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THE TRANSATLANTIC DIVERGENCE IN  
LEGAL THOUGHT: AMERICAN LAW AND  
ECONOMICS VS. GERMAN DOCTRINALISM

Kristoffel Grechenig  
Martin Gelter

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# The Transatlantic Divergence in Legal Thought: American Law and Economics vs. German Doctrinalism

*Kristoffel Grechenig\* & Martin Gelter\*\**

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\* University of St. Gallen, Switzerland, Department of Law. At the time of the writing of this article, the author was working for the START project "Legal Evolution and European Harmonization of Company Law" at the Vienna University of Economics and Business Administration.

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## 1. Introduction

Law and economics has become an integral part of American legal scholarship and the law school curriculum. Ever since the legal realist movement, scholars mostly view the law from an external perspective.<sup>1</sup> It may be surprising to many Americans that European legal scholarship has been largely resistant to this development. Law is typically viewed “from the inside”, that is as an autonomous discipline independent from the other social sciences. Most legal scholarship is doctrinal, meaning that legal scholars employ interpretative methods in order to systematically expose the law and to find out what the law is, frequently even before it is tackled by a court. American-style legal scholarship is often considered very alien, and law and economics in particular often meets outright rejection.

In this paper, we attempt to explain this divergence in the academic legal discourse using the reception of law and economics in legal scholarship in German-speaking countries as a case in point. However, we suspect that our approach can be generalized to other parts of Europe because of common roots and similar historical factors that can be identified in many parts of Europe.

We propose a two-pronged explanation for why law and economics plays an insignificant role in German-speaking countries while the United States have become a stronghold for it. First, in the US, legal realism (in its particular political setting) discredited what has become known as classical legal thought. As a result, legal academics in the US were receptive for new approaches which began to thrive later during the 20<sup>th</sup> century. In German-speaking countries, the free law school had a similar agenda but did not succeed in displacing doctrinal approaches. Consequently, there was no void to be filled by external criteria. Second, utilitarianism had already gained widespread acceptance in American intellectual circles since the 19<sup>th</sup> century. As it forms the foundation of modern welfare economics, its basic tenets provide a fertile soil for the incipient law and economics movement. In contrast, German philosophy promoted a strictly anti-utilitarian attitude hostile to any law and economic movement. To the extent external criteria were (or are) accepted by legal scholarship they needed to be taken from a different source. It has recently been pointed out that, both in the US and in Germany, legal theories opposed to positivism have prevailed. Other than in the US, the German critique resulted in a “value-based”, transcendental jurisprudence.<sup>2</sup> In our view, none of these two

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<sup>1</sup> JAMES E. HERGET, CONTEMPORARY GERMAN LEGAL PHILOSOPHY 104 et seq. (1996).

<sup>2</sup> Viktor Winkler, *Review Essay – Some Realism about Rationalism: Economic Analysis of Law in Germany*, 6 GERMAN L. J. 1034, 1042 (2005).

factors alone can explain the success of law and economics in the US relative to Europe, but the combination of the two can.

We proceed as follows: Section 2 describes the rejection of the economic analysis of law in German-speaking countries and gives an overview on explanations that we found in the existing literature. Section 3 outlines our own hypothesis. Section 4 traces the development in the US, based on the existing literature. It starts with the classical legal thought of the late 19<sup>th</sup> century and subsequently surveying legal realism and the early development of law and economics since the 1960s. Section 5 describes the development of legal theory in German-speaking countries. As both legal realism and the free law school have pointed out, a doctrinal approach to law is equally prone to exploitation to achieve certain political ends. The current state of the discussion on legal philosophy is relevant to us insofar as it influences the ordinary legal discourse, in particular the predominant forms of legal scholarship. Section 6 summarizes.

## **2. The rejection of law and economics in German-speaking countries**

### **2.1. The current state of reception of American-style economic analysis of law**

Typical continental European legal scholars often regard articles published in American law reviews as quite alien. What seems startling is not so much the embedment of American articles into a common law system, but the interdisciplinary and, to the European observer, surprisingly “non-legal” approach adopted by American scholars. While European law scholars’ work typically focuses on the interpretation of the law and the attempt to smooth its inconsistencies by advancing the understanding of its inherent structure and system, American scholars mostly view the law from an external perspective. Law and economics is the most important case in point, as it seems to dominate some fields almost completely. An Italian scholar recently observed that American corporate law professors are not actually legal scholars, but rather economists whose field of research is law.<sup>3</sup>

This purely functional approach distinguishes the US legal academia from scholarship in Europe, including the UK.<sup>4</sup> Especially in German-speaking countries, economic approaches to law frequently meet with outright rejection; law is not merely seen as a field to be investi-

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<sup>3</sup> E.g. STEFANO LOMBARDO, REGULATORY COMPETITION IN COMPANY LAW IN THE EUROPEAN COMMUNITY 18 (2002).

<sup>4</sup> But see Heikki Pihlajamäki, *Against Metaphysics in Law: The Historical Background of American and Scandinavian Legal Realism Compared*, 52 AM. J. COMP. L. 469 (2004) (discussing the notable exception of Scandinavia).

gated with the methods of any branch of social science, but as a separate academic discipline and with particular “scientific” methods.

German-speaking academia has brought forward treatises,<sup>5</sup> articles<sup>6</sup> and research institutes dedicated to the economic analysis of law.<sup>7</sup> Still, predictions on the influence of law and economics made in the early 1990s have not been confirmed: In 1991, Ugo Mattei and Roberto Pardolessi suggested that the status of law and economics in Europe merely lagged behind the US by about 15 years.<sup>8</sup> Assuming an approximately equal speed of development, one would expect that the situation today should be comparable to the early 1990s in the US. Today, it seems that Europe has not caught up. Law and economics continues to linger on the fringes of legal scholarship only.<sup>9</sup> The number of law and economics papers is still dwarfed by the amount published in the US, and economic literature is largely ignored by legal discourse. Legal scholars rarely develop their own economic arguments; where law and economics is discussed, the primary objective is often to gain an understanding of American legal thought rather than the specific application of economic arguments to legal issues.<sup>10</sup>

Admittedly, critiques of law and economics abound in the US. However such criticism opposes a powerful intellectual movement in the United States, whereas similar critiques in German-speaking literature are more or less directed against a tiny seedling that has not been able to grow roots. Mainstream scholars often point out that, while economic analysis emphasizes efficiency criteria and aims to create an optimal allocation of resources under minimal transaction costs, these factors cannot be of primary importance, as the legal system also

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<sup>5</sup> E.g. SCHÄFER & OTT, *id.*; WOLFGANG WEIGEL, RECHTSÖKONOMIK (2003); MICHAEL ADAMS, ÖKONOMISCHE THEORIE DES RECHTS (2004); JÜRGEN NOLL, RECHTSÖKONOMIE – EINE ANWENDUNGSORIENTIERTE EINFÜHRUNG (2005).

<sup>6</sup> The German-speaking literature started to discuss the economic analysis of law in the 1970s and early 1980s, *see e.g.* PETER BEHRENS, DIE ÖKONOMISCHEN GRUNDLAGEN DES RECHTS, note 10 (1986) (references to the early discussion).

<sup>7</sup> E.g. the departments and centers of law and economics at the Universities of Hamburg, Saarbrücken, Vienna and St. Gallen.

<sup>8</sup> Ugo Mattei & Roberto Pardolessi, *Law and economics in civil law countries: a comparative approach*, 11 INT’L REV. L. & ECON. 265, 271-272 (1991) (identifying a lag of at least fifteen years, while at the same time suggesting that law and economics might develop more quickly in Europe because of the different system of appointing judges). *See* UGO MATTEI, COMPARATIVE LAW AND ECONOMICS 89, 91 (1997) (one coauthor maintaining this few some years later). *Also see* Gérard Hertig, *The European Community*, 11 INT’L REV. L. & ECON. 331 et seq. (1991). *See also* Duncan Kennedy, *Two Globalizations of Law & Legal Thought: 1850-1968*, 35 SUFFOLK U. L. REV. 631, 674-678 (2003) (identifying a globalization of contemporary legal discourse independent of law and economics).

<sup>9</sup> Kenneth G. Dau-Schmidt & Carmen L. Brun, *Lost in Translation: The Economic Analysis of Law in the United States and Europe*, 44 COLUM. J. TRANSNAT’L L. 602, 620 (2006); Nuno Garoupa & Thomas S. Ulen, *The Market for Legal Innovation: Law and Economics in Europe and the United States* 12-19 (2006) (providing evidence from journal articles).

<sup>10</sup> *Id.*, at 2.

needs to take non-monetary values into account.<sup>11</sup> Most critics emphasize that efficiency neglects the distribution of goods and income, which leads to an aggravation of existing inequalities.<sup>12</sup> It is argued that replacing the obligations of legal ethics with utility calculus under the *homo oeconomicus* assumption discriminates the poor, thereby failing to meet the goals of equity, fairness and social justice.<sup>13</sup> In addition to that, economic analysis has a reputation of employing utopical models which cannot be applied to practical issues.<sup>14</sup> Moreover, opponents of economic analysis point out that social science is generally unable to deliver precise results, meaning that any claims about economic consequences of legal rules are purely speculative.<sup>15</sup>

In many cases these criticisms can be traced to a restricted understanding of economics among legal scholars, who are rarely familiar with its analytical instruments, such as the role of models<sup>16</sup> or the meaning of non-monetary values.<sup>17</sup> On one hand, certain approaches to law and economics, especially the one attached to the Chicago School,<sup>18</sup> offer a welcome target

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<sup>11</sup> E.g. Jochen Taupitz, *Ökonomische Analyse und Haftungsrecht – Eine Zwischenbilanz*, 196 ARCHIV FÜR DIE CIVILISTISCHE PRAXIS 114, 133 (1996); HELMUT KOZIOL & RUDOLF WELSER, GRUNDRISS DES BÜRGERLICHEN RECHTS 20-21 (12<sup>th</sup> ed., vol. I, 2002). See e.g. Hans-Peter Schwintowski, *Ökonomische Theorie des Rechts*, 53 JURISTEN-ZEITUNG 587 et seq. (1998) (discussing this misconception). See also BERND SCHILCHER, THEORIE DER SOZIALEN SCHADENSVERTEILUNG (1977) (arguing that the “capitalist principle of distribution” (*marktwirtschaftliche Verteilungsprinzip*) contradicts the “social principle” (*Sozialprinzip*)).

<sup>12</sup> E.g. Karl-Heinz Fezer, *Aspekte einer Rechtskritik an der economic analysis of law und am property rights approach*, 41 JURISTEN-ZEITUNG 817, 823-4 (1986); Taupitz, *supra* note 11, at 124 (suggesting that aspects of social distribution of resources are per se outside the scope of economic analysis).

<sup>13</sup> Taupitz, *id.* at 133.

<sup>14</sup> Fezer, *supra* note 12, at 822-3; also see Friedrich Rüdfler, *Gläubigerschutz durch Mindestkapital und Kapitalerhaltung in der GmbH – überholtes oder sinnvolles Konzept*, 4 GESELLSCHAFTS- UND STEUERRECHT AKTUELL 144 (2005) (outright rejection of economic analysis); Fritz Rittner, *Das Modell des homo oeconomicus und die Jurisprudenz*, 60 JURISTEN-ZEITUNG 668 et seq. (2005).

<sup>15</sup> This argument was already made during the discussing of the late 19<sup>th</sup> century. See Izhak Englard, *Victor Mataja’s Liability for Damages from an Economic Viewpoint: a Centennial to an Ignored Economic Analysis of Tort*, 10 INT’L REV. L. & ECON. 173, 185 (1990). It was again brought up by HANS KELSEN, WAS IST GERECHTIGKEIT? 23 et seq. (1953, Reprint 2005). Cf. the controversy between Horst Eidenmüller and Fritz Rittner about the merits of behavioral law and economics: Horst Eidenmüller, *Der homo oeconomicus und das Schuldrecht: Herausforderungen durch Behavioral Law and Economics*, 60 JURISTEN-ZEITUNG 216 et seq. (2005); Rittner, *id.* at 668 et seq.; Horst Eidenmüller, *Schlusswort*, 60 JURISTEN-ZEITUNG 670-671 (2005).

<sup>16</sup> See e.g. Fezer, *supra* note 12, at 820 (pointing out the absence of transaction cost in the Coase Theorem); but see Ronald H. Coase, *The Problem of Social Cost*, 3 J. L. & ECON. 1, 15 et seq. (1960) (analyzing markets in the presence of transaction cost).

<sup>17</sup> Occasionally, it has been pointed out even in the German-language legal literature that non-monetary values are non a priori excluded from economic analysis. See e.g. Schwintowski, *supra* note 11, at 587-8. Also see Frank Adloff, *Theorien des Gebens – Nutzenmaximierung, Altruismus und Reziprozität*, in NONPROFIT-ORGANISATIONEN IN RECHT, WIRTSCHAFT UND GESELLSCHAFT 139 et seq. (Klaus J. Hopt, Thomas von Hippel & W. Rainer Walz eds. 2005); Ludwig von Auer, *Ökonomische Theorieansätze des Gebens*, in NONPROFIT-ORGANISATIONEN IN RECHT, WIRTSCHAFT UND GESELLSCHAFT 159 et seq. (Klaus J. Hopt, Thomas von Hippel & W. Rainer Walz eds. 2005) (controversy on the non-monetary preferences in economics in general).

<sup>18</sup> The most prominent one is probably Richard Posner’s wealth maximization approach. See Richard A. Posner, *Utilitarianism, Economics, and Legal Theory*, 8 J. LEGAL STUD. 103 (1979); Richard Posner, *The Ethical and Political Basis of the Efficiency Norm in Common Law Adjudication*, 8 HOFSTRA L. REV. 487 et seq. (1980). Posner seems to have abandoned this position in the meantime. See Richard A. Posner, *The Ethics of Wealth Maximization*, 36 U. KAN. L. REV. 261, 265 (1988); Richard A. Posner, *The Problematics of Moral and Legal*

for attacks and a basis for outright rejection of any economic approach to law by German scholars, sometimes without profound analysis and discussion.<sup>19</sup>

Since the early days of modern law and economics, wealth maximization has been criticized as an approach that does not correspond to the welfare economic goal of maximizing total social welfare, i.e. a maximization of total utility within a society.<sup>20</sup> It has been pointed out that maximization of total utility has to consider the distribution of wealth<sup>21</sup> as part of its normative objective, if people value an unequal distribution negatively. However, alternative approaches and refinements of the initial theories were widely ignored by the greatest part of German-language legal academia.

Altogether, law and economics typically has to overcome a strong barrier of rejection in German-speaking countries. Occasionally economic analyses are considered acceptable as long as its applicability is restricted to legislation and thus excluded from the scope of a lawyer's or legal scholar's daily work.<sup>22</sup> Where it is accepted as an element of interpretation, mostly as a type of purposivist interpretation of the law,<sup>23</sup> it remains strictly subordinate to the traditional canons of interpretation.<sup>24</sup>

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*Theory*, 111 HARV. L. REV. 1637, 1670 note 62 (1998); also see Francesco Parisi, *Methodological debates in law and economics: the changing contours of a discipline*, in THE ORIGINS OF LAW AND ECONOMICS 47 et seq. (Francesco Parisi & Charles K. Rowley eds. 2005); Charles K. Rowley, *An intellectual history of law and economics: 1739-2003*, in THE ORIGINS OF LAW AND ECONOMICS 3, 21-22 (Francesco Parisi & Charles K. Rowley eds. 2005).

<sup>19</sup> Prominent German-language treatises on legal methods typically mention only Richard Posner as a representative of American law and economics and make no references to other approaches: see HANS-MARTIN PAWLOWSKI, *METHODENLEHRE FÜR JURISTEN* notes 852, 855 (2<sup>nd</sup> ed. 1991), FRANZ BYDLINSKI, *JURISTISCHE METHODENLEHRE UND RECHTSBEGRIFF* 331 (2<sup>nd</sup> ed. 1991); OTTO PALANDT, *BÜRGERLICHES GESETZBUCH, Einleitung* note 32 (62<sup>nd</sup> ed. 2003). The criticism of some other authors also seems to rest address the Chicago School approach only, e.g. ERNST A. KRAMER, *JURISTISCHE METHODENLEHRE* 236 (2<sup>nd</sup> ed. 2005) (citing primarily an article published by Eric Posner in 2003); KOZIOL & WELSER, *supra* note 11, at 20-21; also see KLAUS MATHIS, *EFFIZIENZ STATT GERECHTIGKEIT* (2003) (discussing primarily Posner, but also mentioning other authors). A more comprehensive treatment is given by HORST EIDENMÜLLER, *EFFIZIENZ ALS RECHTSPRINZIP* (1995) (allowing law and economics in legal policy, but permitting it as a guideline to interpretation only where efficiency has been made the policy of a statute), BEHRENS (*supra* note 6) and ANNE VAN AAKEN, *RATIONAL-CHOICE IN DER RECHTSWISSENSCHAFT. ZUM STELLENWERT DER ÖKONOMISCHEN THEORIE IM RECHT* (2003). On controversial assumption of law and economics, see *infra* section 4.5.

<sup>20</sup> See GUIDO CALABRESI, *THE COST OF ACCIDENTS* 24 (1970); Guido Calabresi, *About law and economics: a letter to Ronald Dworkin*, 8 HOFSTRA L. REV. 553 (1980); Guido Calabresi, *The new economics analysis of law: Scholarship, sophistry, or self-indulgence?*, 68 PROC. BRIT. ACAD. 85, 89 (1982); LOUIS KAPLOW & STEVEN SHAVELL, *FAIRNESS VS. WELFARE* (2002); Parisi, *supra* note 18, at 33 et seq, 44 et seq (summarizing).

<sup>21</sup> See Calabresi, *The new economics analysis of law*, *id.* at 93-4, 97. For a comprehensive discussion see KAPLOW & SHAVELL, *id.* at 28 et seq. Legal economists typically argue that redistribution should not be attempted in substantive legal rules, but left to tax law. See Louis Kaplow & Steven Shavell, *Why the Legal System is Less Efficient Than the Income Tax in Redistributing Income*, 23 J. LEGAL STUD. 667 (1994); Louis Kaplow & Steven Shavell, *Should Legal Rules Favor the Poor? Clarifying the Role of Legal Rules and the Income Tax in Redistributing Income*, 29 J. LEGAL STUD. 821 et seq. (2000). Distributive justice was taken into account by utilitarianism as early as in the work of Jeremy Bentham. See e.g. PAUL J. KELLY, *UTILITARIANISM AND DISTRIBUTIVE JUSTICE – JEREMY BENTHAM AND THE CIVIL LAW* 14 et seq. (1990).

<sup>22</sup> See generally EIDENMÜLLER, *supra* note 19; Taupitz, *supra* note 11, at 114 et seq.

<sup>23</sup> See e.g. BYDLINSKI, *supra* note 19, at 331 f; KRAMER, *supra* note 19, at 236-7; Dieter Krimphove, *Rechtstheoretische Aspekte der „Neuen ökonomischen Theorie des Rechts“*, 32 RECHTSSTHEORIE 530 (2001); Reinhard

## 2.2. A short overview of the existing literature

### 2.2.1. Divergence between Common Law and Civil Law

So far, most explanations of this divergence have emphasized institutional factors. Ugo Mattei and Roberto Pardolessi have suggested that the decentralized decision-making system and the more powerful position of the judge in the Anglo-Saxon common law, as opposed to the stereotype of the continental civil law judge is a mere interpreter of the law, as a central reason.<sup>25</sup> A related argument was brought forward by Christian Kirchner in the German context. He stresses the predominant understanding of the constitutional separation of powers, under which judges are only allowed to interpret the law on the basis of existing statutes and prohibits references to non-legal arguments.<sup>26</sup>

Although these points are absolutely valid, they do not suffice as a sole explanation. English legal scholarship provides a counter-example, as it is generally considered to be committed to an “internal” perspective on the law.<sup>27</sup> Admittedly, law and economics has made some in-

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Kohl, *Über die Rechtsanwendung im Sinne der Ökonomischen Analyse des Rechts im Verhältnis zu den hergebrachten Kanons der Gesetzesauslegung*, in JAHRBUCH JUNGER ZIVILRECHTSWISSENSCHAFTLER 1992, 29-46. (Stephan Breidenbach, Stephan Grundmann, Peter O. Mülbelt & Reinhard Singer eds. 1993).

<sup>24</sup> See the discussion in standard works on interpretation such as PAWLOWSKI, *supra* note 19, at notes 852, 855 (2<sup>nd</sup> ed. 1991); KRAMER, *supra* note 19, at 236-7; F. BYDLINSKI, *supra* note 19, at 331-2. Law and economics is not even discussed by KARL LARENZ, *METHODENLEHRE DER RECHTSWISSENSCHAFT* (6<sup>th</sup> ed. 1991) and REINHOLD ZIPPELIUS, *JURISTISCHE METHODENLEHRE* (4<sup>th</sup> ed. 1985); also see standard treatises on civil law such as PALANDT, *supra* note 19, at Einleitung notes 32-3; KOZIOL & WELSER, *supra* note 11, at 20-21; also see Taupitz, *supra* note 11, at 135-6; EIDENMÜLLER, *supra* note 19, at 450 et seq.; Horst Eidenmüller, *Rechtsanwendung, Gesetzgebung und ökonomische Analyse*, 197 ARCHIV FÜR DIE CIVILISTISCHE PRAXIS 80 et seq. (1997) and the particularly critical assessment of Fezer, *supra* note 12, at 817 et seq. For a descriptive accounting of this rejection see Christian Kirchner, *The difficult reception of law and economics in Germany*, 11 INT’L REV. L. & ECON. 277-8 (1991); Taupitz, *id.* at 128 et seq.; Victor Winkler, *Ökonomische Analyse des Rechts im 19. Jahrhundert: Victor Matajas „Recht des Schadensersatzes“ revisited*, 26 ZEITSCHRIFT FÜR NEUERE RECHTSGESCHICHTE 262 et seq. (2004); Wolfgang Weigel, *Law and Economics in Austria*, in INTERNATIONAL ENCYCLOPEDIA OF LAW AND ECONOMICS Nr. 0305 (Boudewijn Bouckaert & Gerrit De Geest eds. 2000), at <http://encyclo.findlaw.com/tablebib.html>; Gérard Hertig, *Switzerland*, 11 INT’L REV. L. & ECON. 293 et seq. (1991). For further references to jurisprudence and doctrinal legal scholarship, see BERND SCHÄFER & CLAUS OTT, *LEHRBUCH DER ÖKONOMISCHEN ANALYSE DES RECHTS* 10-11 (3<sup>rd</sup> ed. 2001). For a discussion of efficiency as a principle of constitutional law, see Konrad Lachmayer, *Effizienz als Verfassungsprinzip: Eine Maxime für staatliches Handeln in Österreich?* in 44. ASSISTENTENTAGUNG, RECHT UND ÖKONOMIK 135 et seq. (Marc Bungenberg, Stefan Danz & Helge Heinrich eds. 2004).

<sup>25</sup> Mattei & Pardolessi, *supra* note 8, at 267; MATTEI, *supra* note 8, at 81-2. See generally Richard A. Posner, *Law and Economics in Common-Law, Civil-Law, and Developing Nations*, 17 RATIO JURIS 66, 76-77 (2004) (contrasting common law and civil law); Richard A. Posner, *The Future of the Law and Economics Movement in Europe*, 17 INT’L REV. L. & ECON. 3, 3 (1997).

<sup>26</sup> Kirchner, *supra* note 24, at 277-292. Also see Posner, *Future*, *id.* at 5; Dau-Schmidt & Brun, *supra* note 9, at 607, 617; Taupitz, *supra* note 11, at 129 et seq. See generally HERGET, *supra* note 1, at 115-116 (discussing separation of powers in general).

