed do not have any necessary reference to matters of fact. All that criticism can do is to disentangle presumptions actually used, and this may be highly useful in inducing self-consciousness about what is being taken for granted, but it is not at all the same thing as projecting in advance a body of presumptions that science must always take for granted. This, it may well be believed, surpasses the wit of man, and the attempt is more aptly described as dogmatism than as criticism. For the same reasons, it follows that Stammler's discrimination of a special class of teleological sciences is certainly not necessary and is probably not even useful.

III

Stammler's failure to produce a new method in jurisprudence and to build up an *a priori* proof of the results of that method does not mean that these results are altogether lacking in significance. It does mean, of course, that he has failed in his own conception of his

work, but history is filled with failures of this kind which nevertheless had their importance. Thus it is possible for one of Stammler's severest critics, Sir Paul Vinogradoff, to speak of the "admirable precepts" of the theory of just law while asserting flatly that the theory of legal categories has "no value for the advancement of juridical thought".³⁸ It seems safe to assume that the value of Stammler's work, whatever it may be, lies in his contention that the conception of substantial justice as the end of law is an indispensable part of jurisprudence. In the concluding part of this paper, therefore, I propose to lay aside entirely all questions of method, and look at some phases of his treatment of this subject which may still have considerable worth, whether they are or can be proved.³⁹ For the sake of accuracy it will be well to remember that this is not a procedure of which Stammler would approve, since he has never believed that any idea was justified by what may be called its scientific utility. In this respect I venture to think that he has sacrificed the spirit to the letter of the Kantian philosophy, which has probably accomplished more by calling attention to the importance of working hypotheses than in any other way.

Stammler has always urged the view that a conscious and methodical consideration of ends is an element of all legal questions, both of legislation and of decision. Moreover, the particular form of this view which he has defended, *viz.*, that the end of law is to do substantial justice, is at least as applicable and probably more appealing than the utilitarian doctrine that the end of law is general happiness. If it be true, as has been thought, that the conception of natural justice was, on the whole, the strongest ideal motive making for the enlightenment of European law, there is certainly no reason to suppose that this motive has lost its power. In fact, it seems humanly certain that this principle will be periodically appealed to, especially when the existing law bears heavily upon a social class which is rapidly becoming conscious of its political power and which feels that it is discriminated against in comparison with other classes. It is easy for utilitarians to overrate the extent to which men desire or expect to be happy. The vast majority of men in the past have accepted a large share of misery as their natural lot without envying very much those who were less miserable. But the feeling that misery is an unnecessary degradation, removable by the use of adequate means and

³⁸HISTORICAL JURISPRUDENCE Vol. I. (1920), p. 146. The passage is not very clear but I suppose the condemnation refers to the four categories of law.

³⁹Cf. Dean Pound's account of Stammler in *The Scope and Purpose of Sociological Jurisprudence* (1911) 25 HARV. L. REV. pp. 147-154.

corresponding to no intrinsic differences of worth that can be rationally justified, undoubtedly has great propulsive power. Thus the sense of human dignity and worth has been deeply rooted in European morals for upwards of two thousand years; it has been preached and acted upon in every period of economic and political stress. The plain fact is, also, that it is often easier to say what is just than what will make men happy.

Probably the chief merit of Stammler's jurisprudence lies in his insistence that to do substantial justice is and must always be an end inherent in the administration and the practice of law, which cannot be pushed off by jurists upon someone else. To turn this question over to the moralists or the philosophers, as the analytic jurists have usually done, is merely a polite way of shelving it indefinitely, for doing justice, if it amounts to anything, is a quite every-day affair; if must be done in the course of the day's work and continuously from day to day. For this reason Stammler has argued that the ideal of justice ought to be part of the equipment even of the legal practitioner, who otherwise becomes a mere technician treating his technique as an end in itself.⁴⁰ It is important to note that the formalism which is complained of in Stammler's writings is not at all the formalism of *Begriffsjurisprudenz*. If it does not seem too paradoxical, we may say that he is offering his own formalism as a cure for the formalism of the legal technician. What he aims at is a mode of juristic reflection which always brings the doing of justice into the picture as the end of the whole process. He is emphatic in insisting that every legal situation is actual and empirical, arising in the course of every-day human relations. His own formula for justice is not put forward as a rule which can be followed but as a guiding idea in the light of which the concrete provisions of the law can be criticised. No one could reject more emphatically than Stammler the notion that there are unchangeable rules of law. There is only a point of view from which the actual content of every new situation as it arises needs to be considered. The very thoroughness of Stammler's formalism forbids confusion between his principles of justice and any actual rule of law.

