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

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

By KRISTOFFEL GRECHENIG & MARTIN GELTER

I. Introduction

Law and economics has become an integral part of U.S. legal scholarship and the law school curriculum. Ever since the legal realist movement, scholars mostly view the law from an external perspective. It may be surprising to many in the United States 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

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out what the law is, frequently even before it is tackled by a court. U.S.-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 play an insignificant role in German-speaking countries while the United States has become a stronghold for it. First, in the United States, legal realism (in its particular political setting) discredited what has become known as classical legal thought. As a result, legal academics in the United States were receptive of new approaches which began to thrive later during the 20th 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, since the 19th century, utilitarianism had gained widespread acceptance in U.S. intellectual circles. 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 United States and in Germany, legal theories opposed to positivism have prevailed. Other than in the United States, the German critique resulted in a “value-based”, transcendental jurisprudence. In our view, none of these two factors alone can explain the success of law and economics in the United States relative to Europe, but the combination of the two can.

We proceed as follows: Section II 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 III outlines our own hypothesis. Section IV traces the development in the United States, based on the existing literature. It starts

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with the classical legal thought of the late 19th century and subsequently surveys legal realism and the early development of law and economics since the 1960s. Section V 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 VI summarizes the above discussion.

II. The Comparatively Weak Position of Law and Economics in German-Speaking Countries

A. The Current State of Reception of U.S.-Style Economic Analysis of Law

Typical continental European legal scholars often regard articles published in U.S. law reviews as quite alien. What seems startling is not so much the immersion of U.S. articles into the common law system, but the interdisciplinary and, to the European observer, surprisingly “non-legal” approach adopted by U.S. 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, U.S. 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 U.S. corporate law professors are not actually legal scholars, but rather economists whose field of research is law.3

This purely functional approach distinguishes the US legal academia from scholarship in Europe, including the UK.4 Especially in German-speaking countries, economic approaches to law have been met with rejection quite frequently; law is not merely seen as a field to be investigated 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 forth treatises,\(^6\) articles\(^7\) and research institutes dedicated to the economic analysis of law.\(^8\) Still, predictions on the influence of law and economics made in the early 1990s have not been confirmed: In 1991, Ugo Mattei and Roberto Pardolesi suggested that the status of law and economics in Europe merely lagged behind the United States by about 15 years.\(^9\) Assuming an approximately equal speed of development, one would expect that the situation today should be comparable to the early 1990s in the United States. Today, it seems that Europe has not caught up. Even though law and economics scholarship has clearly increased in recent years, it continues to linger on the fringes of legal scholarship.\(^9\) The number of law and economics papers is still dwarfed by the amount published in the United States, and most of the law and economics literature is 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

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6. 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).

7. *E.g.*, the departments and centers of law and economics at the Universities of Hamburg, Saarbrücken, Vienna and St. Gallen.


understanding of U.S. legal thought rather than the specific application of economic arguments to legal issues. Admittedly, critiques of the law and economics perspective abound in the United States. However such criticism opposes a powerful intellectual movement in the United States. Similar critiques in German-speaking literature are more or less directed against a seedling that has not yet been able to grow firm roots. Mainstream scholars have pointed 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 needs to take non-monetary values into account. Most critics emphasize that efficiency neglects the distribution of goods and income, which leads to an aggravation of existing inequalities. It is argued that replacing the obligations of legal ethics with utility calculus under the homo economicus assumption discriminates against the poor, thereby failing to meet the goals of social justice. In addition to that, economic analysis has a reputation of employing utopian models which cannot be applied to practical issues. 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.

12. E.g., Karl-Heinz Fezer, Aspekte einer Rechtskritik an der economic analysis of law and am property rights approach, 41 Juristen-Zeitung 817, 823-24 (1986); Taupitz, supra note 11, at 124 (suggesting that aspects of social distribution of resources are per se outside the scope of economic analysis).
13. Taupitz, id. at 133.
15. This argument was already made in the late 19th 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-
In many cases these criticisms can be traced to a restricted understanding of economics among traditional legal scholars, who are rarely familiar with its analytical instruments, such as the role of models or the meaning of non-monetary values. On one hand, certain approaches to law and economics, especially the one attached to the Chicago School, offer a welcome target for attacks and a basis for outright rejection of any economic approach to law, sometimes without profound analysis and discussion.