<sup>27</sup> Brian R. Cheffins, *Using Theory to Study Law: A Company Law Perspective*, 58 CAMBRIDGE L. J. 197, 200-1 (1999); also see Neil Duxbury, *When Trying is Failing: Holmes’s “Englishness”*, 63 BROOK. L. J. 145, 146 (1997); HERGET, *supra* note 1, at 106. Interestingly, ATIYAH & SUMMERS (*supra* note 29, at 347-353) point out that English barristers must win the recognition of judges to qualify for a judgeship themselves, whereas American lawyers must win the favor of politicians. They suggest that the American system is much more conducive to legal innovation in the judiciary for this reason.



roads in the UK, notably in corporate law,<sup>28</sup> but as a whole, scholarly work with black-letter law continues to predominate as it does on the European continent. Other external or critical perspectives seem to remain marginal as they do in continental Europe.<sup>29</sup> Thus, if one were to observe an increased openness of English scholarship to American approaches to law, one can well put down any edge over the continent to the shared English language and a greater American influence resulting from it.

### 2.2.2. *The success and failure of legal positivism*

Closely related to the legal families argument is the theory that legal positivism, understood as strict adherence to positive law and to the exclusion of any substantive justification of norms, caused legal scholarship to dissociate from other disciplines.<sup>30</sup> This is true, for example, for *Hans Kelsen's* widely known approach to legal positivism, which has gained widespread acceptance in civil law countries.

Even though the legal positivism argument has some merits, it cannot provide an exclusive explanation for the widespread rejection of law and economics. After all, economic efficiency could have been implemented by statutory law (e. g. as a method of interpretation), or at least been used (without an explicit statutory basis) as an element of the generally accepted legal principle.<sup>31</sup> Furthermore, legal positivists such as Jeremy Bentham can be counted among the precursors of the modern law and economics movement.<sup>32</sup> This issue aside, it has frequently been pointed out both in the US (most prominently by the legal realists) and in German-language literature (mostly by the free-law school) that personal views of judges inevitably enter judgments, meaning that a clear separation between mere interpretation and the creation of new law, is impossible.<sup>33</sup> We will argue that legal positivism played an important role in the evolution of legal thought. However, we emphasize the role of *policy* in Kelsen's theory.<sup>34</sup>

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<sup>28</sup> Cheffins, *id.* at 208-209.

<sup>29</sup> See Duxbury, *supra* note 27, at 148. Also see PATRICK ATIYAH & ROBERT S. SUMMERS, FORM AND SUBSTANCE IN ANGLO-AMERICAN LAW 398-403 (1987). Atiyah and Summers (who do not discuss law and economics) suggest that legal reasoning and legal institutions differ strongly between the UK and the US. They argue that UK law focuses on formal reasoning, whereas substantive reasoning prevails in the US. Numerous differences relating to that distinction can be observed on all levels of the two legal cultures.

<sup>30</sup> E.g. Wolfgang Weigel, *Prospects for law and economics in civil law countries: Austria*, 11 INT'L REV. L. & ECON 325, 326 (1991).

<sup>31</sup> Mattei & Pardolesi, *supra* note 8, at 269 (emphasizing the role of case law also in civil law countries).

<sup>32</sup> *Infra* section 4.2.

<sup>33</sup> On the German free-law school see *infra* section 5.3. On hermeneutics in general see HANS-GEORG GADAMER, WAHRHEIT UND METHODE: GRUNDZÜGE EINER PHILOSOPHISCHEN HERMENEUTIK (6<sup>th</sup> ed. 1990); on hermeneutics in German legal literature see e.g. JOSEF ESSER, VORVERSTÄNDNIS UND METHODENWAHL IN DER RECHTSFINDUNG (1972). The indeterminacy of jurisprudence on the basis of pre-existing materials such as statutes or precedents is also the fundamental thesis of American legal realism [see e.g. Brian Leiter, *American Legal Realism*, in THE BLACKWELL GUIDE TO THE PHILOSOPHY OF LAW AND LEGAL THEORY 50 (Martin A. Golding & William P. Edmundson eds. 2005)] and of the critical legal studies movement [for an overview, see Mark V.

### 2.2.3. Legal education and career

Some authors have sought to explain the rejection of law and economics by means of legal education. The most frequent culprit is the lack of training in economics among lawyers.<sup>35</sup> A dislike of mathematics prevalent among jurists adds to this factor.<sup>36</sup> By contrast, American students normally have to undergo a more general non-legal education in college before entering law school, which may also result in greater openness towards interdisciplinary approaches to law.<sup>37</sup> Another factor that has been mentioned is the conservative approach to appointing professors prevalent in most European countries.<sup>38</sup>

The role of legal education is of course hard to deny. However, jurists in German-speaking countries had to take courses in economics for a long time;<sup>39</sup> concurrently, American law professors often lack formal training in mathematics,<sup>40</sup> which does not necessarily prevent them from bringing forward economic arguments. In any case, it is probably necessary to ask whether the design of current curricula is rather the consequence than the cause of the small importance of economics for legal interpretation and policy. The same is true of arguments putting down the rejection of law and economics to misconceptions, such as its exclusive identification with the Chicago School.<sup>41</sup>

### 2.2.4. Rent-seeking and academic incentives

This closely relates to arguments trying to explain the rejection of law and economics by rent-seeking activities by traditionally trained jurists and arguing that they constitute a strong interest group opposing any conception that might subvert their position.<sup>42</sup> In the specific Aus-

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Tushnet, *Critical Legal Theory*, in THE BLACKWELL GUIDE TO THE PHILOSOPHY OF LAW AND LEGAL THEORY 80 (Martin A. Golding & William P. Edmundson eds. 2005); seminal works are e.g. Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976); DUNCAN KENNEDY, A CRITIQUE OF ADJUDICATION (1997)].

<sup>34</sup> See pages - 49 - et seq.

<sup>35</sup> Weigel, *supra* note 30, at 326.

<sup>36</sup> R. Cooter & J. Gordley, *Economic Analysis in Civil Law Countries: Past, Present, Future*, 11 INT'L REV. L. & ECON 261-263 (1991).

<sup>37</sup> Cf. Dau-Schmidt & Brun, *supra* note 9, at 617.

<sup>38</sup> MATTEI, *supra* note 8, at 88. Also see the contributions to the symposium on "Selecting Minds", 41 AM. J. COMP. L. 351 et seq. (1993).

<sup>39</sup> Leaving aside the old tradition of "Faculties of Legal and State Sciences" (*rechts- und staatswissenschaftliche Fakultäten*) (infra section 5.1), mandatory courses in economics and business management were only abolished in Austrian law faculties a few years ago. Also see Eugen Böhm-Bawerk, *Book Review of Victor Mataja, Das Recht des Schadenersatzes vom Standpunkt der Nationalökonomie*, 17 ZEITSCHRIFT FÜR DAS PRIVAT- UND ÖFFENTLICHE RECHT DER GEGENWART (GRÜNHUTS ZEITSCHRIFT) 418 (1890) (pointing out that few people are able to be experts both in law and economics).

<sup>40</sup> See Cooter & Gordley, *supra* note 36, at 262.

<sup>41</sup> Weigel, *supra* note 24, at 120; also see Christian Watrin, *Nutzen und Kosten des Rechts*, in EFFIZIENZ DER GESETZESPRODUKTION 239, 242 (Wolfgang Mantl ed. 1995).

<sup>42</sup> Cf. MAX WEBER, WIRTSCHAFT UND GESELLSCHAFT VII § 8, 509 et seq. (5<sup>th</sup> ed. 1976); C. C. von Weizsäcker in a letter dated June 6, 1993, to Horst Eidenmüller, cited by EIDENMÜLLER, *supra* note 19, at 7; cf. Rittner, *supra*

trian context, Wolfgang Weigel points out the predominant position of lawyers in the economy.<sup>43</sup> Other than in the US, where decisions about the acceptance or rejection of an article in law reviews are made by students, in Europe the decision is typically made by established law professors. While students do not normally have a particular position to defend, an established professor may sometimes be opposed to the publication of an article strongly opposed to his own approach. In this sense, the American system of law reviews is more open to new approaches, as it is necessary to promote a new and controversial thesis in order to have an article accepted by a reputable law review; naturally, this is a much better invitation to papers critical of the current state.<sup>44</sup>

Arguments aiming at the protection of vested interests may explain why the predominant type of legal thought has maintained and expanded its position, but it does not explain how it originally came into being. One possibility would be to seek the answer in the economic system in general: For example, some authors have sought the reason in the practice of trying to achieve widespread consensus in politics.<sup>45</sup> This may relate to the long-standing hegemony of Keynesian macroeconomics among economists in Europe.<sup>46</sup> In any case, Germany and other European countries lacked an anti-intervention sociopolitical movement (as it existed in the US), in the vicinity of which the law and economics movement could thrive.<sup>47</sup> Economic and social policy will therefore have to be part of an explanation.

In a recent article, Oren Gazal-Ayal has attempted to explain the prevalence of law and economics with the publication incentives of legal academics: While in the US, and even more so in Israel, standards for appointment and promotion create rewards for law and economics publications, this is not the case in Europe.<sup>48</sup> Similarly, Nuno Garoupa and Thomas Ulen have recently suggested that the US edge in law and economics, and in “legal innovations” can be explained with how legal scholarship is evaluated in the US.<sup>49</sup> The claim is that there is a strong incentive to innovate where multiple law schools compete for faculty members and students, and where successful schools are better able to place their students in the job market.

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note 14, at 669 (rejecting behavioral law and economics (among other arguments) because it threatens to subvert the independence of law). See generally Dieter Grimm, *Methode als Machtfaktor*, in *EUROPÄISCHES RECHTSDENKEN IN GESCHICHTE UND GEGENWART – FESTSCHRIFT FÜR HELMUT COING*, Vol 1, 469 et seq. (Norbert Hörn, Klaus Luig, Alfred Sollner eds. 1982) (discussing the instrumental use of methodology in general); NIKLAS LUHMANN, *ÖFFENTLICHE ENTSCHÄDIGUNG RECHTSPOLITISCH BETRACHTET* 189 et seq., 192 (1965) (discussing the political weight of consensus in legal methodology).

<sup>43</sup> Weigel, *supra* note 30, at 326; also see Hertig, *supra* note 24, at 293 (making a similar argument for Switzerland).

<sup>44</sup> Dau-Schmidt & Brun, *supra* note 9, at 615.

<sup>45</sup> Weigel, *supra* note 30, at 327 (for Austria); Hertig, *supra* note 24, at 300 (for Switzerland).

<sup>46</sup> MATTEI, *supra* note 8, at 92; cf. Weigel *id.*

<sup>47</sup> Taupitz, *supra* note 11, at 128-9.

<sup>48</sup> Oren Gazal-Ayal, *Economic Analysis of Law and Economics*, at <http://ssrn.com/abstract=901164>.

<sup>49</sup> Garoupa & Ulen, *supra* note 9.

They emphasize a variety of institutional factors to explain why legal academia in European countries has a stronger conservative bias, including the organization of the legal profession, the judiciary, and academia. Admittedly, this may be an important contributing factor. However, there are probably two important weaknesses in the argument. First, Garoupa and Ulen themselves point out that legal innovations generally increase the gap between scholarship and practice.<sup>50</sup> This casts doubt on the idea that the content and innovativeness of scholarship is strongly influenced by the student job market. Second, the theory does not explain why the gap between legal scholarship in the US and Europe is so much greater in law than in any other field. Finally, even though Gazal-Ayal's and Garoupa & Ulen's theories are plausible, they do not explain how different incentive came into being. After all, there is a considerable moment of path dependency influencing how research is evaluated in a given field, on which established legal scholars have considerable influence.

### 3. Overview of our own hypothesis

We attempt to trace the acceptance and rejection of law and economics to the evolution of legal theory, in its specific political and social context. Legal scholarship in German-speaking countries and the US developed in a parallel fashion up to the interwar period, but then began to diverge. While in the US, classical legal thought was discredited by legal realism, its German cognate, the free law school, failed to have the same effect. Instead of discrediting *Begriffsjurisprudenz* (conceptual jurisprudence), the counterpart to American classical legal thought, it was replaced by *Interessenjurisprudenz* (interest jurisprudence) and its outgrowth, *Wertungsjurisprudenz* (jurisprudence of value judgments), both of which resemble conceptual jurisprudence in important elements. All these schools bear a strong moment of *reproductive argumentation*, from which novel and external elements, such as the efficiency of a certain interpretation, are excluded.

Other than in the existing literature, the position of policy (*Gesetzgebungslehre*)<sup>51</sup> in legal scholarship is one of the core elements of our explanation. In German-speaking countries, policy typically stands outside the realm of legal scholarship and is left to politics. This tradition can be traced back to the first half of the 19<sup>th</sup> century, namely to *Savigny's* historical school of jurisprudence. It was carried into the 20<sup>th</sup> century by *Interessenjurisprudenz* and restated in *Hans Kelsen's* theory of legal positivism that completely eliminated policy from

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<sup>50</sup> Garoupa and Ulen, *id.* at 41.

<sup>51</sup> In German, the terms *Rechtspolitik* and *Gesetzgebungslehre* can be used interchangeably. See MANFRED REHBINDER, *RECHTSOSOZIOLOGIE*, note 8 (4<sup>th</sup> ed. 2000)].

the “science of law”, amplifying the acceptance of an internal perspective that already dominated in German legal academia.<sup>52</sup>

By deconstructing classical legal thought in the United States, legal realism created a vacuum in legal scholarship and jurisprudence that was to be filled by a discussion on policy. During the following decades, the law and economics movement could take up reconstructive work in order to develop new principles and decision criteria. In doing so, it achieved a hegemony vis-à-vis other movements.<sup>53</sup> This vacuum was never created in German-speaking countries in the first place. It was not surprising that the early law and economics movement that developed in the late 19<sup>th</sup> century in Austria failed.

The fact that legal realism succeeded, while the free law movement failed, can partly be explained by political factors, most importantly the role of judicial review in the United States. The opposition between conservative judges, who used formalistic reasoning to strike down progressive social legislation, and progressive legal scholars created a strong appeal for legal realism, as it gave academics the means to attack the courts. As a result, a pluralism of methods characterizes American legal scholarship today, but it can be said that consequentialist approaches dominate. Among other approaches to the law, such as Critical Legal Studies and Law and Society, it seems that Law and Economics has become dominant. This was due to a background ideology of utilitarianism, which served as a basis for law and economics and which had gained widespread influence in the US since the 19<sup>th</sup> century. In contrast, German philosophy followed a strictly anti-utilitarian path that can be traced back to German idealism (e.g. Kant). It is likely that even if policy had become an integral part of legal scholarship, law and economics would not have been the dominant approach. Contrary to some legal scholars and the hopes of many European legal economists, we argue that the legal discourses are unlikely to converge over the medium term.

#### **4. The US experience: legal realism and utilitarianism**

##### **4.1. American legal realism as background to law and economics**

Contemporary economic analysis of law<sup>54</sup> was developed in the United States, where it has become the predominant method in legal scholarship. Typically, this is explained by means of

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<sup>52</sup> Cf. Cheffins, *supra* note 27, at 198-200 (defining “external” and “internal” perspectives in legal scholarship).

<sup>53</sup> Cf. Thomas Ulen, *The Unexpected Guest; Law and Economics Law and Other Cognate Disciplines, and the Future of Legal Scholarship*, 79 CHI.-KENT L. REV. 403, 414-5 (2004).

<sup>54</sup> For a historical analysis see HEATH PEARSON, *THE ORIGINS OF LAW AND ECONOMICS: THE ECONOMISTS’ NEW SCIENCE OF LAW* 43, 131 (1997); Ejan Mackaay, *History of Law and Economics*, in INTERNATIONAL ENCYCLOPEDIA OF LAW AND ECONOMICS Nr. 0200, 65, at 68, 69 et seq. (Boudewijn Bouckaert & Gerrit De Geest eds. 2000) (both discussing early precursors of law and economics).

the development of legal theory in the US during the first half of the 20<sup>th</sup> century. Up to this time, American and German lawyers shared a similar methodological outlook; the decisive reason why American scholarship turned its back on doctrinalism can be traced to political developments during that period.

During the late 19<sup>th</sup> and early 20<sup>th</sup> century US legal scholarship was characterized by what is today called classical legal thought.<sup>55</sup> This approach which is often identified with the name of Christopher Columbus Langdell paralleled German *Begriffsjurisprudenz* in many important aspects,<sup>56</sup> without any decisive difference resulting from US law's focus on case law as opposed to the German civil law system. Classical legal thought understood law as "legal science".<sup>57</sup> According to Langdell, general principles should be derived from cases, identifying the features of a coherent system. From these principles, it would be possible to deductively find solutions for specific (future) cases.<sup>58</sup> Cases that did not fit into the system should be eliminated as erroneous.<sup>59</sup> This resulted in the kind of formalism Roscoe Pound was to criticize as "mechanical jurisprudence".<sup>60</sup> Neil Duxbury has described the typical law review article of this time as "dry, technical, doctrinal, and often narrowly focused."<sup>61</sup>

The development both in law teaching and legal scholarship was influenced by German legal scholarship during the classical period which, at that time, consisted largely of the "historical school" established by Savigny.<sup>62</sup> From the German tradition, Langdellian legal scholarship

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<sup>55</sup> E.g. MORTON HORWITZ, *THE TRANSFORMATION OF AMERICAN LEGAL THOUGHT 1870-1960*, 9 (1992); DUNCAN KENNEDY, *THE RISE AND FALL OF CLASSICAL LEGAL THOUGHT* (1998); Gary Minda, *One Hundred Years of Modern Legal Thought: From Langdell and Holmes to Posner and Schlag*, 28 IND. L. REV. 353 (1995) (using a different historical classification).

<sup>56</sup> See e.g. Kennedy, *supra* note 8, at 637-648 (identifying a globalization of classical legal thought originating in Germany).

<sup>57</sup> See e.g. BERNARD SCHWARTZ, *MAIN CURRENTS IN AMERICAN LEGAL THOUGHT* 346 et seq. (1993).

<sup>58</sup> Joseph William Singer, *Legal Realism Now*, 76 CALIF. L. REV. 465, 496-7 (1988).

<sup>59</sup> Brian Leiter, *Legal Realism*, in *A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY* 261, 275-6 (Dennis Patterson ed. 1999, reprint 2003).

<sup>60</sup> Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605 (1908). Also see HORWITZ, *supra* note 55, at 16-17; Singer, *supra* note 58, at 496 et seq.; NICHOLAS MERCURO & STEVEN G. MEDEMA, *ECONOMICS AND THE LAW. FROM POSNER TO POST-MODERNISM* 7-9 (1997); Gerald B. Wetlaufer, *Systems of Belief in Modern American Law: A View from Century's End*, 49 AM. U. L. REV. 1, 10 ff (1999) (all discussing the doctrinalism of the classical period).

<sup>61</sup> Neil Duxbury, *When Trying is Failing: Holmes's 'Englishness'*, 63 BROOK. L. J. 145, 156 (1997). The example he gives is Loran L. Lewis, Jr., *The Law of Icy Sidewalks in New York State*, 6 YALE L. J. 258 (1897).

<sup>62</sup> See FRANZ WIEACKER, *PRIVATRECHTSGESCHICHTE DER NEUZEIT UNTER BESONDERER BERÜCKSICHTIGUNG DER DEUTSCHEN ENTWICKLUNG* 381 et seq. (2<sup>nd</sup> ed. 1967); JOHN DAWSON, *THE ORACLES OF THE LAW* 451 et seq. (1968); Stefan Riesenfeld, *The Influence of German Legal Theory on American Law: The Heritage of Savigny and His Disciples*, 37 AM. J. COMP. L. 1 (1989); Michael H. Hoeflich, *Savigny and his Anglo-American Disciples*, 37 AM. J. COMP. L. 17 (1989); Mathias Reimann, *The Historical School Against Codification: Savigny, Carter, and the Defeat of the New York Civil Code*, 37 AM. J. COMP. L. 95 (1989); Mathias Reimann, *Nineteenth Century German Legal Science*, 31. B. C. L. REV. 837, 838 et seq., 894 et seq. (1990); Kennedy, *supra* note 8, at 637 et seq.; Laura I. Appleman, *The Rise of the Modern American Law School: How Professionalization, German Scholarship, and Legal Reform Shaped Our System of Legal Education*, 39 NEW ENGLAND L. REV. 251, 274 et seq. (2005); also see RICHARD A. POSNER, *FRONTIERS OF LEGAL THEORY* 193 et seq. (2001); for a con-

also adopted the understanding of law as a science<sup>63</sup> and the desire to cleanse law of the influences of other disciplines.<sup>64</sup>

Central to classical orthodoxy was an understanding of private law as separate from public law and as politically neutral.<sup>65</sup> In that view, the state should likewise remain neutral in conflicts of interest between different groups and not engage in redistribution.<sup>66</sup> The Supreme Court's jurisprudence was committed to an economic liberalism, which, however, resulted in an increasing amount of opposition within a rapidly changing society.<sup>67</sup>

Of course, the most important precursor to legal realism was *Oliver Wendell Holmes, Jr.*, first as professor at Harvard Law School, later as judge at the Supreme Judicial Court of Massachusetts and finally Justice at the United States Supreme Court. His seminal article "The Path of the Law"<sup>68</sup>, published in 1897, criticized the predominant mode of legal thought, according to which the common law developed by applying an objective set of methods to previous cases and abstract principles.<sup>69</sup> He was the first to come up with the prediction theory, according to which lawyers should attempt to predict the court's expected decision when advising clients.<sup>70</sup> With a view to law and economics, one might even recognize the homo oeconomicus within his writings: "If you want to know the law and nothing else, you must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict, not as a good one, who finds his reasons for conduct, whether inside the law or outside of it, in the vaguer sanctions of conscience."<sup>71</sup>

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temporary view see Joseph H. Beale, *The Development of Jurisprudence During the Past Century*, 18 HARV. L. REV. 271, 283 (1905); with respect to legal education and the Langdell reforms see David S. Clark, *Tracing the Roots of American Legal Education – A Nineteenth-Century German Connection*, 51 RABELS ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT 313, 328 (1987) (pointing out similarities between Savigny's and Langdell's teachings at); Appleman, *id.* at 283 et seq.

<sup>63</sup> Appleman, *id.* at 280 et seq.

<sup>64</sup> Appleman, *id.* at 289 et seq. Cf. HERGET, *supra* note 1, at 113 (discussing the points of intersection between the Langdellian tradition and German conceptual jurisprudence).

<sup>65</sup> HORWITZ, *supra* note 55, at 10-11.

<sup>66</sup> HORWITZ, *id.* at 19-20.

<sup>67</sup> See *infra* in this section.

<sup>68</sup> Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457 (1897).

<sup>69</sup> Holmes, *id.* at 465-6. Cf. his dissenting opinion in *Lochner v. New York*, 198 U.S. 45 (1905): "General propositions do not decide concrete cases. The decision will depend on a judgment or intuition more subtle than any articulate major premise." See furthermore, Brian Tamanaha, *The Realism of the 'Formalist' Age*, ST. JOHN'S LEGAL STUDIES RESEARCH PAPER NO. 06-0073, <http://ssrn.com/abstract=985083> (August 2007) (arguing that legal realist thoughts were part of the legal discourse before Holmes and that the legal realists of the 1920's and 30's only marked the last episode in a long lasting critique on legal reasoning).

<sup>70</sup> Holmes, *id.* at 457 et seq.

<sup>71</sup> Holmes, *id.* at 459.