Even where there is a well established rule of law, it need not be of a sort which tries to foresee all the eventualities that will arise or provide a major premise under which the court can subsume each new case by a simple legal syllogism. There have, of course, been plenty of instances of "strict" law, in which the legislature has undertaken to frame a rule to fit every case as it comes up, but in a great and

⁴⁰RICHTIGES RECHT Introduction.

growing number of instances legislatures are not so ambitious. "Particularly interesting for the technique of modern law are those cases in which the legislator decides certain specific questions in accordance with a certain theory, and leaves to the lawyer to work out the theory and settle the various questions arising therefrom".⁴¹ According to Stammler, the German Civil Code showed a definite tendency in this direction in a number of important respects. Such law Stammler calls "lenient" (*gelindes*); even silence in the law may be a means to justice. The variety of circumstances being as great as it is, the statement in advance of all that a rule ought to include is obviously impossible and to attempt it merely places the just application of the law in jeopardy. I presume we can see what Stammler has in mind if we think of the endless variety of cases in which negligence is a relevant conception. Legislation may give an indication of the direction which decision ought to take but it is practically compelled to place upon the courts the responsibility of finding the precise meaning which a rule ought to bear in the given case. Thus, Stammler argues, justice as the end to be achieved falls directly within the cognizance of the court in a way in which it does not, if the rule to be applied belongs to strict law. A "lenient" rule is something less than a rule in the strict sense; it is a norm or type setting up a sort of policy to be followed with due allowance for the great variety of cases that have to be brought under it. Perhaps the most important use that can be made of Stammler's distinction of form and matter in the law—a use not wholly consonant with the rigidity of the distinction as he draws it—lies in this conception of legal rules as indicative of a line to be followed rather than as complete summations of all the properties included in a legal concept. The rule thus becomes a juristic working hypothesis. It is unfortunate that this emphasis, which might be called the spirit of the Kantian philosophy, has been so completely overlain by the letter of the conceptual analysis.

At the same time it is only fair to Stammler to say that this idea of the juristic working hypothesis did in fact underlie his effort to formulate the principle of justice in a more precise way for juristic use. Justice properly formulated can be applied and used as a directing principle both for legislation and decision, and this contention was, I think, the primary emphasis in the earlier presentation of his theory of just law. It was this effort which led him to his well-known statement of the four principles of just law.⁴² What he reaches is, indeed, only an elaboration of the famous categorical imperative of Kant's ethics, that human beings are to be treated as ends and never as

⁴¹*Ibid.* Bk. II, C. iv; Engl. tr., p. 208.

⁴²*Ibid.* Bk. II, C. ii.

means merely. The elaboration takes account of Stammler's analysis of the conception of society in the *Wirtschaft und Recht* which had led him to conclude that law is the constitutive principle of a society of cooperating wills. Hence he supplements the more strictly Kantian law of Respect by the perhaps Platonic law of Participation. The member of a society is not only worthy of respect as an end in himself and must therefore be protected from the arbitrary impositions of another's will, but he is also entitled to share in the goods, material and spiritual, which his labor helps to create and maintain. Stammler then further elaborates each of these two laws by considering their fulfillment in two different legal respects: Both are conditions necessary to the existence of any legal obligation at all and also to the carrying out or effectuating of any legal obligation that does exist. In this way he obtains what he calls the two principles of Respect and the two principles of Participation.⁴³ Whatever improvement this more elaborate statement may possess over that given by Kant manifestly lies in Stammler's inclusion of the right to share in the goods which society cooperatively creates. It is this which makes possible his careful discussion of subjects like limitations upon the right of contract or the use of property.⁴⁴

The conception of community as a juristic working hypothesis has an application considerably wider than the sociological community which exists as an actual group. It is an intellectual device or a method of juristic reflection⁴⁵ and as such can be applied to individuals in every legal relation, such for example as a contract, even though the persons so related are not in a relation of actual social propinquity. Stammler argues that it is useful to think of persons united by a bond of legal obligation *as if* they formed a special community (*Sondergemeinschaft*), in order to understand the requirement imposed by the relation and especially to discover what justice requires in the manner of giving effect to it. The legal bond, so to speak, marks out a legal pattern in society at large, uniting the individuals concerned in a special cooperating community to accomplish certain specific purposes. Such a community extends as far as the relation runs; it may touch two persons only or it may run to any