17. Occasionally, it has been pointed out even in the German-language legal literature that non-monetary values are not a priori excluded from economic analysis. See, e.g., Schwintowski, supra note 11, at 587-88. See also Frank Adloff, Theorien des Gebens - Nutzenmaximierung, Altruismus und Reziprozität, in NONPROFIT-ORGANISATIONEN IN RECHT, WIRTSCHAFT UND GESELLSCHAFT 139 passim (Klaus J. Hopt, Thomas von Hippel & W. Rainer Walz eds., 2005); Ludwig von Au er, Öko nomische Theorieansätze des Gebens, in NONPROFIT-ORGANISATIONEN IN RECHT, WIRTSCHAFT UND GESELLSCHAFT 159 passim (Klaus J. Hopt, Thomas von Hippel & W. Rainer Walz eds., 2005) (controversy on the non-monetary preferences in economics in general).


19. 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 P A W L O W S K I, METHODENLEHRE FÜR JURISTEN n.852, 855 (2d ed. 1991), FRANZ BYDLIN S K I, JURISTISCHE METHODENLEHRE UND RECHTSBEGRIFF 331 (2d ed. 1991); Otto Palandt, Bürgerliches Gesetzbuch [BGB] [Civil Code] 2003, 62nd ed., Einleitung, n.32 (F.R.G.). The criticism of some other authors also seems to rest address the Chicago School approach only, e.g., ERNST A. KRAMER, JURISTISCHE METHODENLEHRE 236
Since the early days of modern law and economics, wealth maximization has been criticized as an approach that does not correspond to the welfare economics goal of maximizing total social welfare, i.e. the maximization of total utility within a society.\textsuperscript{20} It has been pointed out that if people place a negative value on the unequal distribution of wealth, the maximization of total utility has to include distribution considerations\textsuperscript{21} as part of its normative objective. However, alternative approaches and refinements of the initial theories are still often ignored.

Altogether, law and economics still have to overcome significant obstacles in German-speaking countries. Sometimes, economic analyses are considered acceptable as long as their applicability is restricted to legislation and thus excluded from the scope of a lawyer's or legal scholar's daily work.\textsuperscript{22} Where it is accepted as an element of interpretation, mostly as a type of purposive interpretation of the

\footnotesize{(2nd ed. 2005) (citing primarily an article published by Eric Posner in 2003); KOZIOL & WELSER, supra note 11, at 20-21; see also 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 0.


22. See generally EIDENMÜLLER, supra note 19; see generally Taupitz, supra note 11.
law,\textsuperscript{23} it remains strictly subordinate to the traditional canons of interpretation.\textsuperscript{24}

\textit{i. A Short Overview of the Existing Literature}

1. Divergence Between Common Law and Civil Law

So far, most explanations of this divergence have emphasized institutional factors. Ugo Mattei and Roberto Pardolesi have suggested that a central reason for the divergence is 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 as a mere interpreter of the law.\textsuperscript{25} A related ar-

\begin{itemize}
\item \textsuperscript{23} See, e.g., BYDLINSKI, supra note 19, at 331; KRAMER, supra note 19, at 236-37; Dieter Krimphove, Rechtstheoretische Aspekte der “Neuen ökonomischen Theorie des Rechts,” 32 RECHTSTHEORIE 530 (2001); Reinhard 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 et al. eds., 1993).
\item \textsuperscript{24} See the discussion in standard works on interpretation such as Pawlowski, supra note 19, at notes 852, 855 (2d ed. 1991); KRAMER, supra note 19, at 236-7; F. BYDLINSKI, supra note 19, at 331-32. Law and economics is not even discussed by KARL LARENZ, METHODENLEHRE DER RECHTSSWISSENSCHAFT (6th ed. 1991) and REINHOLD ZIPPELIUS, JURISTISCHE METHODENLEHRE (4th ed. 1985); see also standard treatises on civil law such as PALANDT, supra note 19, at Einleitung notes 32-3; KOZIOŁ & WELSER, supra note 11, at 20-21; see also Taupitz, supra note 11, at 135-36; Eidenmüller, supra note 19, at 450 passim; Horst Eidenmüller, Rechtsanwendung, Gesetzgebung und ökonomische Analyse, 197 ARCHIV FÜR DIE CIVILISTISCHE PRAXIS 80 passim (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 passim; Victor Winkler, Ökonomische Analyse des Rechts im 19. Jahrhundert: Victor Matajas “Recht des Schadensersatzes” revisited, 26 ZEITSCHRIFT FÜR NEUERE RECHTSGESCHICHTE 262 (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 passim. (1991). For further references to jurisprudence and doctrinal legal scholarship, see SCHÄFER & OTT, supra note 5, at 10-11. 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 passim (Marc Bungenberg, Stefan Dänz & Helge Heinrich eds., 2004).
\end{itemize}
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 allowed only to interpret the law on the basis of existing statutes and are prohibited from making reference to non-legal arguments.26