Holmes famously criticized the logical-historical<sup>72</sup> perspective classical legal thought applied to law and the doctrinal deductions that rested on it. He emphasized that to study the objectives the law is intended to achieve, most of its social goals.<sup>73</sup> A judge with an understanding both of historical and current social goals should be better able to contribute to the comprehension and development of the law.<sup>74</sup> At least on a first glance, the judge's discretion therefore blurs the distinction between doctrinal deductions and legal policy, as cases cannot be objectively decided on the basis of precedents and preexisting, coherent common law, but require the judge to take social value judgments himself.<sup>75</sup>

As a result of his tenure as a US Supreme Court justice, Holmes became an idol of a generation of lawyers. Possibly, his most notable dissent was the one in *Lochner v. New York*<sup>76</sup>, in which the majority had denied the constitutionality of a New York State law limiting the daily working hours of bakers. Holmes famously objected that “[a] constitution is not intended to embody a particular economic theory, whether of paternalism [...] or of laissez faire.” During the *Lochner* era, which lasted until 1937, the court decided numerous cases on similar grounds and declared a large body of progressive social legislation as unconstitutional on the basis of formalistic deductions from general principles, most of all freedom of contract.<sup>77</sup> This was criticized by a growing number of lawyers and legal academics.<sup>78</sup> Holmes, who remained a member of the court until 1932, became a precursor of legal realism by means of his dissents, without necessarily sharing the radical rejection of classical legal thought pertaining among many legal realists; his own approach was rather one of judicial restraint.<sup>79</sup>

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<sup>72</sup> *But see* OLIVER WENDELL HOLMES, *THE COMMON LAW*, Lecture 1 (1881) (pointing out that a historical perspective is important in general). However, HORWITZ, *supra* note 55, at 109 et seq., 141 suggests that Holmes' views developed between the publication of “The Common Law” (1881) and “The Path of the Law” (1897) towards more a more pronounced skepticism.

<sup>73</sup> Holmes, *supra* note 68, at 474. *See* Robert S. Summers, *Pragmatic Instrumentalism and American Legal Theory*, 13 *RECHTSTHEORIE* 257, 258 (1982).

<sup>74</sup> *See e.g.* Patrick J. Kelley, *Holmes, Langdell and Formalism*, 15 *RATIO JURIS* 26, 44-5 (2001).

<sup>75</sup> *Cf.* Holmes, *supra* note 68, at 471-2 (“But when I stated my view to a very eminent English judge the other day, he said: ‘You are discussing what the law ought to be; as the law is, you must show a right!’”).

<sup>76</sup> *Lochner v. New York*, 198 U.S. 45 (1908). *See e.g.* Rowley, *supra* note 18, at 10 (discussing the opinion in the context of the development of law and economics).

<sup>77</sup> *See e.g.* *Coppage v. Kansas*, 236 U.S. 1 (1915) (unconstitutionality of a statute banning the enforcement of covenants prohibiting workers from joining unions); *Morehead v. New York*, 298 U.S. 587 (1936) (unconstitutionality of a statute limiting the working hours of pregnant women). For an overview, *see* LAURANCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1346 et seq. (Volume 1, 3<sup>rd</sup> 2000); *but cf.* RICHARD A. POSNER, *OVERCOMING LAW* 284 (1995).

<sup>78</sup> *But see* ROBERT G. MCCLOSKEY & SANFORD LEVINSON, *THE AMERICAN SUPREME COURT* at 92 (4<sup>th</sup> ed. 2005) (generally approving of the court's approach)

<sup>79</sup> *See* SCHWARTZ, *supra* note 57, at 381; NEIL DUXBURY, *PATTERNS OF AMERICAN JURISPRUDENCE* 44 (1995).



Besides Holmes, there were other authors, even before World War I, who rejected the classical orthodoxy, namely progressives such as Roscoe Pound<sup>80</sup> or Benjamin Cardozo.<sup>81</sup> While some later observers, such as Robert Summers, have preferred to group these towering figures as part of one movement into which legal realism joined only later,<sup>82</sup> *Karl Llewellyn*, who shaped the outside and self-perception of legal realism for decades to come, attempted to distance himself and the younger generation of legal realists from their forebears.<sup>83</sup>

The legal realism of the 1920s and 1930s needs to be seen before the backdrop of opposition to the laissez-faire jurisprudence of the *Lochner* era, to which an increasing portion of law scholars objected. Under the influence of the criticism of conceptual jurisprudence earlier brought forward by Jhering in Germany<sup>84</sup> and by the German Free Law School,<sup>85</sup> the legal realists borrowed Holmes credo of law as experience<sup>86</sup> and began to deny the importance of *law in books* (as opposed to *law in practice*).<sup>87</sup> Law was not to be understood as a system of rules, but only as the body of judges' actual decisions.<sup>88</sup> They rejected the idea that law could be an autochthonous, judgment-free science, which allowed to reach predetermined solutions for all possible cases through objective methods (such as analogies) within a closed logical

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<sup>80</sup> Roscoe Pound, *The Need of a Sociological Jurisprudence*, 19 GREEN BAG 607 (1907); Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605 (1908); Roscoe Pound, *Law in Books and Law in Action*, 44 AM. L. REV. 12 (1910).

<sup>81</sup> BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* (1921). Cardozo became a New York state judge in 1914 and succeeded Holmes as a US Supreme Court Justice in 1932.

<sup>82</sup> Robert H. Summers, *Pragmatic Instrumentalism in Twentieth Century American Legal Thought – A Synthesis and Critique of Our Dominant General Theory About Law and its Use*, 66 CORNELL L. REV. 861 (1981) (pointing out the prominence of the progressive movement in US politics between 1890 and 1920 at 869); Summers, *supra* note 73, at 263-4 (describing them as pragmatic instrumentalists); *also see* Wetlaufer, *supra* note 60, at 16 et seq; *cf.* Posner, *supra* note 77, at 2.

<sup>83</sup> HORWITZ, *supra* note 55, at 170 et seq. (describing the Llewellyn-Pound controversy and arguing that Llewellyn's famous list of legal realists conveyed a distorted picture of the movement); DUXBURY, *supra* note 79, at 72 et seq. For the Llewellyn-Pound controversy *see* Karl N. Llewellyn, *A Realistic Jurisprudence – the Next Step*, 30 COLUM. L. REV. 431 (1930); Roscoe Pound, *The Call for a Realistic Jurisprudence*, 44 HARV. L. REV. 697 (1931); Karl N. Llewellyn, *Some Realism about Realism – Responding to Dean Pound*, 44 HARV. L. REV. 1222 (1931) (establishing the list of realists at 1226, note 18); *contra* Viktor Winkler, *The Great Protector. Roscoe Pound (1870-1964) zum 40. Todestag*, 24 DAJV-NEWSLETTER 104 (2004) (emphasizing differences between Roscoe Pound and the legal realists, most of all in their outlook on economic policy). For a contemporary criticism of Pound *also see* Jerome Frank, *Are Judges Human?* 80 U. PA. L. REV. 17, 18-24 (1931)].

<sup>84</sup> Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809 (1935) (referring to Jhering).

<sup>85</sup> *See* HORWITZ, *supra* note 55, at 172 (discussing German influences on Karl Llewellyn); *see generally* James Q. Whitman, *Commercial Law and the American Volk: A Note on Llewellyn's German Sources for the Uniform Commercial Code*, 97 YALE L. J. 156 (1987) (discussing Llewellyn and the UCC); James E. Herget & Stephan Wallace, *The German Free Law Movement as the Source of American Legal Realism*, 73 VA. L. REV. 399 (1987).

<sup>86</sup> "The life of the law has not been logic; it has been experience." [Oliver W. Holmes, Jr., *Book Notice*, 14 AM. L. REV. 233, 234 (1880); HOLMES, *supra* note 72, at 1.

<sup>87</sup> *See e.g.* Jerome Frank, *What Courts Do in Fact*, 26 ILL. L. REV. 645, 761 (1932). This pair of opposite terms can be traced to Roscoe Pound. *See* Pound, *supra* note 80, at 12 et seq. Jerome Frank criticized that "classical" law scholars continued to study the law in books only. *Id.* at 20.

<sup>88</sup> *See e.g.* MERCURO & MEDEMA, *supra* note 60, at 10.

system.<sup>89</sup> At the same times, they rejected any conceptual jurisprudence, which attempted to arrive at concrete solution starting with abstract propositions.<sup>90</sup>

Realism's core tenet, the indeterminacy theory of law,<sup>91</sup> is often understood in the light of the realists' opposition to the philosophy of laissez-faire market capitalism that seemed to be hiding behind the formalist deductions of pre-realist jurisprudence and, in the realist view, served to conceal the inherently political character of judicial decision-making by providing a formal justification.<sup>92</sup> In this view, court decisions are not determined by an objective application of pre-determined legal materials, but need to be traced largely to the value judgment of the particular judges who are able to shape abstract rules and holdings to their needs<sup>93</sup> and only restrained by the necessity to provide reasoning in the form of a judicial opinion.<sup>94</sup> Robert Hale's criticism of classical economic policy and the alleged distributive neutrality of free markets is a case in point,<sup>95</sup> as is the realists' rejection of the distinction between public and private law.<sup>96</sup>

Although the various approaches, methods and projects of legal realists can hardly be described as unitary, and as the most extreme ideas did not gain widespread recognition,<sup>97</sup> legal realism succeeded in putting its impression on American law scholarship permanently.<sup>98</sup> At the political level, legal realism succeeded in its mission when President Roosevelt's New Deal reforms were waived through by the Supreme Court following a judge's change of mind, which made the presidential threat to pack the court with additional judges redundant.<sup>99</sup>

This overview illustrates how the American development was special, also in comparison to the UK. H.L.A. Hart, the renowned English legal positivist, attributes the critical approach to

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<sup>89</sup> John Dewey, *Logical Method and Law*, 10 CORNELL L. Q. 17 (1924) (criticizing the application of logic to legal reasoning); see HORWITZ, *supra* note 55, at 188.

<sup>90</sup> Cohen, *supra* note 84, at 809. See HORWITZ, *supra* note 55, at 199 et seq.

<sup>91</sup> Leiter, *supra* note 33, at 51 et seq.

<sup>92</sup> Singer, *supra* note 58, at 477.

<sup>93</sup> See e.g. Singer, *supra* note 58, at 465, 469-70.

<sup>94</sup> Singer, *supra* note 58, at 471-2; see Llewellyn, *Realism*, *supra* note 83, at 1239 (emphasizing that the issue is *how far* the supposed certainty provided by legal rules actually goes). Today, it appears to be widely recognized that judges are constrained actors, see e.g. KENNEDY, *supra* note 33, at 182 et seq.; *but cf.* Frank, *supra* note 87, at 645, 761, 766 et seq.

<sup>95</sup> Robert Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470 (1923); also see Robert Hale, *Bargaining, Duress, and Economic Liberty*, 43 COLUM. L. REV. 603 (1943). See BARBARA FRIED, *THE PROGRESSIVE ASSAULT ON LAISSEZ FAIRE: ROBERT HALE AND THE FIRST LAW AND ECONOMICS MOVEMENT* (1998).

<sup>96</sup> E.g. Morris R. Cohen, *The Basis of Contract*, 46 HARV. L. REV. 553 (1933); also see Louis Jaffe, *Law Making by Private Groups*, 51 HARV. L. REV. 201 (1937); see Singer, *supra* note 58, at 483 et seq.; Elizabeth Mensch, *The History of Mainstream Legal Thought*, in *THE POLITICS OF LAW* 13, 33 et seq. (David Kairys ed. 1998).

<sup>97</sup> For example, Jerome Frank attempted to trace the outcome of legal cases to judges personalities. See JEROME FRANK, *LAW AND THE MODERN MIND* (1930); *cf.* Summers, *supra* note 73, at 264; Singer, *supra* note 58, at 470; HORWITZ, *supra* note 55, at 176.

<sup>98</sup> See Leiter, *supra* note 33, at 54 et seq..

<sup>99</sup> The decisive case was *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937). See *TRIBE*, *supra* note 77, at 1360; See *MCCLOSKEY & LEVINSON*, *supra* note 78, at 108 et seq., 113, 117 et seq.

law predominant in the US to judicial review of laws for their constitutionality<sup>100</sup> and compliance with basic rights enshrined in the constitution and the amendments.<sup>101</sup> Hart argues that the US constitution “made law what elsewhere would be politics.”<sup>102</sup> He suggests that American legal theory is torn between extreme perspectives of indeterminacy and free judicial decision-making on one side and the contrary desire to be able to find a specific correct solution for every hard case, even if it is difficult to identify (a view today most prominently represented by Ronald Dworkin).<sup>103</sup> This particular political situation was absent in the UK, as were other factors such as federalism and the potential for conflict associated with it.<sup>104</sup> Duncan Kennedy mentions another factor comparing the US to Europe and the UK, namely the greater social heterogeneity of American lawyers, which led to stark ideological contrasts, which nourished the desire to fundamentally criticize the law.<sup>105</sup> Apparently, the American law schools were sufficiently well-developed (other than in England<sup>106</sup>) to allow it to flourish. Although legal realism lost its vitality as a movement during the following years,<sup>107</sup> American legal scholarship never returned to the classical jurisprudence legal realism had discredited.<sup>108</sup> One of the legacies of legal realism was the demand that all policymakers, including judges, should take social science into account,<sup>109</sup> one of which is economics.

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<sup>100</sup> In Hart’s view, the origins of the American development can be traced to *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), the case in which the Supreme Court first established judicial review.

<sup>101</sup> H.L.A. Hart, *American Jurisprudence through English Eyes: The Nightmare and the Noble Dream*, 11 GA. L. REV. 969, 971-2 (1977).

<sup>102</sup> Hart, *id.* at 972.

<sup>103</sup> Hart, *id.* Dworkin famously argues that the correct outcome of a “hard case” can be found by a judge with superhuman analytical qualities (“Hercules”) by extracting it from the basic principles of the legal system and a political theory explaining it. See Ronald Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057 (1975).

<sup>104</sup> KENNEDY, *supra* note 33, at 78-9; ATIYAH & SUMMERS, *supra* note 29, at 249-260 (comparing legal theory in the UK and the US in the first half of the 20<sup>th</sup> century).

<sup>105</sup> KENNEDY *id.* at 79-80; also see ATIYAH & SUMMERS, *id.* at 353-358, 369-375 (comparing the social and ethnic composition of the English and US bars and judiciaries).

<sup>106</sup> In 1938/39, there were only 1515 law students in all of the UK, 60% of which studied at Oxford and Cambridge. An academic degree was not even required to enter the bar for a long time. See Neil Duxbury, *English Jurisprudence between Austin and Hart*, 91 VA. L. REV. 1, 70-71, 79 (2005); also see ATIYAH & SUMMERS, *id.* at 384-388 (comparing the status of law schools in the UK and the US).

<sup>107</sup> The 1950s were dominated by the legal process school, which focused on the decisionmaking process (instead of the substantive content) and on which institutions were in the best position to address which issues. See e.g. HORWITZ, *supra* note 55, at 253 et seq; Singer, *supra* note 58, at 505-6. The most fundamental work is HENRY M. HART & ALBERT SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* (teaching materials of 1958, posthumously published in 1994).

<sup>108</sup> The consequentialist approach dominant in US legal scholarship was also impervious to H.L.A. Hart’s criticism of legal realism. H.L.A. HART, *THE CONCEPT OF THE LAW* (1961) 137; see Leiter, *supra* note 33, at 63-4; Michael Steven Green, *Legal Realism as Theory of Law*, 46 WM. & MARY L. REV. 1915, 1917 (2005).

<sup>109</sup> Walter Wheeler Cook, *The Logical and Legal Bases of the Conflict of Laws*, 33 YALE L. J. 457, 457 et seq. (1924); Hessel E. Yntema, *The Hornbook Method and the Conflict of Laws*, 37 YALE L. J. 468, 481 (1928); Llewellyn, *supra* note 83, at 431 et seq.; Edward S. Robinson, *Law – an unscientific Science*, 44 YALE L. J. 235, 257 (1934); cf. Summers, *supra* note 58, at 870, 889 et seq.; Summers, *supra* note 73, at 260; Gary Minda, *The Law and Economics and Critical Legal Studies Movements in American Law*, in *LAW AND ECONOMICS* 87, 96 (Nicholas Mercuro ed. 1989); DUXBURY, *supra* note 79, at 79 et seq.

The American law and economics movement is at times seen as heir to legal realism and fulfillment of the Holmesian prophecy of the lawyer as a social scientist.<sup>110</sup> Some legal realists began to eclectically look into sociology, psychology or economics.<sup>111</sup> One of the most well-known examples is the seminal 1932 book on “The Modern Corporation and Private Property” by *Adolf A. Berle* (a law scholar) and *Gardiner Means* (an economist),<sup>112</sup> which to this day is considered one of the most important contributions to the discussion about the conflict of interests between shareholders and managers in publicly traded companies. Some studies had considerable influence on legislation, for example in the 1938 bankruptcy codification.<sup>113</sup> The characterization of law and economics as the progeny of legal realism is by no means undisputed. As other movements of American law scholarship of the 20<sup>th</sup> century (which include the legal process school, rights theory and the law and society, critical legal studies movements), the law and economics paradigm is to be seen both as a reaction and a continuation of realism; most schools share the realist rejection of logical and scientific jurisprudence and embrace a consequentialist orientation towards conflicts of interest within society.<sup>114</sup> Economic analysis of law can be considered a descendent of legal realism, as logical deductions from within the legal system are considered normatively undesirable.<sup>115</sup> Admittedly, normative theories (as instruments of legal policy) maintained a subordinate position in legal realism.<sup>116</sup> However, legal realism made it inevitable to renounce pure doctrinalism as the lawyer’s exclusive tool and ultimately required the development of a normative program in order to supplement and replace the indeterminacy of interpretation.<sup>117</sup> As it became widely recognized that the previous doctrinal method in fact allowed a variety of interpretations, other measures needed to be developed in order to decide. These measures had to be geared to external, non-legal elements and led to an emphasis of policy discussion. However, adherents

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<sup>110</sup> See e.g. Richard A. Posner, *The law and economics movement: from Bentham to Becker*, in THE ORIGINS OF LAW AND ECONOMICS 328, 344-5 (Francesco Parisi & Charles K. Rowley eds. 2005); but see POSNER, *supra* note 77, at 3; DUXBURY, *supra* note 79, at 301 et seq. cf. Wetlaufer, *supra* note 60, at 37; Anthony T. Kronman, *Jurisprudential Responses to Legal Realism*, 73 CORNELL L. REV. 335, 339 (1988).

<sup>111</sup> See Kronman, *id.* at 336 et seq. (discussing the “scientific branch” of realism). For example, some incipencies of an economic analysis of contract law can be found in Karl Llewellyn’s work. See Alan Schwartz, *Karl Llewellyn and the early law and economics of contract*, in THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 421 (Volume II, Peter Newman ed. 2002).

<sup>112</sup> See HORWITZ, *supra* note 55, at 166 (considering the book a legal realist work).

<sup>113</sup> See DAVID A. SKEEL, DEBT’S DOMINION 109 et seq. (2001) (discussing the legislative history of the 1938 Chandler Act in the preceeding SEC report).

<sup>114</sup> See e.g. Singer, *supra* note 58, at 503-4 (distinguishing between liberal and critical movements).

<sup>115</sup> See Singer, *supra* note 58, at 516-7; Wetlaufer, *supra* note 60, at 37 (describing law and economics as a direct descendant of legal realism).

<sup>116</sup> Leiter, *supra* note 59, at 276-7 (speaking of “quietism”).

<sup>117</sup> See Harold D. Lasswell & Myers S. McDougal, *Legal Education and Public Policy: Professional Training in the Public Interest*, 52 YALE L. J. 203, 205 (1943) (calling for a change of the curriculum in legal education in order to teach legal policy); cf. Mensch, *supra* note 96, at 36.

of legal realism and its successor movements were slow to develop normative benchmarks on the basis of descriptive insights and to adapt them in the legal discourse; however, finally, these came to dominate, which is why legal policy takes the central role in American law schools.

Legal realism is based on an instrumental understanding of the law, which is bent on a realization of specific social goals. This led lawyers to discuss the policy implications of judicial decision-making openly.<sup>118</sup> Although several decades lay between the heyday of legal realism and the spread of economic analysis of law in the academia, a clear thread connecting the two movements can be identified. Law and economics is based on the instruments of economics, which allows prognoses about the consequences of legal norms, which can and should be subject to empirical scrutiny. By this and some recommendations about economically efficient proposals made by lawyer-economists, the economic analysis of law apparently struck the right note with American law scholarship that had been so fundamentally transformed by realism. In spite of widespread criticism of law and economics, it managed to fill a gap torn open by legal realism for many scholars by replacing the discredited legal formalism by an economic approach, which, again, allowed results that are considered scientific by many.<sup>119</sup>

#### **4.2. The utilitarian basis of law and economics**

Legal realism alone does not suffice to explain the important position of the economic analysis of law in the US legal academia. Other normative research programs sharing an instrumental and consequentialist outlook with law and economics also managed to advance into the gap torn open by legal realism, such as the law and society and critical legal studies movements. However, the particular significance of law and economics and its widespread acceptance can be explained with a longstanding tradition in the US.

The ideas of utilitarianism can be traced back to Jeremy Bentham, who criticized Sir William Blackstone, the eminent English jurist, in his works on legal policy.<sup>120</sup> While Blackstone

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<sup>118</sup> Leiter, *supra* note 59, at 59-60. Other than Ulen & Garoupa, *supra* note 9, at 8, we believe that the *normative* side of law and economics was the more important one.

<sup>119</sup> See Singer, *supra* note 58, at 522 et seq. (considering law and economics an “exercise in formalism”); also see Arthur Allen Leff, *Economic Analysis of Law: Some Realism about Nominalism*, 60 VA. L. REV. 451, 459 (1974); Gary Minda, *The Lawyer-Economist at Chicago: Richard A. Posner and the Economic Analysis of Law*, 39 OHIO ST. L. J. 439, 441 (1978); Erich Schanze, *Ökonomische Analyse des Rechts in den USA: Verbindungslinien zur realistischen Tradition*, in ÖKONOMISCHE ANALYSE DES RECHTS 1, 6-7 (Heinz-Dieter Assmann, Christian Kirchner & Erich Schanze eds. 2<sup>nd</sup> ed. 1993); Dau-Schmidt & Brun, *supra* note 9, at 615-616; see RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 362 (1990) (arguing that economic formalism was preferable to legal formalism, as it can be empirically scrutinized).

<sup>120</sup> We will not go into the debate to what extent Bentham intended to promote his own moral concepts. See, e.g., Richard A. Posner, *Blackstone and Bentham*, 19 J. L. & ECON. 569, 593, 596 (1976).

taught positive law,<sup>121</sup> Bentham was a reformer.<sup>122</sup> He intended to discredit traditional dogmas<sup>123</sup> and he became particularly known for his aversion against theological and metaphysical bodies of thought.<sup>124</sup> In his work, he built on Cesare Beccaria and later found ardent proponents of his ideas in James Mill and his son John Stuart Mill.<sup>125</sup> Bentham defined a legislative objective and attempted to have it prevail in politics. His behavioral model was clearly hedonistic: “Nature has placed mankind under the governance of two sovereign masters, pain and pleasure”.<sup>126</sup> Once “utility” had been determined on this basis, it was the legislator’s job to maximize it: “... the happiness of the individuals, of whom a community is composed ... is the end and the sole end which the legislator ought to have in view.”<sup>127</sup>

In the early 19<sup>th</sup> century, Bentham’s work influenced John Austin, the legal theorist, although little attention was given to him in legal theory between 1830 und 1950.<sup>128</sup> Instead, his works resulted in a widespread echo outside his native country and, by way of Spain, also reached Latin America. However, he hardly succeeded in France and Germany.<sup>129</sup> In the US, he was in contact with various politicians.<sup>130</sup> The greatest happiness principle was recognized by notable politicians such as Thomas Jefferson and Benjamin Franklin as a goal of legal policy, and also taken up and developed further by American philosophers.<sup>131</sup> It is not surprising that he was cited by courts (including the US Supreme Court) quite a number of times.<sup>132</sup>

Bentham’s significance increased until the American civil war, more so in the North than in the South. Among others, Chief Justice Taney of the US Supreme Court declared in an 1837 opinion that “the object and end of all government is to promote the happiness and prosperity

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<sup>121</sup> WILLIAM BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND (1765-1769).