⁴³Stammler states the principles as follows: I. The Principles of Respect: 1. The content of one individual's will must not be subjected to the arbitrary power of another. 2. Every legal requirement must be made effective in such a way that the person obligated may still be regarded as an end in himself. II. The Principles of Participation: 1. A person legally obligated must not be arbitrarily excluded from the legal community. 2. Every power of legal disposition must be made exclusive in such a way that the person excluded may still remain an end in himself. ⁴⁴RICHTIGES RECHT, Bk. III, C. ii; C. v. § 1. ⁴⁵*Ibid.*, Bk. II, C. v. § 2.

larger number. Those included may be interested in different degrees and in different capacities. Third parties not directly within the bond may still be concerned in the way in which the obligation is made effective. Within such a special community, which is a community only in a "mental" sense for purposes of juristic reflection, the principles of respect and participation should be used to guide legislation and also interpretation, if the law leaves any discretion to the courts. Stammler's meaning may be illustrated by indemnity for industrial accidents,⁴⁶ when the alternative is between placing the whole cost of the accident on the employee and making it a charge upon the industry and thus spreading it over all the consumers of the product. In such cases justice requires the use of the notion of proportionality: a loss which will be staggering to an individual alone may be a trifle when widely shared. Indeed, in urging the justice of sharing losses Stammler is willing to go farther than the law has yet gone.⁴⁷

Both in theory and in practice there can be no doubt that Stammler's most fruitful idea was the inclusion of social participation as part of the conception of justice. It is this which distinguishes his jurisprudence most sharply from the traditional versions of natural right. The similarity between Stammler's principle of respect and Kant's categorical imperative is obvious, but between Stammler's whole theory and Kant there is a significant difference. With Kant respect is due to a human being as such and merely because of his inherent humanity. With Stammler the need for justice takes its origin from the fact that law has to constitute a social group within which the exchange of goods and services can supply human needs. Injustice always violates the purpose of the community either by putting a person outside the benefits which the community is designed to confer or by making him subject to the merely arbitrary will of another.⁴⁸ Stammler's principles of just law are therefore not individual rights, though they have to do with the treatment to be accorded individuals. They are requirements for the right constitution of a social group, or conditions for a healthy state of the body politic, to use Plato's expression. For Stammler as for all social idealists society is ultimately a spiritual phenomenon, a union of minds for the creation and maintenance of a spiritual good which has no existence except in the lives of individuals, while at the same time individuals have no existence, and certainly no value, except they as they develop themselves to share in it. The moral health of the one requires the moral health of the other. Perhaps no name is

⁴⁶*Ibid.*, Bk. III, C. iii, § 3.

⁴⁷*Ibid.*, Bk. III, C. i, § 1.

⁴⁸RECHTSWISSENSCHAFT, C. viii, § 7.

more appropriate than justice to describe this mutual implication. It signifies that peculiar double status in which a being is at once means and end and which is realized only in community.

If we place on one side Stammler's effort to create and demonstrate a new "critical" jurisprudence, which I believe to be definitely a failure, his achievement must be judged by the value of the ideas fundamental to his social idealism. He emphasized again the importance of regarding law as a means to an end and he reasserted the claim of justice to be regarded as the best statement of the nature of that end. Implicit in this position was the suggestion that legal rules may most profitably be regarded as juristic working hypotheses to guide decision rather than to predetermine it. This idea, which might have been the most fruitful part of Stammler's jurisprudence, is unfortunately crossed at every point by a growing fondness for *a priori* proof, with the result that he accomplishes relatively little in showing how the ideal of just law can be given concrete juristic utility. In spite of a certain power of intellectual construction Stammler's mind appears to lack that robust grasp of realities which in Kant was responsible at once for his worst inconsistencies and his most penetrating insights, and which off-sets the school-masterly pedantry of his methodology. Whatever Stammler did accomplish in the direction of giving a more usable definition of justice must be set down mainly to the fact that he supplemented Kant's categorical imperative with the Platonic notion of participation. By so doing he presented justice less as an individual right than as a requirement of the social community itself and as an ineradicable condition of social health. The importance of these ideals need not be denied, but after they have been accepted we shall still be profoundly puzzled to know what they mean in the concrete or what they involve in detail. Stammler's thought bears indelibly the impress of the 1890's, an era in which a new sense of social responsibility flowered in a new statement of social idealism. In Stammler as in the Oxford idealists this took the form of elaborating a very general principle of what may be called social solidarity conceived in an ethical sense—the principle that society has the duty of opening to a larger circle of the population the positive means for sharing in the goods, especially the spiritual goods, of a civilized community. Neither in Stammler nor in the English idealists was there any adequate notion of the difficulties of making this ideal effective, nor indeed any will to face the probably revolutionary changes in modern economy required to make it even approximately real. Hence they bequeathed to the next generation a social philosophy less false in its main theses than vague in meaning and uncertain in application.