Although these points are absolutely valid, they do not suffice as a sole explanation. English legal scholarship provides a counterexample, as it is generally considered to be committed to an "internal" perspective on the law.27 Admittedly, law and economics have made some inroads in the U.K., notably in corporate law,28 but as a whole, scholarly work based upon black-letter law continues to predominate as it does on the European continent. External or critical perspectives seem to remain marginal as they do in continental Europe.29 Thus, if one were to observe an increased openness of British scholarship to U.S. approaches to law, one can well put down any edge over the continent to the shared English language and a greater U.S. influence resulting from it.

2. The Success and Failure of Legal Positivism

Closely related to the argument outlined in the previous section is the theory that legal positivism, understood as strict adherence to positive law to the exclusion of any substantive justification of norms, caused legal scholarship to dissociate from other disciplines.30 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

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26. Kirchner, supra note 24, at 277-92. See also Posner, Future, id. at 5; Dau-Schmidt & Brun, supra note 9, at 607, 617; Taupitz, supra note 11, at 129 passim. See generally HERGET, supra note 1, at 115-16 (discussing separation of powers in general).
28. Cheffins, id. at 208-09.
29. See Duxbury, supra note 27, at 148.
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. Furthermore, legal positivists such as Jeremy Bentham can be counted among the precursors of the modern law and economics movement. This issue aside, it has frequently been pointed out both in the United States (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. 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.

3. Legal Education and Career

Some authors have sought to explain the rejection of law and economics by pointing to the particularities of legal education in Germany. The most frequent culprit is the lack of training in economics among lawyers. The alleged dislike of mathematics prevalent among jurists adds to this factor. By contrast, U.S. students normally have to undergo a more general non-legal education in col-

31. Mattei & Pardolesi, supra note 8, at 269 (emphasizing the role of case law also in civil law countries).
32. See infra Section VI.
33. On the German free-law school, see infra section 0. On hermeneutics in general see Hans-Georg Gadamer, Wahrheit und Methode: Grundzüge einer philosophischen Hermeneutik (6th 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. 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)].
34. See infra pages 344 and following.
35. Weigel, supra note 30, at 326.
lege before entering law school, which may also result in greater openness towards interdisciplinary approaches to law.\textsuperscript{37} Another factor is the conservative approach to appointing professors prevalent in most European countries.\textsuperscript{38}

The role of legal education may play a role in explaining the divergence. However, until recently, jurists in German-speaking countries had to take courses in economics;\textsuperscript{39} additionally, U.S. law professors often lack formal training in mathematics,\textsuperscript{40} which does not necessarily prevent them from bringing forward economic arguments. In any case, it is probably necessary to ask whether the design of the current curricula is a consequence, rather than the cause, of the marginal importance of economics for legal interpretation and policy. The same is true of argument attributing the rejection of law and economics to misconceptions, such as its exclusive identification with the Chicago School.\textsuperscript{41}

4. Rent-Seeking and Academic Incentives

The argument has been made that rent-seeking activities by traditionally trained jurists constitute a strong interest group in opposition to any progressive legal movements.\textsuperscript{42} In the Austrian context,

\begin{footnotesize}
\begin{enumerate}
  \item Cf. Dau-Schmidt & Brun, supra note 9, at 618-19.
  \item Mattei, supra note 8, at 88. See also the contributions to the symposium on “Selecting Minds”, 41 AM. J. COMP. L. 351-53 (1993).
  \item Leaving aside the old tradition of “Faculties of Legal and State Sciences” (rechts- und staatswissenschaftliche Fakultäten” (infra section 0), mandatory courses in economics and business management were only abolished in Austrian law faculties a few years ago. See also 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).
  \item See Cooter & Gordley, supra note 36, at 262.
  \item 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).
  \item Cf. Max Weber, WIRTSCHAFT UND GESELLSCHAFT VII § 8, 509 passim (5th 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. Ritner, supra note 14, at 669 (rejecting behavioral law and economics (among other arguments) because it threatens to subvert the independence of law). See generally 1 Dieter Grimm, Methode als Machtfaktor, in EUROPAISCHES RECHTSDENKEN IN GESCHICHTE UND GEGENWART – FESTSCHRIFT FÜR HELMUT COING 469 passim (Norbert Hörm et al. eds., 1982) (discussing the instrumental use of methodology in general); Niklas Luhmann, ÖFFENTLICHE ENTSCHÄDIGUNG RECHTSPOLITISCH BETRACHTET 189, 192 (1965) (dis-
\end{enumerate}
\end{footnotesize}
Wolfgang Weigel points out the predominant position of lawyers in the economy. Other than in the U.S., 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 U.S. 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 status quo.