<sup>122</sup> ELIE HALÉVY, THE GROWTH OF PHILOSOPHIC RADICALISM 35 (1928). Bentham himself criticized Blackstone for his anti-reformist views. See JEREMY BENTHAM, A FRAGMENT OF GOVERNMENT, preface (1776). Bentham particularly criticized the Blackstone’s confusion of *is* and *ought*; e.g. GERALD J. POSTEMA, BENTHAM AND THE COMMON LAW TRADITION (1986) 305. *But see* Posner, *supra* note 120, at 569 (giving a somewhat different interpretation of Bentham’s critique of Blackstone).

<sup>123</sup> Bentham believed that the Common Law tradition was pathologically opposed to reform; POSTEMA, *supra* note 122, at 311-12.

<sup>124</sup> HALÉVY *supra* note 122, at 292 et seq.; KEEKOK LEE, THE LEGAL-RATIONAL STATE 140 et seq (1990).

<sup>125</sup> For further details, see HALÉVY *id.* In certain fields, Mill’s impact was greater than Bentham’s. See e.g. HALÉVY *id.* at 271; KELLY, *supra* note 21, at 5-6.

<sup>126</sup> JEREMY BENTHAM, INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 1 (1789); *also see* KELLY *id.* at 14 et seq (discussing psychological hedonism in Bentham’s work).

<sup>127</sup> BENTHAM *id.* at 27.

<sup>128</sup> Duxbury, *supra* note 106, at 39; *also see* DUXBURY, *supra* note 79, at 54 et seq. (discussing the marginal influence of American legal realism on English legal scholarship).

<sup>129</sup> HALÉVY, *supra* note 122, at 296-7.

<sup>130</sup> PETER KING, UTILITARIAN JURISPRUDENCE IN AMERICA 71 (1986).

<sup>131</sup> KING, *id.* at 139 et seq., 142. Even Bentham thought that this principle was already the driving force of US legislation. KING, *id.* at 62.

<sup>132</sup> A LexisNexis search for “Bentham” yielded 624 hits, among those 46 US Supreme Court opinions. At least seven of them mention the maximum happiness principles. (The search was restricted to opinions in which the words “Bentham” and “happiness” were found within 20 words. The courts typically use the term “greatest happiness principle”.) The search was last repeated November 28, 2005.

of the community by which it is established.”<sup>133</sup> At the same time, newspaper editorials cited Bentham’s ideas positively.<sup>134</sup> Starting with judges such as Lord Mansfield, it slowly came to be recognized that courts were permitted to deviate from the common law if utility required them to do so. Among other things, the reason given for this was the idea that the common law should be subject to a constant utilitarian transformation.<sup>135</sup>

Bentham’s opponents rather criticized his lack of originality instead of his ideas about legal policy.<sup>136</sup> Some opposed his views for religious reasons, which is perspicuous as utilitarianism was seen as a means of banning theology from philosophy.<sup>137</sup> All in all, a significant influence of Bentham on public opinion in the US can be identified as early as in the first half of the 19<sup>th</sup> century.

In parts, his works influenced legal realism, however primarily in the analysis of consequences of legal norms and not as a policy program.<sup>138</sup> The influence of utility maximization in neoclassical welfare economics was much stronger, as it served as a normative objective and as a basis for further developments of utilitarianism.<sup>139</sup> It was also an important building block of the economic analysis of law.<sup>140</sup> William Stanley Jevons, one of the fathers of the theory of marginal utility and follower of Bentham, argued that „utility must be considered as measured by ... the addition to a person’s happiness. It is a convenient name for the aggregate of the favorable balance of feeling produced – the sum of the pleasure created and the pain prevented.”<sup>141</sup>

While Jevons believed that there could be no common denominator for mere sentiment,<sup>142</sup> this could not stop him from engaging in interpersonal comparisons of utilities and aggregating

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<sup>133</sup> Charles River Bridge v. Warren Bridge, 36 U.S. (11 PET.) 420 (1837).

<sup>134</sup> E.g. BOSTON MORNING POST, May 16, 1840; NEW YORK EVENING POST, June 11, 1840. Even the conservative North American Review praised Bentham for attacking old prejudice; also as cited by KING, *supra* note 130, at 252 et seq.

<sup>135</sup> Mensch, *supra* note 96, at 27. Note that Bentham himself rejected the Common Law approach, developing a positivist theory of the law.

<sup>136</sup> KING, *supra* note 130, at 218 et seq., 234-5.

<sup>137</sup> King, *id.* at 240-42 (referring to John Neil).

<sup>138</sup> See e.g. Cohen, *supra* note 84, at 848 (“Since the brilliant achievements of Bentham, descriptive legal science has made almost no progress in determining the consequences of legal rules.”); also see ATIYAH & SUMMERS, *supra* note 29, at 256 (arguing that positivism in the US in the later decades of the 19<sup>th</sup> and the earlier decades of the 20<sup>th</sup> century was linked to an instrumental conception of law based on utilitarianism).

<sup>139</sup> ALFRED BOHNEN & GREHARD WEISSER, DIE UTILITARISTISCHE ETHIK ALS GRUNDLAGE DER MODERNEN WOHLFAHRTSÖKONOMIE (1964).

<sup>140</sup> See e.g. Charles K. Rowley, *Wealth Maximization in Normative Law and Economics: A Social Choice Analysis*, 6 GEO. MASON L. REV. 971, 981 et seq. (1998), cf. also Lewis A. Kornhauser, *A guide to the perplexed claims of efficiency in the law*, 8 HOFSTRA L. REV. 591, 598 (1980). Among others, Francis Ysidro Edgeworth, who with Henry Sidgwick was one of the most important utilitarians of that time and one of the fathers of early welfare economics, used the criterion of “just noticeable differences” to measure utility and thus kept up the utilitarian tradition; Robert Cooter & Peter Rappoport, *Were the Ordinalists Wrong About Welfare Economics?* 22 J. ECON. LIT. 511 (1984).

<sup>141</sup> WILLIAM STANLEY JEVONS, THE THEORY OF POLITICAL ECONOMY 53-4 (1871, Reprint Macmillan 1975).

<sup>142</sup> JEVONS, *id.* at 111.

them.<sup>143</sup> Bentham believed that happiness was homogeneous independently from individuals and could be compared and measured on a cardinal scale.<sup>144</sup> The idea of cardinal measurement of utility maintained its influence from the works of Bentham down to Arthur Cecil Pigou<sup>145</sup> and continued to ordinal comparisons of utility<sup>146</sup> which characterized the law and economics movement.<sup>147</sup> The most decisive factor was the conviction that estimates about individual utility are a better approach than any alternative, which is shared between utilitarianism and the economic analysis of law.<sup>148</sup> In many cases, the practical implementation of this idea meant that utility had to be transformed into monetary value, which is often done in modern law and economics as well as in the origins of which can be traced back to Bentham.<sup>149</sup>

In any case, Bentham created a normative objective for economics and thus, at the same time, allowed it to become the subject of legal theory.<sup>150</sup> At times, early law and economics works referred to Bentham directly. For example, Bentham's "Introduction to the Principles of Morals and Legislation" became the basis of the economic analysis of criminal law developed by the later Nobel laureate Gary Becker in his seminal article on "Crime and Punishment".<sup>151</sup> Richard Posner, one of the pioneers of the economic analysis of law, concedes that Bentham's

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<sup>143</sup> See Rowley, *supra* note 140, at 971, 981.

<sup>144</sup> E.g. Rowley, *id.* at 978-9 (discussing this in the context of law and economics).

<sup>145</sup> ARTHUR CECIL PIGOU, *THE ECONOMICS OF WELFARE* (1920); *cf.* Rowley, *id.* at 978-9, 982.

<sup>146</sup> The renunciation of cardinal measurement of utility and interpersonal comparisons of utility is often attributed to Vilfredo Pareto. See PAUL A. SAMUELSON, *FOUNDATIONS OF ECONOMIC ANALYSIS* 93-4 (1947); specifically, see VILFREDO PARETO, *MANUALE DI ECONOMIA POLITICA* (1906) (particularly chapters III §§ 12, 16, 29 and II §§ 34 et seq. discussing utilitarianism]. Neoclassical consumer theory was developed on the assumption of individual ordinal preferences (SAMUELSON, *id.* at 97-8). Also see Nicholas Kaldor, *Welfare Propositions and Inter-personal Comparisons of Utility*, 49 *ECON. J.* 549 (1939); J. R. Hicks, *The Foundations of Welfare Economics*, 49 *ECON. J.* 696 ff (1939); SAMUELSON, *id.* at 173 et seq., 226 et seq.. For a historical overview, see Cooter & Rappoport, *supra* note 140, at 507 et seq.

<sup>147</sup> On the discussion about Pareto efficiency and the Kaldor-Hicks criterion, see *infra* notes 227-7 and accompanying text.

<sup>148</sup> See e.g. Rowley, *supra* note 140, at 981 et seq.

<sup>149</sup> Jeremy Bentham, *The Philosophy of Economic Science*, in JEREMY BENTHAM'S ECONOMIC WRITINGS 117 (W. Stark ed.) ("Money is the instrument of measuring the quantity of pain or pleasure. Those who are not satisfied with the accuracy of this instrument must find some other that shall be more accurate, or bid adieu to politics and morals"); see LEE, *supra* note 124, at 119; KELLY, *supra* note 21, at 33-4.

<sup>150</sup> Richard A. Posner, Bentham's influence on the law and economics movement, 51 *CURRENT LEGAL PROBS.* 425, 437 (1998); also see Rowley, *supra* note 18, at 8; also *cf.* Wilfred Harrison, *Introduction to J. Bentham*, in JEREMY BENTHAM, *A FRAGMENT ON GOVERNMENT IX* (1988) (pointing out the novelty of the approach of using legislation as a means to put utilitarianism into practice). *But see* JOSEPH PRIESTLEY, *AN ESSAY ON THE FIRST PRINCIPLES OF GOVERNMENT* (1768) (an early work with a similar approach); on this issue see e.g. HALÉVY, *supra* note 122, at 127-8. P. J. KELLY, *UTILITARIANISM AND DISTRIBUTIVE JUSTICE – JEREMY BENTHAM AND THE CIVIL LAW* (1990).

<sup>151</sup> G. Becker, *Crime and Punishment: An economic Approach*, 76 *J. POL. ECON.* 169 (1968); see Posner, *supra* note 120, at 600 (discussing Bentham's influence on Becker's work); see generally Posner, *supra* note 150, at 430, 437 ("Bentham can be considered, along with Smith, who was, however more ambivalent about the ethical significance of economics, the founder of normative economics.")



utilitarianism exerted a decisive influence,<sup>152</sup> although he attempted to distinguish his own normative approach to law and economics from utilitarianism several times.<sup>153</sup>

Similar to Bentham, Posner assumes that individuals are rational utility maximizers, and that economic efficiency is a scientific concept.<sup>154</sup> Posner permits interpersonal comparisons of utility, uses wealth as a cardinal measure for utility, and starts off with the maximization of total utility as the core of utilitarianism.<sup>155</sup> In general, the method of aggregating all types of utility to one unit<sup>156</sup> is not only the core of utilitarianism, but also of economic cost-benefit analysis.<sup>157</sup> Likewise, the other pillars of utilitarianism, i.e. consequentialism (according to which human actions should be judged by their consequences), and the principle of universal maximization of happiness or utility (i.e. the idea that the fulfillment of human desires according to individual preferences is desirable as such) formed the basis of economic analysis of law.<sup>158</sup> Rowley describes “welfarism”, “sum-ranking” and „consequentialism“ as characteristics of utilitarianism, which influenced the theory of marginal utility and welfare economics, in which law and economics originates.<sup>159</sup> Most likely, the development of the law and economics movement was facilitated by the fact that influential critiques of utilitarianism had not yet been written in its early years,<sup>160</sup> and that the American academic community felt largely appreciative towards it.<sup>161</sup> Even (American) critics of utilitarianism did not distance themselves all too clearly from some of its fundamental tenets.<sup>162</sup>

As a preliminary result, we can identify two crucial reasons why economic ideas were easily implemented into American legal scholarship: First, utilitarianism had gained considerable significance in American society and also influenced influence the modern law and econom-

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<sup>152</sup> *Supra* note 151.

<sup>153</sup> *E.g.* Posner, *supra* note 18, at 103; Posner, *supra* note 120, at 425. *See* Parisi, *supra* note 18, at 46-7 (summarizing, but using a very narrow definition of utilitarianism). Precisely this attempt to distance himself drew a lot of criticism to Posner, in particular his attempt to supplant utility maximization with wealth maximization. *See e.g.* Calabresi, *The new economics analysis of law*, *supra* note 20, at 90; *also see* MATHIS, *supra* note 19, at 187.

<sup>154</sup> Rowley, *supra* note 140, at 990 [referring to RICHARD A. POSNER, *THE ECONOMICS OF JUSTICE* (1981)].

<sup>155</sup> *Also see* Rowley, *supra* note 140, at 992.

<sup>156</sup> BERNHARD GESANG, *EINE VERTEIDIGUNG DES UTILITARISMUS* 19 (2003) 19.

<sup>157</sup> *See e.g.* Kornhauser, *supra* note 140, at 598.

<sup>158</sup> A useful overview of these terms is provided by GESANG, *supra* note 156, at 17 et seq.

<sup>159</sup> Rowley, *supra* note 140, at 981 et seq.; *also see* Kornhauser, *supra* note 140, at 591 et seq., 598-9 (discussing the close links between utilitarianism and the law and economics objective of maximizing total utility).

<sup>160</sup> *E.g.* AMARTYA SEN, *COLLECTIVE CHOICE AND SOCIAL WELFARE* (1970); JOHN RAWLS, *A THEORY OF JUSTICE* (1971); ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* (1974); RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* (1977). Of course, some known earlier critiques had been written, LIONEL ROBBINS, *AN ESSAY ON THE NATURE AND SIGNIFICANCE OF ECONOMIC SCIENCE* (1932).

<sup>161</sup> *See* Calabresi, *The new economics analysis of law*, *supra* note 20, at 104; *also see* John Broome, *Modern Utilitarianism* in, *THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW* 651, 656 (Volume II, Peter Newman ed. 2002); *cf.* Mark J. Roe, *Backlash*, 98 COLUM. L. REV. 217, 239 (1998) (speculating that American society may be more open to law and economics efficiency analysis than others, as unequal distribution may more easily result in destructive political instability elsewhere).

<sup>162</sup> Rawls's concept of justice was at times interpreted as utilitarian, to which, of course, Rawls objected. *See* JOHN RAWLS, *JUSTICE AS FAIRNESS* (2001).

ics movement. Second, the specific political context during the first half of the 20<sup>th</sup> century led to the rise of legal realism, which discredited classical legal thought and thus created a vacuum in legal scholarship that could be filled by new ideas. Today, most American law scholars seem to share an instrumental understanding of law: law is seen a means to achieve specific goals instead of value in itself.<sup>163</sup> Much more than elsewhere, this allowed new movements to flourish, most of all law and economics.

### 4.3. Origins and developments of the modern law and economics movement

Economists have taken an interest in the law for a long time before the development of the modern economic analysis of law.<sup>164</sup> At the same time, legal scholars have attempted to gain a better understanding of the law by studying economics.<sup>165</sup> However, law and economics as a tool open to a larger group among legal scholars developed only during the 1960s and was initiated mostly by the works of Ronald Coase and Guido Calabresi, who are typically described as the founding fathers of the law and economics movement.<sup>166</sup> The ground had been prepared during the 1940s and 1950s at the University of Chicago, which was to become the intellectual home of the economic analysis of law, much as Harvard had stood for the Langdellian tradition and Yale and Columbia had for legal realism.<sup>167</sup> Aaron Director, the second economist to be appointed to the law school from in 1946,<sup>168</sup> began to exert a great influence both at the department of economics and the law school. His teaching abilities allowed him exert considerable influence on both his students and other faculty members.<sup>169</sup> He was the original editor of the *Journal of Law and Economics*, in which Ronald Coase was to publish his seminal article on “The Problem of Social Cost” in 1960,<sup>170</sup> which finally triggered the application of economic analysis beyond business law fields such as antitrust, corporate and tax law, and thus started off the law and economics movement. Coase’s article provides a powerful criticism of Arthur Pigou<sup>171</sup> and the Pigovian idea of internalizing external by im-

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<sup>163</sup> Summers, *supra* note 58, at 861 et seq.; Lewis A. Kornhauser, *The Great Image of Authority*, 36 STAN. L. REV. 349, 361 (1984).

<sup>164</sup> For early examples in Austria, see VICTOR MATAJA, DAS RECHT DES SCHADENERSATZES VOM STANDPUNKT DER NATIONALÖKONOMIE (1888), KLEINWÄCHTER, DIE KARTELLE – EIN BETRAG ZUR FRAGE DER ORGANISATION DER VOLKSWIRTSCHAFT (1883).

<sup>165</sup> See Mackaay, *supra* note 54, at 70-71 (discussing the decline of the 19<sup>th</sup> century law and economics movement).

<sup>166</sup> Also see Schanze, *supra* note 119, at 2 et seq.

<sup>167</sup> DUXBURY, *supra* note 79, at 331. Charles K. Rowley, *Law and economics from the perspective of economics*, in THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 478 (Volume II, Peter Newman ed. 2002).

<sup>168</sup> DUXBURY, *supra* note 79, at 342; Mackaay, *supra* note 54, at 72

<sup>169</sup> DUXBURY, *supra* note 79, at 342 et seq.; James J. Heckman, *The Intellectual Roots of the Law and Economics Movement*, 15 L. & HIST. REV. 327, 331 (1997).

<sup>170</sup> R. H. Coase, *The Problem of Social Cost*, 3 J. L. & ECON. 1 (1960).

<sup>171</sup> ARTHUR CECIL PIGOU, THE ECONOMICS OF WELFARE (4<sup>th</sup> ed. 1932).

posing damage payments on the party responsible to achieve a reduction to the economically efficient amount. By pointing out the incentive effects on the purported victims of external effects, Coase demonstrated the reciprocity of the relation between tortfeasor and victim. As a result, what is now known as the Coase Theorem, and “Coasian bargaining” more generally lent themselves to the application of economics to a wide variety of legal problems. Another important precursor, the 1992 Nobel laureate Gary Becker, taught mostly at the University of Chicago as well (albeit not at the law school); he is often credited with first having applied economic methods to situations that are not normally considered to be governed by markets, such as crime, racial discrimination<sup>172</sup> or family life<sup>173</sup>.<sup>174</sup> He is known for his work on rational and irrational behavior,<sup>175</sup> on human capital<sup>176</sup> and his pioneer work on crime and punishment,<sup>177</sup> where he first applied an economic analysis that can be found in almost every law and economics textbook today.<sup>178</sup>

On the basis of these bodies of work, economics was first able to achieve results interesting to lawyers working in some core fields of law, such as contract law, tort law, and criminal law, including fields not governed by markets, but also go into greater depth in fields that had been discussed by economists for some time, such as industrial economics, and turn up with results that were of some interest to legal scholars and to the practice of law.<sup>179</sup>

However, the decisive factor for the significance of the economic analysis of law today was the application of economic principles not only by economists, but most of all by legal scholars themselves. During the 1960s and 70s, Guido Calabresi began to study tort law from an economic perspective independently from Coase, and published a series of articles<sup>180</sup> and a book on the costs of accidents.<sup>181</sup> Another important precursor of the law and economics

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<sup>172</sup> GARY BECKER, *THE ECONOMICS OF DISCRIMINATION* (1957).

<sup>173</sup> GARY BECKER, *A TREATISE ON THE FAMILY* (1981).

<sup>174</sup> Cf. Mackaay, *supra* note 54, at 73.

<sup>175</sup> Gary Becker, *Irrational Behavior and Economic Theory*, 70 J. POL. ECON. 1 (1962) (arguing that irrational actors will, in the long run, be eliminated from the market or forced to act rationally). GARY BECKER, *THE ECONOMIC APPROACH TO HUMAN BEHAVIOR* (1976).

<sup>176</sup> GARY BECKER, *HUMAN CAPITAL* (1975).

<sup>177</sup> Becker, *supra* note 151.

<sup>178</sup> See e.g. RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 215 et seq. (6<sup>th</sup> ed. 2003); A. MITCHELL POLINSKY, *AN INTRODUCTION TO LAW AND ECONOMICS* 79 et seq. (3<sup>rd</sup> ed. 2003).

<sup>179</sup> Cf. Richard A. Posner, *The Decline of Law as an Autonomous Discipline: 1962-1987*, 100 HARV. L. REV. 765, 767 (1987).

<sup>180</sup> Guido Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 YALE L. J. 499 (1961); Guido Calabresi, *The Decision for Accidents: An Approach to Non-Fault Allocation of Costs*, 78 HARV. L. REV. 713 (1965); Guido Calabresi, *Transaction Costs, Resource Allocation and Liability Rules: A Comment*, 11 J. L. & ECON. 67 (1968); Guido Calabresi & A. Douglas Melamad, *Property Rules, Liability Rules and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972); Guido Calabresi & Jon Hirschoff, *Toward a Test for Strict Liability in Torts*, 81 YALE L. J. 1055 (1972); Guido Calabresi, *Optimal Deterrence and Accidents*, 84 YALE L. J. 656 (1975); Guido Calabresi, *Concerning Cause and the Law of Torts*, 43 U. CHI. L. REV. 69 (1975).

<sup>181</sup> GUIDO CALABRESI, *THE COST OF ACCIDENTS* (1970).

movement in legal academia was Henry Manne, whose main fields were corporate and securities law, where he became chiefly known as a proponent of anti-interventionist views<sup>182</sup> and as a critic of the prohibition of insider trading.<sup>183</sup> In 1976, Manne established a two-week intensive course on microeconomics for judges.<sup>184</sup> Although this program was often criticized as being biased in favor of the Chicago School and as sponsored by large corporations,<sup>185</sup> about a third of federal judge had participated in it by 1983<sup>186</sup>, 40% by 1990.<sup>187</sup> Two further steps in the establishment of law and economics as a scholarly field were taken by Richard Posner, who founded the *Journal of Legal Studies* in 1972, an journal focusing on law and economics, but mostly read and stocked with articles by members of law faculties.<sup>188</sup> His monograph on the “Economic Analysis of Law”, first published in 1973<sup>189</sup>, was the first standard textbook of law and economics.<sup>190</sup> After more then 40 years, the economic analysis of law has become an established element of America legal culture,<sup>191</sup> which is also accepted by its critics.<sup>192</sup> It may be true that the Chicago School has already penetrated those fields readily open to this approach.<sup>193</sup> However, other types of economic analysis have since evolved, which also have been able to influence legal thought in the US.

#### 4.4. American legal scholarship and law and economics today

The very idea of a “legal science” was discredited by legal realism in the earlier decades of the 20<sup>th</sup> century. However, while law was still recognized as an autonomous discipline in the

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<sup>182</sup> Henry Manne, *The Higher Criticism of the Modern Corporation*, 62 COLUM. L. REV. 399 (1962); Henry Manne, *Mergers and the Market for Corporate Control*, 73 J. POL. ECON. 110 (1965); Henry Manne, *Our Two Corporate Systems: Law and Economics*, 54 VA. L. REV. 259 (1967).

<sup>183</sup> Henry Manne, *In Defense of Insider Trading*, 44 HARV. BUS. REV. 113 (1966); HENRY MANNE, INSIDER TRADING AND THE STOCK MARKET (1966); see generally DUXBURY, *supra* note 79, at 359. See Henry Manne, *How law and economics was marketed in a hostile world: a very personal history*, in THE ORIGINS OF LAW AND ECONOMICS 309 (Francesco Parisi & Charles K. Rowley eds. 2005) (vividly describing early resistance to law and economics).

<sup>184</sup> See Henry N. Butler, *The Manne Program in Economics for Federal Judges*, 50 CASE W. RES. L. REV. 351 (1999).

<sup>185</sup> See DUXBURY, *supra* note 79, at 359-60; George L. Priest, *Henry Manne and the Market Measure of Intellectual Influence*, 50 CASE W. RES. L. REV. 325, 330 (1999) (discussing the program’s curriculum).

<sup>186</sup> DUXBURY, *supra* note 79, at 360.

<sup>187</sup> Butler, *supra* note 103, at 352. See generally Bruce A. Green, *Judicial Independence: May Judges Attend Privately Funded Educational Programs? Should Judicial Education be Privatized?: Questions of Judicial Ethics and Policy*, 29 FORDHAM URB. L. J. 941, 941-2, 954 (2002).

<sup>188</sup> The *Journal of Law and Economics* had been founded in 1958 by Aaron Director and later edit by Ronald Coase.

<sup>189</sup> RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* (1<sup>st</sup> ed. 1972).

<sup>190</sup> POSNER, *supra* note 178.

<sup>191</sup> William M. Landes & Richard A. Posner, *The Influence of Economics on Law: A Quantitative Study*, 36 J. L. & ECON. 385 (1993) (using empirical analysis to corroborate this thesis as early as 1993).

<sup>192</sup> E.g. Anthony T. Kronman, *The Second Driker Forum for Excellence in the Law*, 42 WAYNE L. REV. 115 (1995) 160.

<sup>193</sup> See e.g. Richard A. Epstein, *Law and Economics: Its Glorious Past and Cloudy Future*, 64 U. CHI. L. REV. 1167, 1167 et seq. (1997).

mid-20<sup>th</sup> century, Richard Posner identifies a decline of this view since about 1960.<sup>194</sup> In his view, the reason for this decline is not the influence of economics and related disciplines, but also the end of political consensus among legal academics and a general loss of confidence in the ability of lawyers to solve the problems of modern society.<sup>195</sup> This does not necessarily imply that American law scholarship exclusively or even primarily uses the economic analysis of law; however, going back to legal realism, a consequentialist perspective clearly predominates. A legal scholar may choose between a variety of methodological approaches of various disciplines (including sociology and political science).

Correspondingly, the work of legal scholars in the US is fundamentally different from that at legal faculties elsewhere, including other common law countries. Legal scholars are typically less interested in doctrinal details than in a study of the law from an external, interdisciplinary perspective.<sup>196</sup> Scholarship does not bother with finding the “correct” interpretation or with finding out what the law is, but is concerned with legal policy and what the law should be. It has occasionally been criticized that this development has resulted in legal scholarship having lost its usefulness to practice (for example in finding analyzing and differentiating precedents):<sup>197</sup> Insofar as policy arguments outside the legal system are not accepted by judges, the rejection of doctrinalism has made legal scholarship less useful for practitioners.

A variety of other factors may help to explain why interdisciplinarity gained so much ground in the US. The unusual world of legal periodicals (compared both to other and to journals in other legal systems) almost certainly accounts for a share in this development.<sup>198</sup> Students decide about the acceptance and rejection of articles,<sup>199</sup> and their gratuitous work allows authors to publish much longer articles than in German-speaking countries.<sup>200</sup> The articles published by American law reviews, other than articles in typical German-speaking journals, are hardly under any pressure to be immediately useful to the practice of judges and lawyers, which facilitates focusing on interdisciplinary and theoretical issues.<sup>201</sup> Furthermore, different from most other countries, law is a graduate degree in the US, many students have an aca-

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<sup>194</sup> Posner, *supra* note 179, at 761; *contra e.g.* Charles Fried, *The Artificial Reason of Law or: What Lawyers Know*, 60 TEX. L. REV. 35 (1981).

<sup>195</sup> Posner, *supra* note 179, at 766-7; *also cf.* Cheffins, *supra* note 27, at 201-2.

<sup>196</sup> Cheffins, *id.* at 198-9.

<sup>197</sup> Harry T. Edwards, *The Growing Divergence between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34, 42 ff (1992).

<sup>198</sup> For a descriptive account from the perspective of a German scholar of comparative law, see Reinhard Zimmermann, *Law Reviews: A Foray Through A Strange World*, 47 EMORY L. J. 659 (1998).

<sup>199</sup> For a critical assessment, see James Lindgren, *An Author's Manifesto*, 61 U. CHI. L. REV. 527 (1994).

<sup>200</sup> Occasionally, there have been articles spanning several hundred pages. See e.g. KAPLOW & SHAVELL, *supra* note 20, which was first published as an article of more than 400 pages in the Harvard Law Review. See Louis Kaplow & Steven Shavell, *Fairness versus Welfare*, 114 HARV. L. REV. 961-1388 (2001).

<sup>201</sup> Cf. Zimmermann, *supra* note 198, at 679-688.

demic or practical background in other fields, and those aiming at an academic career sometimes enroll in Ph.D. programs in economics, political science or philosophy (or an MBA) before, parallel to, or after law school.<sup>202</sup> US law schools sometimes even employ economists with no formal training in law. Hence, many professors have the necessary methodological background for law and economics, which also has an impact on legal education.

#### 4.5. *Law and economics as a political program?*

An important criticism of economic analysis of law is its purported conservative slant in economic policy.<sup>203</sup> In our view, this claim is incorrect, but has some justification before the specific background in which law and economics began to thrive. Law and economics arguments, particularly those attributed to the Chicago School, were often used to substantiate conservative political goals. Richard Posner, who is often described as a conservative<sup>204</sup>, is probably the best example: his theory that the *common law* tends towards efficiency<sup>205</sup> is a very good argument against legislative intervention to the benefit of (purportedly) disfavored groups.

Posner's influential textbook, which is easily accessible to non-economist readers, and his outstanding scholarship (also in terms of quantitative output) have imprinted its image on how the law and economics movement is seen by outsiders.<sup>206</sup> Posner, and not Guido Calabresi<sup>207</sup>, came to be considered the leading figure of the movement in its early days, which is sometimes attributed to the “imperialistic character” of his treatise.<sup>208</sup> His proposals have some-

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<sup>202</sup> Cf. Robert C. Ellickson, *Bringing Culture and Human Frailty to Rational Actors: A Critique of Classical Law and Economics*, 65 CHI.-KENT. L. REV. 23, 26 (1989) (providing figures for top-tier school law professors with a Ph.D. in economics).

<sup>203</sup> E.g. Morton J. Horwitz, *Law and Economics: Science or Politics?* 8 HOFSTRA L. REV. 905 ff (1980); MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES 126 (1987); Robert C. Downs, *Law and Economics: Nexus of Science and Beliefs*, 27 PAC. L. J. 1, 19 (1995). Similar criticisms have been made in German-speaking literature, see Taupitz, *supra* note 11, at 129-30, 133.

<sup>204</sup> E.g. Robin Paul Malloy, *Invisible Hand or Sleight of Hand? Adam Smith, Richard Posner and the Philosophy of Law and Economics*, 36 U. KAN. L. REV. 209 (1988); Minda, *supra* note 55, at 373; *contra* Richard A. Posner, *The New Institutional Economics Meets Law and Economics*, 149 J. INSTITUTIONAL & THEORETICAL ECON. 73, 83 (1993).

<sup>205</sup> According to Posner, legal precedents have to maintain themselves in the market: if a precedent case turns out to be economically untenable, the parties involved will attempt to have it overruled, to which courts will eventually give in. According to Posner, this results in an evolutionary process that eventually yields efficient law. POSNER, *supra* note 189; also see Paul H. Rubin, *Why is the Common Law Efficient?* 6 J. LEGAL STUD. 51 (1977); George L. Priest, *The Common Law Process and the Selection of Efficient Rules*, 6 J. LEGAL STUD. 65 (1977). The theory is of course not universally accepted. See Kornhauser, *supra* note 140, at 591; Adam J. Hirsch, *Comment: Evolutionary Theories of Common Law Efficiency: Reasons for (Cognitive) Skepticism*, 32 FLA. ST. U.L. REV. 425 (2005); Nicola Gennaioli & Andrei Shleifer, *The Evolution of Common Law*, 115 J. POL. ECON. 43 (2007) (differentiating).

<sup>206</sup> Cf. e.g. James R. Hackney, Jr., *Law and Neoclassical Economics*, 15 L. & Hist. Rev. 275, 316 (1997).

<sup>207</sup> Guido Calabresi is generally considered a liberal, see Horwitz, *supra* note 203, at 909.

<sup>208</sup> KELMAN, *supra* note 203, at 117.

times been radical and often idiosyncratic<sup>209</sup> and have made him a popular target of criticism.<sup>210</sup>

The practical impact of this form of economic analysis is intimately linked to two factors. On the one hand, some lawyer-economists have been appointed as judges since President Reagan took office, e.g. Richard Posner in 1981. This did not just allow law and economics to influence the case law directly, but also had some repercussions on legal education. A study published in 2002<sup>211</sup> found that a few judges (who were incidentally also law teachers) dominate the selection of jurisprudence in case books, with Richard Posner, Frank Easterbrook und Ralph Winter, who are all associated with the Chicago School,<sup>212</sup> leading the field.

A second important point is the so-called “antitrust revolution”, which accompanied the rise of law and economics. This term describes the abandonment of the extensive interpretation of the Sherman, Clayton and FTC Acts<sup>213</sup> that had dominated in the decades following World War II, which allowed more levy to the cleansing powers of the market; the Harvard School of antitrust, which had hitherto dominated industrial economics and was skeptical towards large firms and conglomerates, had to cede ground to the *Chicago School*, which was based on neoclassical price theory and emphasized the inherent instability of monopolies.<sup>214</sup> From the 1980s onwards, the courts began to adopt Chicago School views, such as the argument that antitrust should serve allocative efficiency only and neglect other goals, such as the protection of small business.<sup>215</sup> The Department of Justice’s merger guidelines began to reflect

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<sup>209</sup> Cf. e.g. the proposal to deregulate the market for adoptions. See Elisabeth Landes & Richard A. Posner, *The Economics of the Baby Shortage*, 7 J. LEGAL. STUD. 323 (1978); Richard A. Posner, *The Regulation of the Market in Adoptions*, 67 B. U. L. REV. 59 (1987).

<sup>210</sup> Cf. KELMAN, *supra* note 203, at 117.

<sup>211</sup> Mitu Gulati & Veronica Sanchez, *Giants in a World of Pygmies? Testing the Superstar Hypothesis with Judicial Opinions in Casebooks*, 87 IOWA L. REV. 1141, 1155 (2002).

<sup>212</sup> Frank Easterbrook is known as an eminent scholar of corporate law and coauthor of a monograph on the subject, FRANK EASTERBROOK & DANIEL FISCHER, *THE ECONOMIC STRUCTURE OF CORPORATE LAW* (1991). Ralph Winter is a professor at Yale Law School and known in corporate law academia as the originator of the “race to the top” view in the debate about regulatory competition in corporate law. See Ralph Winter, *State Law, Shareholder Protection and the Theory of the Corporation*, 6 J. LEGAL STUD. 251 (1977). Cf. Gulati & Sanchez, *id.* at 1166 (“Despite his Yale background, many commentators consider Winter to be close in philosophy to the Chicago brand of Law and Economics.”); also see Stephan J. Choi & G. Mitu Gulati, *Mr. Justice Posner? Unpacking the Statistics*, 61 NYU ANN. SURV. AM. L. 19 (2005) (identifying Judges Posner and Easterbrook as the ones with the largest number of published opinions).

<sup>213</sup> 15 U.S.C. §§ 1-7 (Sherman Act), §§ 12-27 (Clayton Act), §§ 41 ff (FTC Act).

<sup>214</sup> See Michael S. Jacobs, *An Essay on the Normative Foundations of Antitrust Economics*, 74 N.C. L. REV. 219, 226 et seq. (1995); cf. Frank Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1, 2 (1984).

<sup>215</sup> Cf. Jacobs, *id.* at 220-1; see e.g. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 588–89 (1986); Northwest Wholesale Stationers v. Pacific Stationery & Printing Co., 472 U.S. 284, 296 (1985); National Collegiate Athletic Ass’n v. Board of Regents of Univ. of Okla., 468 U.S. 85, 104–07 (1984); in particular Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 53 FN 21 (1977).

these views as well.<sup>216</sup> Meanwhile, a counter-movement has emerged (so-called “post-Chicago” antitrust), which has already been reflected by the case law.<sup>217</sup>

It can hardly be denied that the growth of law and economics has to be seen before a specific political backdrop. The Chicago School, which dominates the outside view of law and economics,<sup>218</sup> is the target of most of the criticism launched both inside and outside the US. As practitioner of law and economics, we share the view that an outright condemnation of an economic approach to law is misguided, as there are other schools that do not share this alleged political agenda.<sup>219</sup>

Politics is of course an issue where law and economics attempts to set normative guidelines for legal policy: In order to be able to say whether a specific legal norm is efficient (or just more efficient than an alternative), one needs to define efficiency as an objective.<sup>220</sup> Under a utilitarian objective function, total utility is maximized, which results in a measurement problem. One simple solution is to use total wealth as the objective, which in many cases will constitute a permissible simplification of the analysis,<sup>221</sup> at least when supplemental predictions on tendencies (such as risk aversion or the declining marginal utility of wealth) are permitted. However, using total wealth as the ultimate objective has obvious distributive ramifications. Richard Posner’s attempt to distinguish his own approach from utilitarianism by using wealth as the only value to be considered<sup>222</sup> did not prevail in the debate.<sup>223</sup> Many legal economists

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<sup>216</sup> Oliver E. Williamson, *Delimiting Antitrust*, 76 GEO. L. J. 271, 273-4 (1987). Cf. the so-called „more economic approach“ that is gaining ground in European antitrust law. See e.g. Doris Hildebrand, *Der „more economic approach“ in der Wettbewerbspolitik*, 2005 WIRTSCHAFT UND WETTBEWERB 513.

<sup>217</sup> See *Image Technical Servs., Inc. v. Eastman Kodak Co.*, 1989--1 Trade Cas. (CCH) P 68,402, at 60,210, 60,211--60,214 (N.D. Cal. Apr. 18, 1988), rev'd, 903 F.2d 612 (9th Cir. 1990), aff'd, 504 U.S. 451 (1992); cf. Robert H. Lande, *Chicago Takes it on the Chin: Imperfect Information Could Play a Role in the Post-Kodak World*, 62 ANTITRUST L. J. 193 (1993); Jacobs, *supra* note 214, at 246-7.

<sup>218</sup> See e.g. Rowley, *supra* note 18, at 24; Susan Rose-Ackerman, *Law and Economics: Paradigm, Politics, or Philosophy*, in LAW AND ECONOMICS 233, 237 (Nicholas Mercuro ed. 1989); *supra* note 19.

<sup>219</sup> See e.g. Minda, *supra* note 109, at 111, note 3; MERCURO & MEDEMA, *supra* note 60, at 79 et seq.; Ejan Mackaay, *Schools: General*, in INTERNATIONAL ENCYCLOPEDIA OF LAW AND ECONOMICS Nr. 0500, 402, 410 (Boudewijn Bouckaert & Gerrit De Geest eds. 2000); also see Francesco Parisi, *Positive, Normative and Functional Schools in Law and Economics*, 18 EUR. J. L. & ECON. 259, 264-5 (2004); Rose-Ackerman, *supra* note 218, at 234; Susan Rose-Ackerman, *Economics, Public Policy, and Law*, 26 VICTORIA U. WELLINGTON L. REV. 1, 1 (1996) (“Economics is method, not ideology.”); cf. Ulen, *supra* note 53, at 408 (speaking of a “process of inquiry”). Authors such as Guido Calabresi, Steven Shavell und A. Mitchell Polinsky have been said to adhere to the „New Haven School“ or „Reformist School“. See MERCURO & MEDEMA, *id.*, at 80; Wetlaufer, *supra* note 60, at 37; Mackaay, *supra* note 54, at 412; cf. Bruce A. Ackerman, *Law, Economics, and the Problem of Legal Culture*, 6 DUKE L. J. 929 (1986); Rose-Ackerman, *supra* note 218, at 235-6, 255, note 19

<sup>220</sup> Some leading law and economics scholars explicitly denounce the term efficiency as being merely a tool to approximate the maximization of total individual well-being. See KAPLOW & SHAVELL, *supra* note 20, at 37.

<sup>221</sup> See e.g. KAPLOW & SHAVELL, *supra* note 20, at 37.

<sup>222</sup> Posner, *Utilitarianism*, *supra* note 18; Posner, *Ethical and Political Basis*, *supra* note 18.

<sup>223</sup> *Contra e.g.* Ronald Dworkin, *Is Wealth a Value?* 9 J. LEGAL STUD. 191 (1980); Anthony T. Kronman, *Wealth Maximization as a Normative Principle*, 9 J. LEGAL STUD. 227 (1980).



today aim at the maximization of total human utility or social welfare as such.<sup>224</sup> Louis Kaplow and Steven Shavell explicitly include the distribution of income into their welfare economic conception and point out that the declining marginal utility of wealth will often be an argument in favor of redistribution from the rich to the poor,<sup>225</sup> although the problem of measurement has by no means been solved. Wealth maximization, which is blind towards distribution, is today only seen as a means to approximate utility maximization by most.<sup>226</sup> The same applies to Pareto efficiency (a set of endowments is considered Pareto efficient when no one's position can be improved by harming another person)<sup>227</sup> – essentially a minimum consensus position that should be acceptable to all – and to the Kaldor-Hicks criterion (an increase in total utility is presumed when a change in endowments, by means of e.g. a change in the law, would theoretically allow its beneficiary to compensate the loser, even if compensation does not actually take place).<sup>228</sup> In any case, the selection of a normative criterion is not an issue of the methods of economics, but of the underlying moral, philosophical and political premises.<sup>229</sup>

It suffices to conclude that the rapid spread of law and economics in the US appears to have been bolstered by the close connection between one of its leading schools with a political current that was on the rise at this time. However, this should not tempt legal scholars to reject economic methods outright.

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<sup>224</sup> The outlines of this approach can already be discerned in CALABRESI, *supra* note 20; for more detailed arguments see Calabresi, *About Law and Economics*, *supra* note 20; Calabresi, *The new economics analysis of law*, *supra* note 20, at 89; Lucian A. Bebchuk, *The Pursuit of a Bigger Pie: Can Everyone Expect a Bigger Slice*, 8 HOFSTRA L. REV. 671 (1980); KAPLOW & SHAVELL, *supra* note 20. For a summary of the discussion, see Parisi, *supra* note 18, at 33 et seq., 44 et seq..

<sup>225</sup> KAPLOW & SHAVELL, *id.*, at 29 et seq. See Herbert Hovenkamp, *The Marginalist Revolution in Legal Thought*, 46 VAND. L. REV. 305 (1993) (giving a historical account).

<sup>226</sup> Even Richard Posner seems to have abandoned his original perspective. See Posner, *Ethics*, *supra* note 18, at 265 (“... I never suggested that [wealth] is the only social value ...”); Posner, *Problematics*, *supra* note 18, at 1670 note 62; also see Parisi, *supra* note 18, at 47; Rowley, *supra* note 18, at 21-2. cf. Herbert Hovenkamp, *Legislation, Well-being, and Public Choice*, 57 U. CHI. L. REV. 63 (1990) (describing Kaldor-Hicks efficiency as measuring wealth, not utility).

<sup>227</sup> See e.g. ANDREU MAS-COLELL, MICHAEL D. WHINSTON & JERRY R. GREEN, MICROECONOMIC THEORY 313 (1995); ROBERT COOTER & THOMAS ULEN, LAW AND ECONOMICS 12 (3<sup>rd</sup> ed. 2000).

<sup>228</sup> See e.g. Heico Kerkmeester, *Methodology: General*, in INTERNATIONAL ENCYCLOPEDIA OF LAW AND ECONOMICS Nr. 2000, 383, 386 (Boudewijn Bouckaert & Gerrit De Geest eds. 2000); but cf. Christopher T. Wonnell, *Efficiency and Conservatism*, 80 NEB. L. REV. 643, 695 (2001) (arguing that Kaldor-Hicks-Kriterium is distorted to the detriment of the poor).

<sup>229</sup> Kornhauser, *supra* note 163, at 354.

## 5. The development in German-speaking Europe

### 5.1. Law and Economics in the late 19<sup>th</sup> century

Early antecedents of modern law and economics date back to the end of the 19<sup>th</sup> century and can be traced to German-speaking Europe, particularly Vienna, the capital of the Habsburg Empire.<sup>230</sup> One of the pioneers of economic analysis of law was *Victor Mataja*, a professor of political economy and later a member of the government as commerce secretary. *Mataja*'s most important work in this field was certainly his monograph "Das Recht des Schadensersatzes vom Standpunkte der Nationalökonomie" ("The law of torts and contractual liability from the point of view of political economy"), published in 1988.<sup>231</sup> *Mataja* anticipated central ideas of the 20<sup>th</sup> century law and economics movement. In spite of his revolutionary methodology, his book had no lasting influence on legal scholarship and practice.<sup>232</sup>

Similar to modern law and economics, *Mataja* emphasized the incentive effects of tort law which lead him to criticize the negligence rule.<sup>233</sup> He suggested that, under the rule of negligence, the incentives for preventing the damage were lower than socially optimal because the tortfeasor would not exercise more care than required by the law. On the contrary, strict liability would set optimal incentives because the damage costs would be internalized and the tortfeasor would minimize total costs. In the case of an act of God, he argued that the costs of damage should not be borne by the owner but by the one who can best prevent the damage.<sup>234</sup> *Mataja* focused not only on incentive effects, but discussed other principles as well. He noted that, due to the decreasing marginal utility of wealth, the costs of damage should be spread over more than one person.<sup>235</sup>

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<sup>230</sup> Law and economics scholarship includes e.g. MATAJA, *supra* note 164; KLEINWÄCHTER, *supra* note 164; ANTON MENGER, DAS BÜRGERLICHE RECHT UND DIE BESITZLOSEN KLASSEN (1890). The Freiburg School of Economics of the 1930s and 1940s also addressed the economic role of legal institutions, but in a rather different way than contemporary law and economics; see Franz Böhm, *Die Forschungs- und Lehrgemeinschaft zwischen Juristen und Volkswirten an der Universität Freiburg in den dreißiger und vierziger Jahren des 20. Jahrhunderts* in HANS JULIUS WOLFF (ED.), AUS DER GESCHICHTE DER RECHTS- UND STAATSWISSENSCHAFTEN ZU FREIBURG IM BREISGAU (1957) 95-113.

<sup>231</sup> *Mataja* published another article on liability where he discussed the upcoming reforms: Victor Mataja, *Das Schadenersatzrecht im Entwurf eines Bürgerlichen Gesetzbuches für das Deutsche Reich*, 1 ARCHIV FÜR BÜRGERLICHES RECHT 267 (1889).

<sup>232</sup> For a more detailed discussion see Englard, *supra* note 15, and Winkler, *supra* note 24.

<sup>233</sup> MATAJA, *supra* note 164, at 23-24, 32 et seq.; cf. Böhm-Bawerk, *supra* note 39, at 420-21; contemporary literature includes, e.g., STEVEN SHAVELL, FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW 179-80 (2004).

<sup>234</sup> Cf. the cheapest cost-avoider literature, e.g., GUIDO CALABRESI, THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS 135-73, 261-63 (1970); Guido Calabresi & Jon T. Hirschoff, *Toward a Test for Strict Liability in Torts*, 81 YALE L.J. 1055, 1060 (1972); Harold Demsetz, *When Does the Rule of Liability Matter?*, 1 J. LEGAL STUD. 13, 27-28 (1972).