Arguments aiming at the protection of vested interests may explain why the predominant type of legal thought has maintained and expanded its potion, but they do 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 pointed to the generally established practice of seeking to achieve widespread consensus in politics. This may relate to the long-standing hegemony of Keynesian macroeconomics among economists in Europe. In any case, Germany and other European countries lacked an anti-intervention sociopolitical movement (as it existed in the U.S.) in the vicinity of which the law and economics movement could thrive. Economic and social policy must therefore have to be part of the explanation.

In a recent article, Oren Gazal-Ayal has attempted to explain the prevalence of law and economics in the United States with the publication incentives of legal academics: While in the United States, 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. Similarly, Nuno Garoupa and Thomas Ulen have re-

43. Weigel, supra note 30, at 326; see also Hertig, supra note 24, at 293 (making a similar argument for Switzerland).
44. See Dau-Schmidt & Brun, supra note 9, at 615.
45. Weigel, supra note 30, at 327 (for Austria); Hertig, supra note 24, at 300 (for Switzerland).
46. MATTEI, supra note 8, at 92; cf. Weigel id.
47. Taupitz, supra note 11, at 128-29.
cently suggested that the U.S. edge in law and economics and in “legal innovations” can be explained with how legal scholarship is evaluated in the U.S.\textsuperscript{49} 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. 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.\textsuperscript{50} This casts doubt on the idea that the content and innovation in scholarship is strongly influenced by the student job market. Second, the theory does not explain why the gap between legal scholarship in the United States and Europe is so much greater in law than in any other field. Finally, even though Gazal-Ayal’s and Gaorupa and Ulen’s theories are plausible, they do not explain how different incentives came into being. After all, there is considerable path dependency influencing how research is evaluated in a given field, over which established legal scholars have considerable influence.

III. Overview of Our Own Hypothesis

In this section 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 United States developed in a parallel fashion up to the interwar period, but then began to diverge. While in the United States, 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 U.S. 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,

\textsuperscript{49} Garoupa & Ulen, supra note 9.
\textsuperscript{50} Id. at 41.
from which novel and external elements, such as the efficiency of a
certain interpretation, are excluded.

The position of policy (Gesetzbegungslehre)\textsuperscript{51} in legal scholarship
is one of the core elements of our explanation. In German-speaking
countries, policy typically stands outside the realm of legal scholar-
ship and is left to politics. This tradition can be traced back to the
first half of the 19\textsuperscript{th} century, namely to Savigny’s historical school of
jurisprudence. It was carried into the 20\textsuperscript{th} century by Interessenjuris-
prudenz and restated in Hans Kelsen’s theory of legal positivism that
completely eliminated policy from the “science of law,” amplifying
the acceptance of an internal perspective that already dominated
German legal academia.\textsuperscript{52}

By deconstructing classical legal thought in the United States, le-
gal realism created a vacuum in legal scholarship and jurisprudence
that was to be filled by a discussion on policy. In the decades that fol-
lowed, the law and economics movement could take up reconstructive
work in order to develop new principles and decision criteria. In do-
ing so, it achieved a hegemony vis-à-vis other movements.\textsuperscript{53} This vac-
uum was never created in German-speaking countries in the first place. For this reason, among others, it is not surprising that the early
law and economics movement that developed in the late 19th century
in Austria failed.

The fact that in the United States the legal realism movement
succeeded, while in German-speaking countries the free law move-
ment failed, can partly be explained by political factors, most impor-
tantly the role of U.S. judicial review. The opposition between con-
servative judges, who used formalistic reasoning to strike down
progressive social legislation, and progressive legal scholars fostered
legal realism as this opposition gave academics the means to attack
the courts. As a result, a pluralism of methods characterizes U.S. le-
gal scholarship today, but it can be said that consequentialist ap-
proaches are dominant. Among other approaches to the law, such as

\textsuperscript{51}. In German, the terms Rechtspolitik and Gesetzbegungslehre can be used in-
2000).

\textsuperscript{52}. \textit{Cf.} Cheffins, \textit{supra} note 27, at 198-200 (defining “external” and “internal”
perspectives in legal scholarship).

\textsuperscript{53}. \textit{Cf.} Thomas Ulen, \textit{The Unexpected Guest; Law and Economics Law and
Other Cognate Disciplines, and the Future of Legal Scholarship}, 79 CHI.-KENT L.
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 has gained widespread influence in the United States since the 19th 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.

IV. The U.S. Experience: Legal Realism and Utilitarianism

A. American Legal Realism as Background to Law and Economics

Contemporary economic analysis of law\(^4\) was developed in the United States, where it has become a predominant method of legal scholarship. Typically, this is explained by means of the development of legal theory in the United States during the first half of the 20th century. Up to this time, U.S. and German lawyers shared a similar methodological outlook. The decisive reason why U.S. scholarship turned its back on doctrinalism can be traced to political developments during that period.

During the late 19th and early 20th century U.S. legal scholarship was characterized by what is today called classical legal thought.\(^5\) This approach, which is often identified with the name of Christopher Columbus Langdell, paralleled German Begriffsjurisprudenz in many important aspects,\(^6\) without any decisive difference resulting from U.S. law's focus on case law as opposed to the German civil law sys-

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\(^6\) See, e.g., Kennedy, supra note 8, at 637-48 (identifying a globalization of classical legal thought originating in Germany).
tem. Classical legal thought understood law as "legal science." 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 deduce solutions for specific (future) cases. Cases that did not fit into the system should be eliminated as erroneous. This resulted in the kind of formalism Roscoe Pound was to criticize as "mechanical jurisprudence." Neil Duxbury has described the typical law review article of this time as "dry, technical, doctrinal, and often narrowly focused."

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. From the German tradition, Langdellian legal

57. See generally, e.g., BERNARD SCHWARTZ, MAIN CURRENTS IN AMERICAN LEGAL THOUGHT 346 (1993).
scholarship also adopted the understanding of law as a science, desiring to cleanse law of the influences of other disciplines.

Central to classical orthodoxy was an understanding of private law as separate from public law and as politically neutral. Under that view, the state should likewise remain neutral in conflicts of interest between interest groups and avoid engaging in redistribution of wealth. In contrast, the U.S. Supreme Court's jurisprudence was committed to an economic liberalism, which, resulted in an increasing amount of opposition within a rapidly changing society.

Of course, the most important precursor to legal realism was Oliver Wendell Holmes, first as professor at Harvard Law School, later as judge at the Supreme Court of Massachusetts and finally, as a United States Supreme Court Justice. His seminal article, "The Path of the Law," 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. He was the first to come up with the prediction theory, according to which lawyers should attempt to predict the court's decision when advising clients. With a view to law and economics, one might even recognize the *homo economicus* 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.”

Holmes famously criticized the logical-historical perspective classical legal thought applied to law and the doctrinal deductions that resulted from it. He emphasized that the study of law should focus on the social objectives it is intended to achieve. A judge with an understanding of both historical and current social goals should be better able to contribute to the understanding and development of the law. At least upon first glance, this view would allow the judge’s discretion to blur the distinction between doctrinal deductions and legal policy, as cases cannot be objectively decided on the basis of precedents and preexisting, coherent common law, whereas in reality the judge’s individual social value judgments inevitably influence his decisions.

As a result of his tenure as a United States 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, in which the majority 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 formalist deductions from general principles, most of all the principle of the freedom

71. Holmes, id. at 459.
72. But see Oliver Wendell Holmes, The Common Law: Lecture 1 1-38 (Dover Publications 1991) (1881) (pointing out that a historical perspective is important in general). However, Horwitz, supra note 55, at 109, 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.
73. Holmes, supra note 68, at 474. See also Robert S. Summers, Pragmatic Instrumentalism and American Legal Theory, 13 RECHTSTHEORIE 257, 258 (1982).
75. Cf. Holmes, supra note 68, at 471-72 (“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!’”).
76. Lochner v. New York, 198 U.S. 45 (1908). See e.g., Rowley, supra note, at 10 (discussing the opinion in the context of the development of law and economics).
of contract.\textsuperscript{77} This approach was criticized by a growing number of lawyers and legal academics.\textsuperscript{78} Holmes, who remained a member of the Court until 1932, was a precursor of legal realism through his dissents. Holmes did not necessarily share the radical rejection of classical legal thought as is common among many legal realists; rather, his own approach was one of judicial restraint.\textsuperscript{79}