<sup>235</sup> MATAJA, *supra* note 164, at 27 et seq. (referring to Böhm-Bawerk).

*Mataja* made several further arguments that were truly novel for his time<sup>236</sup> and certainly would have been a condign founding father of a law and economics movement. His contemporaries did not ignore his 1888 monograph, and in the course of the discussions leading to the German Civil Code, *Mataja* was cited and discussed by legal scholars during the debate on the respective merits of negligence and strict liability.<sup>237</sup> Outside of German speaking countries, *Mataja* was picked up, among others, by the Frenchman *Teisseire* in his 1901 book *Essai d'une théorie générale sur le fondement de la responsabilité*, and by the Hungarian *Géza Marton*.<sup>238</sup> The professional positions *Mataja* held made him an important figure in the contemporary debate.

The economic methods that were needed to develop interdisciplinary theories were already well advanced at that time,<sup>239</sup> and the discussion on private law (e.g. freedom of contract) had largely become an economic debate as far as the most fundamental issues were concerned.<sup>240</sup> Institutionally, the disciplines were combined at the University of Vienna in one school, and the law curriculum included a significant amount of economics. Jurists such as *Carl Menger* and *Böhm-Bawerk* were appointed professors of economics.<sup>241</sup> Any persisting fears of contact between scholars of the two disciplines<sup>242</sup> should have been overcome without great difficulty. Overall, the scholarly environment seemed downright cut out to initiate a school of law and economics.<sup>243</sup> It almost comes as a surprise that *Mataja* did not spark a law and economics movement comparable to the American one starting in the 1960s.

The legitimacy of economic arguments in the legal discourse was never fully recognized and subject to a dispute between economists and lawyers. Economists, such as *Böhm-Bawerk*, supported *Mataja's* approach and praised his work as an important contribution to interdisciplinary research.<sup>244</sup> *Carl Menger*, one of the founding fathers of the Austrian School of Eco-

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<sup>236</sup> See, e.g., his discussion on compulsory insurance for accidents at work and occupational disease, *MATAJA*, *supra* note 164, at 85 et seq, 111 et seq.

<sup>237</sup> See, e.g., MAX RÜMELIN, *DIE GRÜNDE DER SCHADENSZURECHNUNG UND DIE STELLUNG DES DEUTSCHEN BÜRGERLICHEN GESETZBUCHS ZUR OBJEKTIVEN SCHADENERSATZPFLICHT* (1896).

<sup>238</sup> Cf. Englard, *supra* note 15, at 183.

<sup>239</sup> With regard to the marginalist revolution see e. g. ERNESTO SCREPANTI & STEFANO ZAMAGNI, *AN OUTLINE OF THE HISTORY OF ECONOMIC THOUGHT* 145 et seq (1995); Hovenkamp, *supra* note 225, at 308 et seq, (arguing that marginalism had a strong impact on legal thought).

<sup>240</sup> SIBYLLE HOFER, *FREIHEIT OHNE GRENZEN* 98 (2001). Of course, details were mainly discussed in the legal discourse. *Id.*

<sup>241</sup> Winkler, *supra* note 24, at 276.

<sup>242</sup> See *Böhm-Bawerk*, *supra* note 39, at 418 et seq.

<sup>243</sup> HERMANN KANTOROWICZ, *DER KAMPF UM DIE RECHTSWISSENSCHAFT* 38 (1906, reprint Nomos 2002); *Böhm-Bawerk*, *supra* note 39, at 419.

<sup>244</sup> *Böhm-Bawerk*, *supra* note 39, at 418 ff. Also Emil Steinbach, *Die Rechtsgrundlage, betreffend den Ersatz von Vermögensschäden* 21 *JURISTISCHE BLÄTTER* 243, note 1 (1888) praises *Mataja's* work.

nomics, criticized the conservative attitude of the predominant Savignyan jurisprudence.<sup>245</sup> Even some lawyers, such as Carl Menger's brother Anton, a professor of civil procedural, recognized that the historical school of jurisprudence was an improper approach for reforms and for policy discussions.<sup>246</sup> However, *Anton Menger's* opinion remained rather exceptional. Even most of those members of the legal community who favored Mataja's preference for strict liability rejected his approach.<sup>247</sup> Without further justification, Windscheid, Laband and other lawyers argued that ethical, political and economic considerations were not part of the lawyers' work.<sup>248</sup> Even *Rümelin*, a seemingly progressive thinker, argued that Mataja's "whole train of thoughts was morbid".<sup>249</sup> Similarly, *Erwin Steinitzer's* 1908 "Ökonomische Theorie der Aktiengesellschaft" (Economic Theory of the Public Corporation) and other pioneering works of economic analysis gained little influence, even though Steinitzer, much like Mataja, anticipated several insights of modern law and economics. Among those were the principal-agent problem<sup>250</sup> and the perspective of the corporation as a nexus of contracts.<sup>251</sup>

The decline of the early law and economics movement was ascribed to the increasing specialization of the social sciences and to the plurality of the economic methods. Some argued that economics as a scholarly discipline was underdeveloped. Applying its "preliminary results" to the law would have led to an increased uncertainty.<sup>252</sup> Of course, there were always controversies in the legal debate on the validity of certain legal methods just as in the economic debate. Moreover, different perspectives and traditions within both legal scholarship and economics<sup>253</sup> did not hinder the evolution of the discipline in the United States.

The critical point for why Mataja did not initiate a law and economics movement was that the doctrinal method of his time was unable to integrate economic ideas. Legal methodology was strongly focused on systematicism and the idea of a coherent interpretation of legal norms. A

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<sup>245</sup> Cf. T. W. Hutchison, *Some Themes from Investigations into Method*, in JOHN R. HICKS & WILHELM WEBER, *CARL MENGER AND THE AUSTRIAN SCHOOL OF ECONOMICS* 15, 26-7 (1973).

<sup>246</sup> A. MENER, *supra* note 230, at 5 et seq, 10 et seq; cf. HOFER, *supra* note 240, at 134 et seq.

<sup>247</sup> Englard, *supra* note 15, at 187.

<sup>248</sup> Bernhard Windscheid, *Die Aufgaben der Rechtswissenschaft*, in PAUL OERTMANN, BERNHARD WINDSCHEID, *GESAMMELTE REDEN UND ABHANDLUNGEN* 112 (1904); see Paul Oertmann, *Windscheid als Jurist*, in OERTMANN, *id.*, at XXXIII; WIEACKER, *supra* note 62, at 431. PAUL LABAND, *DAS STAATSRECHT DES DEUTSCHEN REICHS* (2nd edition, 1888) (arguing that, even though he esteemed disciplines such as history, economics, politics and philosophy, they were irrelevant for legal interpretation).

<sup>249</sup> RÜMELIN, *supra* note 237, at 7 (1896); cf. KNUT W. NÖRR, *ZWISCHEN DEN MÜHLSTEINEN* 38 et seq (1988) (arguing that economics had little influence on the legal discussion).

<sup>250</sup> ERWIN STEINITZER, *ÖKONOMISCHE THEORIE DER AKTIENGESELLSCHAFT* 55 et seq (1908).

<sup>251</sup> *Id.* at 48 f; compare contemporary research regarding 'nexus of contracts', e.g., Michael Jensen & William Meckling, *Theory of the Firm: Managerial Behavior, Agency Cost and Ownership Structure*, 3 J. FIN. ECON. 305, 310 (1976).

<sup>252</sup> PEARSON, *supra* note 54, at 43, 131; Mackaay, *supra* note 54, at 70. See also Böhm-Bawerk, *supra* note 39, at 418-19 (arguing that the fact that „economics was not a mature discipline“ could be an obstacle to interdisciplinary research).

<sup>253</sup> See MERCURO & MEDEMA, *supra* note 60.

reform that would have introduced a sudden change independent of the current law would have required an immense reconstruction of the legal system in order to find and form a new coherent interpretation of the entire edifice.<sup>254</sup> For example, replacing the negligence standard in tort law with strict liability would have made a great number of scholarly writings as well as court decisions obsolete, and would have required a reconstruction of all statutes based on the negligence standard, including rules of contributory and comparative negligence. Such a reinterpretation would have been unavoidable, as jurists believed that the legitimacy of legal norms was based on their consistency;<sup>255</sup> ideally, not a single norm in the legal system should contradict another one. Consequently, amendments based on economic arguments would have been perceived as external shocks alien to the system of 19<sup>th</sup> century conceptual formalism.<sup>256</sup> Unsurprisingly, Mataja's proposal for strict liability was criticized and eventually rejected.<sup>257</sup> This "methodological" rejection was supported by political factors. The law and economics scholars of the late 19<sup>th</sup> century, other than some of their American descendants in the 1970s, tended to propose reforms that ran contrary to the decision makers' interests. More progressive legal scholars such as *Anton Menger* criticized the law for protecting the interests of the ruling class.<sup>258</sup> Interdisciplinary research was often rejected by those who preferred the existing law.<sup>259</sup> By contrast, a significant part of the later US law and economics literature was dedicated to explaining why the existing law was optimal, partly to legitimize the case law via interferences by statutory law.<sup>260</sup>

## 5.2. An internal view of policy and interpretation

Several critics have repeatedly pointed to the marginalization of policy in German legal scholarship.<sup>261</sup> This is relevant for our theory since law and economics was a normative

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<sup>254</sup> Compare SCHÄFER & OTT, *supra* note 24, at 52; for a critical assessment of this argument *see* MATTEI, *supra* note 5, at 82.

<sup>255</sup> WIEACKER, *supra* note 62, at 401. Compare the struggle for legal positivism and coherence, e.g., CLAUDIUS WILHELM CANARIS, SYSTEMDENKEN UND SYSTEMBEGRIFF IN DER JURISPRUDENZ 121 et seq (1969) (arguing that the judge must strictly abide the law but also acknowledging that statutes are not always coherent).

<sup>256</sup> Conceptual formalism only allowed changes that were inherent in the system, most importantly through deductions based on legal concepts; *see* GEORG F. PUCHTA, CURSUS DER INSTITUTIONEN, BAND I. EINLEITUNG IN DIE RECHTSWISSENSCHAFT UND GESCHICHTE DES RECHTS BEY DEM RÖMISCHEN VOLK 36 (1841).

<sup>257</sup> RÜMELIN, *supra* note 237, at 6.

<sup>258</sup> A. MENGER, *supra* note 230 (criticizing the draft on a German Civil Code).

<sup>259</sup> Grimm, *supra* note 42, at 489. *Cf.* WIEACKER, *supra* note 62, at 442.

<sup>260</sup> This approach is borne by the theory that the common law moves towards efficiency; *cf. supra* note 205.

<sup>261</sup> *E.g.* Luhmann, *supra* note 42, at 11, 193; Ernst Fuchs, *Gerechtigkeitswissenschaft*, JURISTISCHE WOCHENSCHRIFT 8 (1920, reprinted in ALBERT FOULKES, ERNST FUCHS – GESAMMELTE SCHRIFTEN ÜBER FREIRECHT UND RECHTSREFORM, 1973) (criticizing that there is no „Gerechtigkeitswissenschaft“, i.e., no legal discipline discussing justice); THEO MAYER-MALY, RECHTSWISSENSCHAFT 201 (1972); Ota Weinberger, *Zur Theorie der Gesetzgebung*, in JOHANN MOKRE & Ota WEINBERGER, RECHTSPHILOSOPHIE UND GESETZGEBUNG 173 et seq (1976); HELMUT SCHELSKY, DIE SOZIOLOGEN UND DAS RECHT 59 et seq (1980); PETER GESETZGEBUNGSLEHRE 9, 14 (1973); Theo Öhlinger, *Planung der Gesetzgebung und Wissenschaft – Einführung in das Tagungsthema*,

movement that introduced policy criteria into the legal debate. In order to better understand why the mainstream approach was not receptive to (economic) policy considerations it is worthwhile looking at the evolution of legal methods. A central point was the self-reference of the legal discourse which meant that arguments for both interpretation and policy were to be found in the existing law. This tradition can be traced to the 19<sup>th</sup> century Historical School of *Savigny*, which proposed to take the customs of ancient Roman law as a model, and re-emerged in a different shade in *Hans Kelsen's* 20<sup>th</sup> century “Pure Theory of Law”. Whereas Savigny proposed to make policy considerations dependent on the existing law, Kelsen argued that policy should be entirely excluded from “legal science”.<sup>262</sup> In light of the success of these movements in German-speaking countries, the law and sociology literature has tried to interpret the law as an autopoietic system which was supposed to operate widely autonomous from other subsystems of society.<sup>263</sup> This focus on systematization was coined both by the natural law approach as well as by the Historical School<sup>264</sup> and led to an overemphasis of the non-contradiction condition in the law. Under these premises, it was not surprising that any reform had to be consistent with the existing law.<sup>265</sup>

A decisive development preceding the Historical School of Law was the rise of historicism towards the end of the 18<sup>th</sup> century. *Johann Gottfried Herder* and others sparked the separation of the humanities from philosophy.<sup>266</sup> Phenomena were increasingly viewed in their historical context, discussed with reference to their origins and explained in a dynamic way of movements and developments. To think historically meant to put oneself in the *Zeitgeist* of the re-

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in THEO ÖHLINGER, *METHODIK DER GESETZGEBUNG – LEGISTISCHE RICHTLINIEN IN THEORIE UND PRAXIS 1* (1982); VLADIMIR KUBEŠ, *THEORIE DER GESETZGEBUNG* (1987); Markus Lammer, *Grundfragen der Gesetzgebungslehre*, in WOLFGANG MANTL, *EFFIZIENZ DER GESETZESPRODUKTION* 60-61 (1995); Michael Holoubek, *Rechtswissenschaftliche Rechtspolitik? Plädoyer für einen (weiteren) Gegenstand der Rechtswissenschaften*, in MICHAEL HOLOUBEK & GEORG LIENBACHER, *RECHTSPOLITIK DER ZUKUNFT – ZUKUNFT DER RECHTSPOLITIK* 13, 18 (1999); Arthus Kaufmann, *Historischer Diskurs*, in ARTHUR KAUFMANN, WINFRIED HASSEMER & ULFRID NEUMANN, *EINFÜHRUNG IN RECHTSPHILOSOPHIE UND RECHTSTHEORIE DER GEGENWART* 110 et seq (2002); Alfred Büllsbach, *Rechtswissenschaft und Sozialwissenschaft*, in ARTHUR KAUFMANN, WINFRIED HASSEMER & ULFRID NEUMANN, *EINFÜHRUNG IN RECHTSPHILOSOPHIE UND RECHTSTHEORIE DER GEGENWART* 416 (2002). Britta Rehder, *What is Political About Jurisprudence? Courts, Politics and Political Science in Europe and the United States*, MPLFG DISCUSSION PAPER 07/5.

<sup>262</sup> See Kaufmann, *supra* note 261, at 124-25. On the European continent, the interpretation of legal doctrine is frequently considered to be “scientific”. See e.g. Mathias M. Siems, *Legal Originality*, EDINBURGH LAW SCHOOL WORKING PAPER 13, note 65, at <http://ssrn.com/abstract=976168>.

<sup>263</sup> See, e.g., GUNTHER TEUBNER, *RECHT ALS AUTOPOIETISCHES SYSTEM* (1989).

<sup>264</sup> Kaufmann, *supra* note 261, at 82. WIEACKER, *supra* note 62, at 372 et seq (arguing that the Historical School of Law and the Natural Law approach were quite similar in this respect).

<sup>265</sup> See HERGET, *supra* note 1, at 104-6, 110 (arguing that, in Germany, system, structure and coherence were disproportionately important compared to American legal thought).

<sup>266</sup> See, e.g., GUNNAR SKIRBEKK & NILS GILJE, *GESCHICHTE DER PHILOSOPHIE VOL II* 552 et seq (1987).

spective age and understand the problem “from within”.<sup>267</sup> Whereas *Leopold von Ranke* contributed to the “science of history”<sup>268</sup>, *Friedrich Carl von Savigny* was the main proponent of a “science of law” as an independent discipline. Like *Herder*, *Savigny* aspired to explain legal phenomena as an outgrowth of their respective historical context, which was most explicitly expressed in the *Volksgeist* (spirit of the people).<sup>269</sup>

*Savigny*’s Historical School was the basis for today’s approach to policy.<sup>270</sup> In his influential work *Vom Beruf unserer Zeit für Gesetzgebung und Rechtswissenschaft* of 1814, he argued that the *Volksgeist* was an expression of the law and it was to be found in the Roman Law and not in codifications. This was an attack on the natural law approach that presumed that the optimal law could be derived in a rational manner, without regard to its historical evolution.<sup>271</sup> Similarly, *Gustav von Hugo* argued that the natural law was unable to offer clear results and that policy should adhere to current and past customs.<sup>272</sup>

In fact, *Savigny* had written *Vom Beruf* in reaction to *Anton Friedrich Justus Thibaut*’s *Über die Notwendigkeit eines allgemeinen bürgerlichen Rechts in Deutschland*, which had been published in the same year. *Thibaut* claimed that the law must always be wise and independent from current and past customs. This was possible only if external criteria were used<sup>273</sup> and, as he believed, it was the only way to change unjust law. For *Thibaut*, the conventional legal thought of his age was extremely conservative as it tried to maintain the existing social and economic order.<sup>274</sup> He criticized that there were few scholars sufficiently knowledgeable to draft such general, abstract laws.<sup>275</sup> The dispute between *Thibaut* and *Savigny* was not much different from *Bentham*’s attack on *Blackstone*. However, external criteria (like the maximization of some intrinsic good) were not explicitly addressed in the German dispute, and they eventually lost their importance in the following decades as *Savigny*’s Historical School began to dominate the scene.

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<sup>267</sup> JOHANN G. HERDER, AUCH EINE PHILOSOPHIE DER GESCHICHTE ZUR BILDUNG DER MENSCHHEIT 37 (1774, Suhrkamp 1967) (arguing that one should „go inside the specific age, the area, and the history in general, and feel everything from within“).

<sup>268</sup> See, e.g., SKIRBEKK & GILJE, *supra* note 266, at 559 et seq.

<sup>269</sup> See WIEACKER, *supra* note 62, at 356 et seq (explaining the influence of *Herder* on *Savigny*).

<sup>270</sup> Büllesbach, *supra* note 261, at 416.

<sup>271</sup> FRIEDRICH KARL VON SAVIGNY, VOM BERUF UNSERER ZEIT FÜR GESETZGEBUNG UND RECHTSWISSENSCHAFT (1814).

<sup>272</sup> WIEACKER, *supra* note 62, at 379-80. Regarding *Savigny*’s position via the Natural Law approach compare HORST SCHRÖDER, FRIEDRICH KARL VON SAVIGNY – GESCHICHTE UND RECHTSDENKEN BEIM ÜBERGANG VOM FEUDALISMUS ZUM KAPITALISMUS IN DEUTSCHLAND 257 et seq (1984).

<sup>273</sup> ANTON F. J. THIBAUT, ÜBER DIE NOTWENDIGKEIT EINES ALLGEMEINEN BÜRGERLICHEN RECHTS IN DEUTSCHLAND 12-13 (1814, reprint Goldbach 1997) (arguing that legal norms not only have to be „clear, unequivocal, and comprehensive“ but that they must also be „wise“ and „appropriate“).

<sup>274</sup> *Id.* at 58.

<sup>275</sup> *Id.* at 38.

For *Savigny*, the law was to be found in customs, legal scholarship and the practice, most importantly from concepts of Roman Law. He argued that Roman Law embodied the true will of the people as a whole. However, this interpretation of the *Volksgeist* was presumed to be independent of social and political movements. Savigny did not believe that the law had an end in itself.<sup>276</sup> However, his approach required this assumption to allow further interpretative work by jurists! It denied a social function and legitimized the law on its historical evolution, for which reason it was impermissible to question its social adequacy. Clearly, non-legal criteria were necessary for the original development of the Historical School of Law; once this approach was accepted, external criteria became superfluous.<sup>277</sup>

From today's perspective, *Savigny's* approach was strictly conservative in the sense that it was opposed to change and progress.<sup>278</sup> Under this theory, any changes had to be changes through interpretation, which meant that Savigny allocated the decision-making authority to the legal community instead of philosophers or the government.<sup>279</sup> This allocation of powers was affirmed by *Puchta's* approach, which created a monopoly of the legal community to interpret and thereby to make law.<sup>280</sup> Over the course of the 19<sup>th</sup> century, the jurist class obtained not just their own discipline, independent of philosophy; but they also played a major role in the decision-making process through their interpretative competences.

This idiosyncratic allocation of important decision-making power to jurists, as it was brought forward by Savigny and his followers, meant that other authorities were restrained from implementing reforms if those reforms were incoherent with the existing concepts.<sup>281</sup> This consequence closely relates to Savigny's argument that codification and statutory law were an expression of authoritative power and not the people's will.<sup>282</sup> Savigny apparently believed that allocating decision rights to lawyers was in the interest of the people, and that no other (interest) group was better suited as its representative.<sup>283</sup>

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<sup>276</sup> SAVIGNY, *supra* note 271, at 18 (explicitly stating that the law had no end in itself).

<sup>277</sup> Grimm, *supra* note 42, at 476-77. SCHRÖDER, *supra* note 272, at 215 et seq, 218 et seq, passim (explaining how Savigny suppressed philosophical inquiries in his theory).

<sup>278</sup> See WIEACKER, *supra* note 62, at 383, 385. Cf. JOACHIM WEGE, POSITIVES RECHT UND SOZIALER WANDEL IM DEMOKRATISCHEN UND SOZIALEN RECHTSSTAAT (1977) 132 ff (arguing that legal positivism is used to maintain the status quo).

<sup>279</sup> SAVIGNY, *supra* note 271, at 7-8. (explicitly stating that under his theory the people are represented by lawyers). Cf. WIEACKER, *supra* note 62, at 392; DAWSON, *supra* note 62, at 456-57.

<sup>280</sup> GEORG F. PUCHTA, DAS GEWOHNHEITSRECHT (1828, 1837). WIEACKER, *supra* note 62, at 399 f; Grimm, *supra* note 42, at 478 (both arguing that Puchta consolidated the lawyers' monopoly).

<sup>281</sup> Grimm, *supra* note 42, at 475.

<sup>282</sup> Cf. SAVIGNY, *supra* note 271, at 10, 21.

<sup>283</sup> See, e.g., KARL MARX & FRIEDRICH ENGELS, DIE DEUTSCHE IDEOLOGIE (1845-46; published 1932); A. MENGER, *supra* note 230; Hermann Kantorowicz, *Savigny and the Historical School of Law*, 53 L. Q. REV. 335 (1937); Reimann, *supra* note 62, at 95 et seq, 110 et seq. For an extensive elaboration of the political components of Savigny's theory see SCHRÖDER, *supra* note 272.



Due to the inherent indeterminacy of the law, personal, moral views of jurists were ultimately allowed to enter the legal system.<sup>284</sup> In order to build and maintain the lawyers' empire, lawyers believed (or pretended) to rely on an objective, impartial method which excluded political issues. This was the only way to gain acceptance as an independent authority in this pre-democratic period. The presumably depoliticized law was used to synthesize the feudal system with the developing capitalistic one.<sup>285</sup>

Several scholars criticized the Historical School, among others, *Hegel* in his treatise on legal philosophy of 1821<sup>286</sup> and *Kirchmann* in his famous speech of 1847<sup>287</sup>. Much later, the free-law movement attacked Savigny's methods<sup>288</sup> but the Historical School had already too thoroughly penetrated the legal community for subsequent change to be possible.<sup>289</sup> *Puchta*<sup>290</sup>, *Windscheid*<sup>291</sup>, *Gerber*<sup>292</sup> and other proponents of the Historical School's "Romanistic" and "Germanistic" branches perpetuated Savigny's approach that was initially developed for private law, but also applied to public law.<sup>293</sup> Their methods were clearly directed at restating the existing law and not at reform.<sup>294</sup> With Puchta, the emphasis on the jurists' law resulted in an ever growing belief in coherence, systematization and constructivism.<sup>295</sup> Puchta's emphasis of legal terms led to a separation of law from social circumstances,<sup>296</sup> something that Savigny had predicted would happen.<sup>297</sup> Even the "Germanistic" branch of the Historical School, which was concerned about 19<sup>th</sup> century industrialization, widely approved of legal science as an instrument independent from social consequences.<sup>298</sup>

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<sup>284</sup> Cf. Grimm, *supra* note 42, at 482, 484.

<sup>285</sup> SCHRÖDER, *supra* note 272, at 221-22, 276.

<sup>286</sup> GEORG W. F. HEGEL, GRUNDLINIEN DER PHILOSOPHIE DES RECHTS 182-83, § 211 (1821; reprint Felix Meiner 1995).

<sup>287</sup> JULIUS H. V. KIRCHMANN, ÜBER DIE WERTLOSIGKEIT DER JURISPRUDENZ ALS WISSENSCHAFT (1847-48) (arguing that the exclusion of politics from the discipline of law is a misery); cf. RUDOLF MÜLLER-ERZBACH, WOHIN FÜHRT DIE INTERESSENJURISPRUDENZ? 36 (1932); cf. KERSTING, POLITIK UND RECHT, ABHANDLUNGEN ZUR POLITISCHEN PHILOSOPHIE DER GEGENWART UND ZUR NEUZEITLICHEN RECHTSPHILOSOPHIE 342 (2000).

<sup>288</sup> See, e.g., Kantorowicz, *supra* note 283, at 326 et seq.

<sup>289</sup> See Müller-Erzbach, *supra* note 287, at 36. WIEACKER, *supra* note 62, at 382-83 (explaining Savigny's role in this development); for further references see Kantorowicz, *supra* note 283, at 326.

<sup>290</sup> GEORG F. PUCHTA, LEHRBUCH DER PANDEKTEN 29-30, § 16 (1838; 9th edition, Leipzig 1863).

<sup>291</sup> BERNHARD WINDSCHEID, DIE GESCHICHTLICHE SCHULE IN DER RECHTSWISSENSCHAFT, NORD UND SÜD, VOL IV 42 et seq (1878) reprinted in OERTMANN, *supra* note 248, at 66 et seq; *Eck*, Gedächtnisrede 17 cited in Oertmann, *Windscheid als Jurist*, *supra* note 248, at XXXI.

<sup>292</sup> CARL F. GERBER, SYSTEM DES DEUTSCHEN PRIVATRECHTS (1848); CARL F. GERBER, GESAMMELTE JURISTISCHE ABHANDLUNGEN (1872).

<sup>293</sup> See, e.g., CARL F. GERBER, ÜBER ÖFFENTLICHE RECHTE (1852). Other proponents were Laband und Jellinek; see Alexander Somek, *German legal philosophy and theory in the nineteenth and twentieth century* in PATTERSON, A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY 347-48 (1999).

<sup>294</sup> Grimm, *supra* note 42, at 479 (with reference to Puchta).

<sup>295</sup> *Id.* at 478.

<sup>296</sup> PUCHTA, *supra* note 256, at 36-37.

<sup>297</sup> SAVIGNY, *supra* note 271, at 18; cf. HERGET, *supra* note 1, at 110-11.

<sup>298</sup> Grimm, *supra* note 42, at 480 et seq (with reference to Gerber).

Ironically, the codifications of the early 19<sup>th</sup> century, which were drafted under natural law principles, favored this separation. They created legal material that lawyers could work with, so that the lawyers did not need to revert to natural law anymore in order to find legal norms.<sup>299</sup> Clearly, the presumption was that external criteria were accounted for through legislation and once accepted would not be questioned.<sup>300</sup> New legal norms could then only be created within the boundaries of the legal constructs. In a way, 19<sup>th</sup> century legal science returned to a similar kind of formalism of which they had accused the earlier natural law movement.<sup>301</sup> The *Kodifikationsfrage* (the dispute about codification)<sup>302</sup> was carried out between those who were in favor of codification and those that were against it because a codification would neglect the historical evolution of the law. This dispute eventually unraveled, at least for Windscheid, by codifying the historically evolved law.<sup>303</sup>

This separation of legal science from social circumstances was supported by an engrained anticonsequentialist tenor of German philosophy, most importantly of German Idealism. Even though German Idealism was opposed to the Historical School, the exclusion of social consequences was inherent in both schools.<sup>304</sup> Kant thought that the moral value of something could not be judged by the consequences, but that there was a value in itself,<sup>305</sup> which was subject to pre-empirical and not empirical knowledge.<sup>306</sup> German idealism formed the basis of influential 20<sup>th</sup> century writing<sup>307</sup> and clearly ran contrary to utilitarianism, and thus, contrary

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<sup>299</sup> *Id.* at 472.

<sup>300</sup> GERBER, SYSTEM, *supra* note 292, at XI (1848, 5<sup>th</sup> edition 1955). This was closely connected to the decreasing use of a historical interpretation of legal norms; *cf.* DAWSON, *supra* note 62, at 444-45.

<sup>301</sup> WIEACKER, *supra* note 62, at 372 ff, 401 f (arguing that legal positivism and the natural law approach had a similar methodology).

<sup>302</sup> For a short summary *see* WIEACKER, *supra* note 62, at 390 et seq.

<sup>303</sup> WINDSCHEID, *supra* note 291, at 75: „Are these really the alternatives: Either a codification or the centuries of legal work ... We want the code and the centuries of legal work as well.“ [emphasis in the original text]; compare also BERNHARD WINDSCHEID, RECHT UND RECHTSWISSENSCHAFT, GREIFSWALDER UNIVERSITÄTS-FESTREDE (1854) reprinted in OERTMANN, *supra* note 248, at 19. It is worthwhile noting that Savigny was not entirely and at all times against codifications but he was strictly opposed to statutory law independent of the existing law; SAVIGNY, *supra* note 271, at 10-11.

<sup>304</sup> Concerning the influence of German Philosophy on Savigny *see* SCHRÖDER, *supra* note 272, at 215 et seq, 224-25, 227 (arguing, however, that Savigny often misunderstood philosophical writings). Regarding the influence of Kant and Fichte on Savigny *see* KNUT W. NÖRR, *Savignys Anschauung und Kants Urteilkraft* in FEST-SCHRIFT FÜR HELMUT COING VOL I 615 et seq (1982); *cf.* WIEACKER, *supra* note 62, at 373-74, (arguing that Kant's work „Critique of Pure Reason“ was the historical basis of formalism, most importantly of legal positivism).

<sup>305</sup> IMMANUEL KANT, GRUNDLEGENG DER METAPHYSIK DER SITTEN (1785): “In the realm of ends everything has either a price or a worth. Anything with a price can be replaced by something else as its equivalent, whereas anything that is above all price and therefore admits of no equivalent has worth ... neither nature nor art can supply anything that would make up for that lack in you; for their value doesn't lie in the effects that flow from them ...”.

<sup>306</sup> OTFRIED HÖFFE, EINFÜHRUNG IN DIE UTILITARISTISCHE ETHIK 43-44 (1992).

<sup>307</sup> *See, e.g.*, NICOLAI HARTMANN, ETHIK (1926); RUDOLF STAMMLER, DIE LEHRE VOM RICHTIGEN RECHTE (1902); KARL LARENZ, RICHTIGES RECHT (1979). *Cf.* KERSTING, *supra* note 287, at 367 (arguing that Stammler did not fully understand Kant); compare also NÖRR, *supra* note 249, at 33.

to law and economics. Anti-consequentialism was only slowly starting to be discredited with Hegel, who used history to explain the current state of affairs.<sup>308</sup> However, historicism was characterized by idealism until *Karl Marx* and his dialectic materialism challenged it in a way that influenced, even though indirectly, the legal discussion. This was the starting point for a widespread emphasis on the consequences of legal norms and the demystification of law – a development that eventually led to the free-law movement. In spite of this development, utilitarianism was not gaining acceptance. Even consequentialists like Marx criticized utilitarian ethics because they thought it impossible to reduce human wants and desires to a single measure, utility.<sup>309</sup> Critics of legal positivism such as *Scheler* und *Hartmann* developed approaches based on natural law and explicitly turned against utilitarianism.<sup>310</sup> Virtually all important legal writings were based on idealistic approaches and were clearly anti-utilitarian.<sup>311</sup> Few lawyers in the German-speaking area of Europe were pro-utilitarian, most prominently *Jhering*. *Jhering*, however, used a sociological, not an economic approach, and his theory of legal evolution used external criteria only to a limited extent. Under his theory, the law emerged as a result of a struggle in which people owe a duty to themselves to fight for their rights.<sup>312</sup> An infringement of rights was an injury to one's sense of justice or one's moral integrity.<sup>313</sup> This violation, however, *Jhering* argued was not a certain utility loss but rather a violation of the concept of law as such.<sup>314</sup> Only in a second step, he explained deterrence effects of a norm that established a duty to defend oneself.<sup>315</sup> Altogether, there was a clear anti-utilitarian attitude which did not exclusively come from German idealism.<sup>316</sup> It is one reason for the general dismissal of law and economics.

### 5.3. Legal Realism as a missing link?

American legal realism was an important antecedent for law and economics and for its successful reception in legal thought. It discredited prevailing dogmas and so created space for

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<sup>308</sup> ALFRED VERDROSS, *ABENDLÄNDISCHE RECHTSPHILOSOPHIE* 161 (1963) (calling Hegel a follower of the Historical School of Law). But *cf. supra* note 286, regarding Hegel's critique on Savigny.

<sup>309</sup> MARX & ENGELS, *supra* note 283, at 394 et seq (arguing that utilitarianism is a „theory of mutual exploitation“).

<sup>310</sup> MAX SCHELER, *DER FORMALISMUS IN DER ETHIK UND DIE MATERIALE WERTETHIK* (1913-1916), *gesammelte Werke* 2, at 350 (1954); HARTMANN, *supra* note 307, at 79-80. These approaches were further developed by *Coing* and others; WIEACKER, *supra* note 62, at 591-92. For further references *see* VERDROSS, *supra* note 308, at 205 et seq (arguing that there is an anti-hedonistic attitude).

<sup>311</sup> *See, e.g.*, FN 307. *Cf.* KERSTING, *supra* note 287, at 334 et seq.

<sup>312</sup> RUDOLPH VON JHERING, *DER KAMPF UMS RECHT* 20-46 (23<sup>rd</sup> edition, 1946).

<sup>313</sup> *Id.*, at 18.

<sup>314</sup> *Id.*, at 40.

<sup>315</sup> JHERING, *supra* note 312, at 46 et seq.

<sup>316</sup> Anton Hügli & Byung-Chul Han, *Utilitarismus*, in *HISTORISCHES WÖRTERBUCH DER PHILOSOPHIE*, VOL 11, at 506 (2001).

new developments. Its critique of legal methods sparked a demand for new criteria for decision-making. On the normative side, judges were called upon to think about policy more openly; on the positive side, lawyers needed to find better tools for predicting the consequences of the law. There was a similar movement in German-speaking Europe, known as the free-law school, which, however, was not as successful as Legal Realism. Temporarily, the free-law movement managed to undermine the prevailing formalism to some degree,<sup>317</sup> but it eventually received a deadly blow by the Nazi regime. As *Interessenjurisprudenz* assumed the legacy of classical formalism, interdisciplinary research was put to an end. Heck, one of the best known proponents of this school, explicitly emphasized a purely internal view of the law.<sup>318</sup>

The end of classical formalism was a consequence of the emphasis on the social function of the law. Many understood law as a means to regulate and steer human behavior and not as an end in itself.<sup>319</sup> The free-law movement might have discredited classical legal thought altogether but it managed to do so only with respect to the most extreme types of formalism. The movement slowly began to develop towards the end of the 19<sup>th</sup> century, as a critique on the theory of lacunae<sup>320</sup> and reached its peak in the years preceding World War I.<sup>321</sup> At the same time, the closely connected Law and Sociology movement<sup>322</sup> criticized the dominant understanding of the law. The free-law movement emerged from a discussion group of a small

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<sup>317</sup> LARENZ, *supra* note 24, at 19 et seq. Cf. Kaufmann, *supra* note 261, at 121 (arguing that the free-law movement was primarily directed against the conceptual jurisprudence). For an attack on conceptualism see, e.g., Eugen Ehrlich, *Über Lücken im Rechte*, JURISTISCHE BLÄTTER 447 (1888); EUGEN EHRLICH, FREIE RECHTSFINDUNG UND FREIE RECHTSWISSENSCHAFT (1903); Eugen Ehrlich, *Die richterliche Rechtsfindung auf Grund des Rechtssatzes*, 67 JHERINGS JAHRBÜCHER FÜR DE DOGMATIK DES BÜRGERLICHEN RECHTS 1917, 1-80 [reprinted in MANFRED REHBINDER, EUGEN EHRLICH: RECHT UND LEBEN (1967)]. Cf. Herget & Wallace, *supra* note 85.

<sup>318</sup> PHILIPP HECK, BEGRIFFSBILDUNG UND INTERESSENJURISPRUDENZ 27 (1932) (arguing that the *Interessenjurisprudenz* was based on merely legal foundations). Cf. HERGET, *supra* note 1, at 111 (arguing that the „scholastic tradition persisted, but in a new form“); cf. Alexander Somek, *From Kennedy to Balkin: Introducing Critical Legal Studies from a Continental Perspective*, 42 KAN. L. REV. 759, 763 (1994) (arguing that „... every attack on legal formality seems to have been silenced“); accord. Somek, *supra* note 293, at 348.

<sup>319</sup> Especially Jhering's *Law as a Means to an End* (1877-83) had an immense influence on the legal discourse. RUDOLPH VON JHERING, DER ZWECK IM RECHT, VOL I 250 (3<sup>rd</sup> edition 1893) argued, e.g., that the law was „not the most sublime in the world and had no end in itself“ but the law „was a means to an end, final purpose of which was the existence of a society.“ Cf. Winkler, *supra* note 24, at 262, 276-77. Regarding Marx see WEGE, *supra* note 278, at 47 et seq.

<sup>320</sup> See, e.g., Ehrlich, *Lücken*, *supra* note 317, at 447-630 (arguing that, due to the deeply enrooted approach to law, changes in the law were only possible by means of the „good faith“ clause; *id.* at 112. See also OSKAR BÜLOW, GESETZ UND RICHTERAMT (1885). Regarding the free-law critique on the presumed determinacy of the law see also DAWSON, *supra* note 62, at 442-43; LUIGI LOMBARDI, GESCHICHTE DES FREIRECHTS 54 et seq (1967).

<sup>321</sup> MARTIN KRIELE, GRUNDPROBLEME DER RECHTSPHILOSOPHIE 43 (and footnote 4) (2004) (arguing that the main works of the free-law school were written between 1906 and 1915).

<sup>322</sup> MAX WEBER, WIRTSCHAFT UND GESELLSCHAFT (1921/22; 5<sup>th</sup> edition 1976); EUGEN EHRLICH, GRUNDLE- GUNG DER SOZIOLOGIE DES RECHTS (1913).

number of people around *Kantorowicz* and *Radbruch* in 1903 and 1904.<sup>323</sup> Its name can be traced to a speech given by *Eugen Ehrlich* in 1903.<sup>324</sup> In 1906, *Kantorowicz* published his influential book „Der Kampf um die Rechtswissenschaft“ (The Struggle for Legal Science) which was an outright attack on classical legal thought.<sup>325</sup> Similar to American legal realism, members of the free-law movement understood judicial opinions as discretionary acts, which were only justified by a charade of legal methods after the actual decision had been taken.<sup>326</sup> Analogies and justifications for extensive and restrictive modes of interpretation were considered to be pseudo-logic arguments.<sup>327</sup> Hermeneutics played a major role in that the pre-understanding of a judge was considered decisive for legal intuition and thus for the outcome of the case.<sup>328</sup> Free-law scholars argued that an objective interpretation which assumed that legal norms could have a unique meaning was not possible. In *Ehrlich's* words: "The one who speaks always wants to say something different from what the one who listens understands."<sup>329</sup> Others such as *Kantorowicz* likewise attacked dogmas such as objectivism and predictability of the case law.<sup>330</sup> *Kantorowicz's* primary goal was to explain the extent of freedom judges already had<sup>331</sup> and not, contrary to some of his critics,<sup>332</sup> to facilitate arbitrary jurisprudence.<sup>333</sup> From these insights, free-law scholars such as *Fuchs* derived a fact-base approach to the law.<sup>334</sup> Moreover, they encouraged lawyers to engage in interdisciplinary work.<sup>335</sup>

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<sup>323</sup> The participants surrounding *Kantorowicz* and *Radbruch* discussed writings by *Ehrlich*, *Savigny* and others; see *Muscheler, Einführung*, in *HERMANN KANTOROWICZ (GNAEUS FLAVIUS), DER KAMPF UM DIE RECHTSWISSENSCHAFT VIII* (reprint 2002). Cf. comprehensively regarding *Kantorowicz* *KARLHEINZ MUSCHELER, HERMANN ULRICH KANTOROWICZ: EINE BIOGRAPHIE* (1984). The name *Freirecht* (free-law) goes back to *EUGEN EHRLICH, FREIE RECHTSFINDUNG UND FREIE RECHTSWISSENSCHAFT* (1903).

<sup>324</sup> *Ehrlich, Freie Rechtsfindung und Freie Rechtswissenschaft* (1903).

<sup>325</sup> *KANTOROWICZ, supra* note 243 (foreword).

<sup>326</sup> *KRIELE, supra* note 321, at 43. A good example of this critique is *HERMANN ISAY, RECHTSNORM UND ENTSCHEIDUNG* 61-62 (1929).

<sup>327</sup> *Muscheler, Einführung, supra* note 323, at XVII (about *Kantorowicz*). *KANTOROWICZ, supra* note 243, 35 himself used the expression „dishonest shortcuts“. See also *HERGET, supra* note 1, at 111; *Somek, supra* note 293, at 348.

<sup>328</sup> Cf. *Kaufmann, supra* note 261, at 122.

<sup>329</sup> *Ehrlich, Rechtsfindung supra* note 317, at 207 (criticising objectivity in the law). *BYDLINSKI, supra* note 19, at 69 et seq is a good example of how hermeneutics have influenced contemporary legal methods.

<sup>330</sup> *KANTOROWICZ, supra* note 243, at 36-37. See also *Ernst Fuchs, Freirechtsschule und Wortstreitgeist, MONATSSCHRIFT FÜR HANDELSRECHT UND BANKWESEN* 17 (1918, reprinted in *FOULKES, supra* note 261) (criticising legal dogmata); cf. *Kaufmann, supra* note 261, at 121.

<sup>331</sup> *KANTOROWICZ, supra* note 243, at 35.

<sup>332</sup> See, e.g., *HECK, supra* note 318, at 116 et seq; see also *PHILIPP HECK, DAS PROBLEM DER RECHTSGEWINNUNG* 23-24 (1912, 2<sup>nd</sup> edition 1932).

<sup>333</sup> *KANTOROWICZ, supra* note 243, at 34. Still this critique was put fourth several times after *Kantorowicz's* clarification, see especially *HECK, BEGRIFFSBILDUNG, supra* note 318, at 105, 111; *HECK, supra* note 332, at 22 et seq.

<sup>334</sup> *Fuchs, supra* note 261, at 7.

<sup>335</sup> See, e.g., *KANTOROWICZ, supra* note 243, at 38; *Fuchs, supra* note 261, at 7; *KARL G. WURZEL, DAS JURISTISCHE DENKEN* 5-6, 70 et seq (1904, reprint 1991); *KARL G. WURZEL, DIE SOZIALDYNAMIK DES RECHTS* 182 et

Prior to World War II, the free law school was not only accepted among academics,<sup>336</sup> but also widely recognized by judges, including a Chief Justice of the Austrian Supreme Court.<sup>337</sup> Some even understood, contrary to a long tradition, that judicial decisions had the same legal power and validity as a statute.<sup>338</sup>

Today, free-law notions appear infrequently in recognized textbooks of legal history, legal outlines of law and philosophy,<sup>339</sup> and legal textbooks on legal methodology.<sup>340</sup> The decline and eventual fall of the movement was partly due to a misunderstanding of the main propositions.<sup>341</sup> More importantly, free-law scholars, such as Kantorowicz, were professionally pre-empted. In spite of these obstacles, the movement might still have persisted if the Nazis had not come to power. Due to the Jewish ancestry of some of its adherents,<sup>342</sup> they were often subject to derision.<sup>343</sup> As a result of the Nazi regime, many free-law scholars were immediately suspended from their posts, which led to a rapid decline of the movement.<sup>344</sup> Other than in the United States there was no time for the school to develop until World War II. The fact that legal methods are often said to show some continuity prior and posterior to World War

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seq (1924, reprint 1991). *Müller-Erbach*, *supra* note 287, at 107 argued that German corporate law did not account for the economic implications of dispersed ownership in publicly held corporations, and referred to the failure of the general meeting as a corporate decision-maker body.

A very well-known free-law work of the 1920s include ISAY, *supra* note 326.

<sup>337</sup> See ISAY, *supra* note 326, at 62 et seq for citations of the mentioned lawyers. See also NÖRR, *supra* note 249, at 30 (with reference to decisions). See the decision of the Reichsgericht, June 27, 1922, RGZ 104, 397 (explaining the inventive role of judges).

<sup>338</sup> NÖRR, *supra* note 249, at 30 et seq. Cf. DAWSON, *supra* note 62, at 432 et seq, 463 (arguing that in the 1920's courts increasingly cited precedents as a results of the "case-law revolution").

<sup>339</sup> WIEACKER, *supra* note 62, VERDROSS, *supra* note 308; Kaufmann, *supra* note 261, at 1 et seq.

<sup>340</sup> BYDLINSKI, *supra* note 19, with few sporadic references; PAWLOWSKI, *supra* note 19, at no. 137 with a short reference to Isay; See LARENZ, *supra* note 24, at 59-62 (with a discussion of the free-law school); however, this part is missing in the student's edition: KARL LARENZ, *METHODENLEHRE – STUDIENAUSGABE* (1992, 2<sup>nd</sup> edition).

<sup>341</sup> Reh binder, *Vorwort*, *supra* note 317; Muscheler, *Einführung*, *supra* note 323, at XIII-IX. BYDLINSKI, *supra* note 19, at 152.

<sup>342</sup> See LOMBARDI, *supra* note 320, at 41 (briefly analysing the ancestry of some free-law proponents). See also NÖRR, *supra* note 249, at 31.

<sup>343</sup> See, e.g., Philipp Heck, *Die Interessenjurisprudenz und ihre neuen Gegner*, 22 ARCHIV FÜR CIVILISTISCHE PRAXIS 129 et seq, 151 (1936) (arguing that various proponents of the free-law school and the sociological jurisprudence were „non-aryan“. See also Foulkes, *Vorwort* in FOULKES, *supra* note 261, at 9 (discussing the roles of Heck and Thiema).

<sup>344</sup> Muscheler, *Einführung*, *supra* note 323, at XXII; Foulkes, *Vorwort* in FOULKES, *supra* note 261, at 9. *Contra* apparently Behrends, *Von der Freirechtsbewegung zum Ordnungs- und Gestaltungsdenken* in RALF DREIER & WOLFGANG SELLERT, *RECHT UND JUSTIZ IM „DRITTEN REICH“* 34 et seq (1989) (arguing that the free-law movement met the legal theory of the Nazi-regime). Kantorowicz was suspended on April 13, 1933; see Jörn Eckert, *Was war die Kieler Schule?*, in FRANZ JÜRGEN SÄCKER, *RECHT UND RECHTSLEHRE IM NATIONALSOZIALISMUS* 44 (1992).

II<sup>345</sup> does not mean that the Nazi regime did not have any influence. On the contrary, it prevented a change in legal thought that elsewhere, especially in the United States was made.<sup>346</sup> After World War II, free-law scholars such as *Radbruch*<sup>347</sup> and *Esser*<sup>348</sup> were quite successful in the academic debate<sup>349</sup> but were unable to deploy any serious influence on the daily practice of law.<sup>350</sup> Even though the free-law school did much to discredit formalism, the legacy of classical legal thought was taken up by the school of *Interessenjurisprudenz*.<sup>351</sup> *Interessenjurisprudenz* after all was a school that used hermeneutics and other insights to advance classical legal thought and not to replace it with an entirely different approach.<sup>352</sup> Some free-law scholars mitigated their own views which partly led to a convergence of the two schools.<sup>353</sup> The fall of the free-law school was an important factor for today's aversion against law and economics.<sup>354</sup> If classical legal thought had been discredited and free-law views concerning the indeterminacy of the law had become widely accepted, a demand for external criteria to evaluate legal propositions would likely have developed.

#### 5.4. Reproduction in "Interessenjurisprudenz" and "Wertungsjurisprudenz"

The school of *Interessenjurisprudenz* and its successor *Wertungsjurisprudenz* form today's basis for legal methods.<sup>355</sup> Both approaches make references to policy and legislation as an inferior part of legal science, and exclude external criteria, including economic efficiency.

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<sup>345</sup> Ingeborg Maus, *Juristische Methodik und Justizfunktion im Nationalsozialismus*, in HUBERT ROTTLEUTHNER, RECHT, RECHTSPHILOSOPHIE UND NATIONALSOZIALISMUS, 18 ARSP-BEIHEFT 167 et seq, 193 (1983); Ingeborg Maus, „Gesetzesbindung“ der Justiz und Struktur der Nationalsozialistischen Rechtsnormen, in DREIER & SELERT, *supra* note 344, at 81 et seq.

<sup>346</sup> For a discussion on whether the Nazi's legal theory was based on positivism or natural law see Kaufmann, *Rechtsphilosophie und Nationalsozialismus* in ROTTLEUTHNER, *supra* note 345, at 1 et seq.

<sup>347</sup> GUSTAV RADBRUCH, EINFÜHRUNG IN DIE RECHTSWISSENSCHAFT 161 (1952, 9<sup>th</sup> edition) (arguing that the methods of interpretation are chosen after the decision has been made).

<sup>348</sup> ESSER, *supra* note 33, at 7-8 (arguing that the courts do not apply doctrinal legal methods but that they simply use them for justifying their decision legal artis); cf. *id.*, at 14-15, 23-24, 41-42.

<sup>349</sup> See, e.g., LARENZ, *supra* note 307, at 24. See also PAWLOWSKI, *supra* note 19, at no. 757 et seq with reference to Esser, Harenburg and others.

<sup>350</sup> Kaufmann, *supra* note 261, at 82-83; s auch unten Abschnitt 5.5.

<sup>351</sup> HERGET, *supra* note 1, at 111 and *infra* note 318. See above all Heck's critique on the free-law school: HECK, *supra* note 318, at 104 et seq; HECK, *supra* note 332, at 23 et seq; Heck, *supra* note 343, at 129 et seq.; also see MARTIJN W. HESSELINK, THE NEW EUROPEAN LEGAL CULTURE 30-32 (2001) (explaining that in Europe in general, while 19<sup>th</sup> century formalism ended as it did in the US, it was replaced by *Interessenjurisprudenz* and similar schools that assigned at least a limited role to considerations extraneous to the legal system in legal reasoning).

<sup>352</sup> ESSER, *supra* note 33, at 116 et seq.

<sup>353</sup> HECK, *supra* note 318, at 105-06 with reference to Ehrlich; and HECK, *supra* note 332, at 25-26 with reference to Kantorowicz (arguing that the term „free-law method“ should be dropped). Cf. Muscheler, *Einführung*, *supra* note 323, at XVII bzw Karlheinz Muscheler, *Ein Klassiker der Jurisprudenz: „Der Kampf um die Rechtswissenschaft“ von Hermann Kantorowicz*, NEUE JURISTISCHE WOCHENSCHRIFT 567 (2006); also see LOMBARDI, *supra* note 320 (discussing the free-law school and the *Interessenjurisprudenz* as one movement).

<sup>354</sup> Cf. Somek, *Kennedy*, *supra* note 318, at 763-64 (making the same argument regarding the aversion of Critical Legal Studies).

<sup>355</sup> LARENZ, *supra* note 24, at 120; BYDLINSKI, *supra* note 19, at 116-17, 123.

Other than the free-law school, which disengaged the unquestioned trust in statutes, the *Interessenjurisprudenz* restored the “faithfulness” in statutes and legal documents in general. This reestablishment included a disuse of external criteria, and was a way of pretending that lawyers were impartial – precisely because they were only interpreting a given norm. *Heck* explained that *Interessenjurisprudenz* distinguished itself from the free-law school exactly in its confidence in statutory law.<sup>356</sup> For him, the appropriateness of a norm was often much less important than the coherence with the legal system.<sup>357</sup> The younger school of *Wertungsjurisprudenz* had a very similar approach in that all value judgments had to be found in statutory law. Not surprisingly, legal theorists often find it difficult to distinguish between the two.<sup>358</sup> It was justified on the premise that legal certainty was more important than justice.<sup>359</sup>

The battle over the heritage of *Begriffsjurisprudenz* resulted in a general acceptance of social norms as part of legal methods – but only if they were mentioned in the legislative documents.<sup>360</sup> *Interessenjurisprudenz* assumed that legislators sought to solve conflicts between different human interests. Thus, any relevant conflict would be referred to in the official explanatory documents accompanying legislation, that is, it had to be somehow derived from and recognized by the legislative process. Contrary to *Begriffsjurisprudenz*, it displaced conceptual abstractions with conflicts of interest. However, general policy arguments and moral views by the judges were not allowed to be officially mentioned in judicial reasoning.<sup>361</sup> Judges were said to be bound by the “legislators’ views”, instead of their own intuitions.<sup>362</sup> Scholarship should support judicial decision-making by organizing legal materials and filling lacunae in the legal system.<sup>363</sup>

With this internal view of the law, *Interessenjurisprudenz* was unable to develop a theory of policy and legislation. *Heck* described the “finding of norms” recursively: the law as it should be is part of interpretation and thus the law as it is.<sup>364</sup> According to *Heck*, solely legal tools were permitted in interpretation, which should be totally independent from external moral

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<sup>356</sup> HECK, *supra* note 318, at 111, 118; Heck, *supra* note 343, at 144. See also Julius Binder, *Bemerkungen zum Methodenstreite in der Privatrechtswissenschaft*, 100 ZEITSCHRIFT FÜR DAS GESAMTE HANDELSRECHT UND WIRTSCHAFTSRECHT 82 (1934).

<sup>357</sup> HECK, *supra* note 318, at 105; HECK, *supra* note 332, at 5.

<sup>358</sup> Grimm, *supra* note 42, at 469 et seq; cf. BYDLINSKI, *supra* note 19, at 123, 126.

<sup>359</sup> KRIELE, *supra* note 321, 44.

<sup>360</sup> BYDLINSKI, *supra* note 19, at 114.

<sup>361</sup> Cf. BYDLINSKI, *supra* note 19, at 115 et seq.

<sup>362</sup> HECK, *supra* note 332, at 8.

<sup>363</sup> HECK, *supra* note 318, at 126.

<sup>364</sup> *Id.* at 127-28.



views.<sup>365</sup> Clearly, *Interessenjurisprudenz* promoted a constructivist, internal view of the law, much like 19<sup>th</sup> century *Begriffsjurisprudenz*, and left little space for interdisciplinary studies. Part of this approach was the immense emphasis of coherence. *Heck* thought that the interpreter should always take into account the entirety of the statutes when reading legal norms.<sup>366</sup> Any gap had to be filled from within the legal system in strict faith to the statutes;<sup>367</sup> any external criteria that indicated a different interpretation or proposed a different reading, arguably a more appropriate one, had to be excluded. It is not surprising that other social sciences such as history, philosophy, sociology and economics were explicitly excluded from legal inquiry.<sup>368</sup> This anti-interdisciplinary view prevails even today.<sup>369</sup>

Today's *Wertungsjurisprudenz* picked up the internal view of the law from *Interessenjurisprudenz*, but argued that a "subjective" (originalist) interpretation should be replaced by an "objective" interpretation, that is an interpretation which focuses on the "values" embodied in legislative acts.<sup>370</sup> Proponents of *Wertungsjurisprudenz* argue that it is possible to offer a method of interpretation that yields clear and objective results where legislative intent is not made clear, and thus to repel value judgments by the courts.<sup>371</sup> According to *Wertungsjurisprudenz*, values have to be found within the relevant statutes and not by means of external criteria; for this inquiry it is thought to be irrelevant that the value judgments in a pluralistic society (and thus statutory values) are necessarily manifold.<sup>372</sup> Many believe that legislation serves as a compromise normalizing divergent values.<sup>373</sup> Of course, this undertaking is much too optimistic as it is impossible to determine "objective values" of particular statutes.

Today, few scholars argue that decision-making has to include external criteria and even if they do, criteria are not truly external. For example, *Zippelius* argues for taking into account the "legal ethos of a community" and the "prevailing views of justice" that are to be found in the constitution and the entirety of the legal norms.<sup>374</sup> Most think that external criteria may not be used to interpret the law: *Pawlowski* argues that the authority of judgements can only

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<sup>365</sup> *Id.* at 28-29.

<sup>366</sup> *Id.* at 107.

<sup>367</sup> *See, e.g. Id.* at 111. *Cf. HERGET, supra* note 1, at 115-16.

<sup>368</sup> HECK, BEGRIFFSBILDUNG, *supra* note 318, at 21.

<sup>369</sup> ALEXANDER SOMEK & NIKOLAUS FORGÓ, NACHPOSITIVISTISCHES RECHTSDENKEN. INHALT UND FORM DES POSITIVEN RECHTS (1996) (fiercely attacking contemporary legal education).

<sup>370</sup> BYDLINSKI, *supra* note 19, at 123-24, 127, 131; LARENZ, *supra* note 24, at 318. *But see* HECK, *supra* note 318, at 96 (mentioning „objective“ elements). *See also* ALEXANDER SOMEK, RECHTSSYSTEM UND REPUBLIK 193 *et seq* (1992).

<sup>371</sup> BYDLINSKI, *supra* note 19, at 128, 131.

<sup>372</sup> ROBERT ALEXY, THEORIE DER JURISTISCHEN ARGUMENTATION 329-30 (1996) (discussing the „exoneration function“ of legal methods and the various ways of internal justifications).

<sup>373</sup> *Id.*

<sup>374</sup> *Zippelius*, Wertungsprobleme im System der Grundrechte (1962) 131 ff; *Zippelius*, Das Wesen des Rechts (1965) 123 ff; *Zippelius*, Juristische Methodenlehre<sup>4</sup> (1985) 12 ff, 21.

be based on legal, that is, statutory norms.<sup>375</sup> *Larenz* states that a „lawyer has an advantage over an ethicist because, other than the ethicist, he is bound by the values predetermined by the legal system, the constitution and the generally accepted legal standards”.<sup>376</sup> *Bydlinski* argues that all criteria used for decision-making have to be found in the statutes; otherwise the law as such could not be clearly defined.<sup>377</sup> This internal view of the law has influenced the policy discussion by reducing the set of arguments to systematic ones. Many lawyers nowadays argue that the law should be coherent when it comes to reforms.<sup>378</sup> For the rest, they argue that the law should be appropriate (“angemessen”, “sachgerecht”) without further specification. These terms have been used by scholars of both the *Interessenjurisprudenz* and *Wertungsjurisprudenz*.<sup>379</sup>

### 5.5. The end of legislation and policy as an element of legal science

The internal view of the law, promoted by the schools of *Interessenjurisprudenz* and *Wertungsjurisprudenz*, was more than apparent in *Hans Kelsen*’s “Pure Theory of Law” through which it has influenced a broad spectrum of legal theories. Whereas *Savigny* argued for an approach under which policy was based on current law, *Kelsen* wanted to ban policy altogether from the legal discourse. The political implications were quite different. During the predemocratic 19<sup>th</sup> century, an internal view of the law had been used to maintain the current law. On the contrary, in post-World-War-One democracies, an internal view of the law was thought to be progressive because the law would most closely reflect the will of the people embodied in legislative enactments.<sup>380</sup> For our purposes, however, the effect was the same – law and economics was rejected as a legal discipline.<sup>381</sup>

Different from *Savigny*, *Kelsen* emphasized the distinction between normative theories (the law as is ought to be) and positive theories (the law as it was). Influenced by logical positivism and the Vienna Circle of philosophy,<sup>382</sup> *Kelsen* argued that normative theories were not

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<sup>375</sup> PAWLOWSKI, *supra* note 19, at no. 95.

<sup>376</sup> LARENZ, *supra* note 24, at 291; *cf.* LARENZ, *supra* note 307, at 25.

<sup>377</sup> BYDLINSKI, *supra* note 19, at 128 (arguing that, due to the “need for rational verification ... the legal standards have to be clearly separated from other standards”).

<sup>378</sup> A good example is the reform of a new Austrian commercial code; *see* the statements [http://www.bmj.gv.at/download/gesetzes/stellungnahmen\\_hraendg2004.pdf](http://www.bmj.gv.at/download/gesetzes/stellungnahmen_hraendg2004.pdf) (last visited on October 14, 2006).

<sup>379</sup> ZB LARENZ, *supra* note 340, at 6; HECK, *supra* note 332, at 8. *Cf.* Nikolaus Forgó & Alexander Somek, *Nachpositivistisches Rechtsdenken*, in SONJA BUCKEL, RALPH CHRISTENSEN & ANDREAS FISCHER-LESCANO, *NEUE THEORIEN DES RECHTS* 263, 277 (2006) (arguing against a dogmatic use of legal terms); *accord.* SOMEK & FORGÓ, *supra* note 369.

<sup>380</sup> Grimm, *supra* note 42, at 491-92.

<sup>381</sup> *See* NOLL, *supra* note 9, however, without reference to law and economics.

<sup>382</sup> Kaufmann, *supra* note 261, at 124.

scientific and thus lacked valid arguments.<sup>383</sup> Legal science could only put the legal norms in order and form a coherent system but had to abstain from questioning the reasonableness of the norms.<sup>384</sup> Since normative arguments were not verifiable or falsifiable, policy was arbitrary.<sup>385</sup> In his view, any natural law is utopian.<sup>386</sup>

The purity of *Kelsen's* theory was precisely the exclusion of other disciplines.<sup>387</sup> This way, a lawyer was thought to be able to make apolitical and impartial decisions when interpreting the law or deciding a case.<sup>388</sup> As a relativist, *Kelsen* had personal moral views, but he denied its general validity or even the possibility of general validity.<sup>389</sup> It is not surprising that *Kelsen* analyzed a variety of ethical approaches in his work *Was ist Gerechtigkeit? (What is Justice?)*, including utilitarianism, but concluded that all of them are indeterminate.<sup>390</sup> Whereas Bentham defined the maximization of happiness as the objective of legislation, *Kelsen* avoided any guidelines to the law regarding contents.<sup>391</sup>

For *Kelsen*, statutory law was the result of a political compromise that interpreters, most importantly judges, ought not to undo by applying personal value judgments.<sup>392</sup> Naturally, this precludes an open policy discussion as part of “legal science”.<sup>393</sup> An internal view of the law was quite welcome by the legal community. First, it gave the lawyer a competitive advantage over scholars from other disciplines in the political decision-making. Secondly, lawyers were able to reject any responsibility for the legal system as they were seen as passive and impartial executors of a given statutory law.

This need for impartiality was consolidated after World War II where lawyers disclaimed responsibility for having interpreted the law as it was given. Not surprisingly, people argued that legal positivism had facilitated gross perversions of justice under the Nazi regime.<sup>394</sup>

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<sup>383</sup> HANS KELSEN, DIE PHILOSOPHISCHEN GRUNDLAGEN DER NATURRECHTSLEHRE UND DES RECHTSPOSITIVISMUS 64, 70 (1928).

<sup>384</sup> *Id.* at 67, 71.

<sup>385</sup> SKIRBEKK & GILJE, *supra* note 266, at 834-35.

<sup>386</sup> KELSEN, *supra* note 15, at 43, 52; KELSEN, *supra* note 383, at 68.

<sup>387</sup> HANS KELSEN, REINE RECHTSLEHRE 1 (1960, reprint 2000) (arguing that psychology, sociology, ethics and political sciences should be excluded from legal science); *see also* KELSEN, *supra* note 15, at 52.

<sup>388</sup> KELSEN, *supra* note 15, at 51-52.

<sup>389</sup> *See, e.g.*, KELSEN, *supra* note 15, at 52.

<sup>390</sup> *Id.* passim (discussing Platon, Aristoteles, Kant, Bentham and others).

<sup>391</sup> *See* LEE, *supra* note 124, at 165, 185. GERALD J. POSTEMA, *supra* note 122.

<sup>392</sup> KELSEN, *supra* note 383, at 67. *cf. also* Kaufmann, *supra* note 261, at 125; for a short summary of the background of legal positivism *see* KRIELE, *supra* note 321, at 65 et seq, 74 et seq.

<sup>393</sup> *Cf.* Weinberger, *supra* note 261, at 175.

<sup>394</sup> *See, e.g.*, Gustav Radbruch, *Gesetzliches Unrecht und übergesetzliches Recht*, SÜDDEUTSCHE JURISTENZEITUNG (1946), reprinted in ARTHUR KAUFMANN, GUSTAV RADBRUCH GESAMTAUSGABE VOL 3, at 105 (1990); WILHELM R. BEYER, RECHTSPHILOSOPHISCHE BESINNUNG (1947); HELMUT COING, DIE OBERSTEN GRUNDSÄTZE DES RECHTS (1947); HANS WELZEL, NATURRECHT UND MATERIALE GERECHTIGKEIT (1951); HEINRICH ROMMEN, DIE EWIGE WIEDERKEHR DES NATURRECHTS (2<sup>nd</sup> edition 1947); Hermann Weinkauff, *Die deutsche Justiz und der Nationalsozialismus: Ein Überblick*, in HERMANN WEINKAUFF & ALBRECHT WAGNER, DIE DEUTSCHE JUS-

*Radbruch* proposed that statutory law should not be binding where it stood in clear contradiction to justice.<sup>395</sup> The revival of natural law in the postwar period led to an intermittent revival of an external perspective of the law,<sup>396</sup> but the movement did not survive. Soon, the prevailing opinion held that positivism and non-positivism had been irrelevant for Nazi jurisprudence.<sup>397</sup> The main argument was that Nazi law combined both positivism and non-positivistic approaches: statutory law passed under the regime had been interpreted in a strictly positivistic manner; any “pre-revolutionary” law had been interpreted widely, i.e. reinterpreted in the light of Nazi ideology.<sup>398</sup> As a result, a critique of legal positivism can no longer credibly invoke the development of Nazi jurisprudence in support.<sup>399</sup> The natural law revival lasted shortly, and many returned to what *Kaufmann* called *neopositivism*, which in the guise of *Wertungsjurisprudenz* once again excluded external criteria from the legal disciplines.<sup>400</sup>

This evolution of legal thought reflects the fact that many lawyers argued that their work was merely technical and that their profession was apolitical.<sup>401</sup> This was probably an important factor facilitating the reconstruction of the law and the legal professions after World War II<sup>402</sup>. Critical, interdisciplinary studies would have uncovered the political function of lawyers. It is not surprising, that an economic analysis of the law was not accepted in the legal community.

## 6. Summary

We have explained the divergence of legal thought between the United States and German-speaking Europe by means of the development of classical legal thought, the legal realism critique and the acceptance or rejection of utilitarianism. 19<sup>th</sup> century German legal thought was deeply systematic and coherence-based which left little space for changes due to external

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TIZ UND DER NATIONALSOZIALISMUS 17, 28 (1968); Hermann Weinkauff, *Der Naturrechtsgedanke in der Rechtsprechung des Bundesgerichtshofs*, NEUE JURISTISCHE WOCHENSCHRIFT 1689, 1691 (1960). Cf. Lon L. Fuller, *Positivism and Fidelity to Law – A Reply to Professor Hart*, 71 HARV. L. REV. 630, 657-661 (1958).

<sup>395</sup> Radbruch, *supra* note 394, at 83, 89.

<sup>396</sup> Kaufmann, *supra* note 261, at 81 et seq; HERGET, *supra* note 1, at 1 et seq.

<sup>397</sup> Kaufmann, *supra* note 346, at 1 et seq; Vivian G. Curran, *Fear of Formalism: Indications from the Fascist Period in France and Germany of Judicial Methodology's Impact on Substantive Law*, 35 CORNELL INT'L. L. J. 101, 151, FN 235 (2001).

<sup>398</sup> BERND RÜTHERS, DIE UNBEGRENZTE AUSLEGUNG. ZUM WANDEL DER PRIVATRECHTSORDNUNG IM NATIONALSOZIALISMUS 176 et seq, 148 et seq, 239 et seq (1966-67) (mentioning numerous examples of judicial reinterpretations of private law); Bernd Rütters, *Recht als Waffe des Unrechts – Juristische Instrumente im Dienst des NS-Rassenwahns*, NEUE JURISTISCHE WOCHENSCHRIFT 2825, 2832-33 (1988); see also Kaufmann, *supra* note 346, at 14-15 (with reference to *Carl Schmitt* and others).

<sup>399</sup> Cf. RÜTHERS, *supra* note 398, at 442 et seq (arguing that the legal methods are per se inadequate as a defense against a totalitarian perversion of the law).

<sup>400</sup> Kaufmann, *supra* note 261, at 82-83.

<sup>401</sup> RÜTHERS, *supra* note 398, at 56; see also *id.*, at 55 (discussing the role of Ex-Nazi faculty members in the reconstruction of a democracy).

<sup>402</sup> See RÜTHERS, *supra* note 398, at 56 (arguing that there was a repeated reinterpretation of great parts of the law due to the changes of political systems in the 20<sup>th</sup> century).

criteria such as economic efficiency. First, it was argued, most prominently by *Savigny*, that customs represent the law, both as it is and as it should be. Secondly, once these customs were put into statutory law, the lawyer's work could focus on the interpretation of the statutes without further asking whether the law made sense. This made it possible for many to distinguish between the policy and mere interpretation where the lawyer's main work increasingly became the latter. This distinction was heavily criticized in the United States as well as overseas. In the United States, legal realism led to a discreditation of classical legal thought and opened legal scholarship for external criteria. Legal realism, among other things, argued that a judicial decision was not determined merely by precedents and other legal materials but always influenced by the judge's personal views. Not surprisingly, there was a demand for normative standards which law and economics was soon ready to satisfy. In German-speaking Europe the case was similar at first. The free-law movement gained widespread acceptance in its critique on classical conceptualism. Other than in the United States, the movement was cut short by World War II and was not revived in the postwar period. The prevailing opinion sought to further develop classical legal thought instead of discrediting it and excluded external criteria from its inquiries. Kelsen's influential legal theory was even more radical in this respect and declared that policy was to be excluded from legal science altogether. The essence of this view, which is shared by the dominant schools of German legal theory, prevails until today and has profound consequences for the reception of the economic analysis of law. Throughout history, normative analysis reappeared every once in a while. However, the German attitude was profoundly anti-utilitarian and thus hostile to law and economics. Other than in the United States, there was a deep aversion against utilitarian ethics which came not only from German idealism but also from materialistic approaches. As far as policy analysis was done it had to include something else than law and economics.