Besides Holmes, there were other authors, even before World War I, who rejected the classical orthodoxy, namely progressives such as Roscoe Pound\textsuperscript{80} or Benjamin Cardozo.\textsuperscript{81} While some later observers such as Robert Summers have preferred to group these towering figures into one movement,\textsuperscript{82} Karl Llewellyn, who would shape the outside and self-perception of legal realism for decades, actually attempted to distance himself and the younger generation of legal realists from their forebears.\textsuperscript{83}


\textsuperscript{80} 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).


\textsuperscript{82} 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 U.S. politics between 1890 and 1920 at 869); Summers, supra note 73, at 263-64 (describing them as pragmatic instrumentalists); see also Wetlaufer, supra note 60, at 16 passim; cf. Posner, supra note 77, at 2.

\textsuperscript{83} Horwitz, supra note 55, at 170 (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 72-160. 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 out-
The legal realism of the 1920s and 1930s should be viewed 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
brought forth earlier by Jhering in Germany\(^1\) and by the Free Law
School,\(^2\) the legal realists borrowed from Holmes the credo of law as
experience\(^3\) and began to deny the importance of "law in books" (as
opposed to "law in practice").\(^4\) Law was not to be understood as a
system of rules, but only as the body of judicial decisions.\(^5\) They re-
jected the idea that law could be an autochthonous, judgment-free
science, which allowed one to reach predetermined solutions for all
possible cases through objective methods (such as analogies) within a
closed logical system.\(^6\) At the same time, they rejected any concep-
tual jurisprudence which attempted to arrive at concrete solution
starting with abstract propositions.\(^7\)

Realism's core tenet, the indeterminacy theory of law,\(^8\) is often
understood in light of the realists' opposition to the philosophy of
laissez-faire market capitalism. To realists, market principles seemed
to be hiding behind the formalist deductions of pre-realist jurispru-
dence and, in the realist view, served to conceal the inherently politi-
cal character of judicial decision-making by providing a formal justifi-

look on economic policy). For a contemporary criticism of Pound, see also Jerome

84. Felix S. Cohen, Transcendental Nonsense and the Functional Approach, 35

85. 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 Le-

86. "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
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87. 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 generally
Pound, supra note 80. Jerome Frank criticized that "classical" law scholars continued
to study the law in books only. Id. at 20.

88. See e.g. MERCURIO & MEDEMA, supra note 60, at 10.

89. John Dewey, Logical Method and Law, 10 CORNELL L. Q. 17 (1924) (criticiz-
ing the application of logic to legal reasoning); see HORWITZ, supra note 55, at 188.

90. Cohen, supra note 84, at 809. See HORWITZ, supra note 55, at 199 passim.

91. Leiter, supra note 33, at 51 passim.
cation. In this view, court decisions are not determined by an objective application of pre-determined legal materials, but are traced largely to the value judgment of the judges who shape abstract rules and holdings in accordance to their views, restrained only by the necessity to provide reasoning in the form of a judicial opinion. Robert Hale’s criticism of classical economic policy and the alleged distributive neutrality of free markets is a case in point, as is the realists’ rejection of the distinction between public and private law.

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, legal realism succeeded in leaving a permanent impression on U.S. legal scholarship. 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 (making the President’s threat to pack the court with additional judges redundant).

This overview illustrates how U.S. development was unique, also in comparison to the U.K. H. L. A. Hart, the renowned British legal positivist, attributes the critical approach to law predominant in the

92. Singer, supra note 58, at 477.
93. See, e.g., Singer, supra note 58, at 465, 469-70.
94. Singer, supra note 58, at 471-72; 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 passim, but cf. Frank, supra note 87, at 645, 761, 766-84.
97. 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.
98. See Leiter, supra note 33, at 54.
99. 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 108-13, 117-20.
United States to judicial review of laws for their constitutionality and the compliance with basic rights enshrined in the United States Constitution. Hart argues that the United States Constitution "made law what elsewhere would be politics." He suggests that U.S. 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), on the other. This particular political dynamic is absent in U.K. jurisprudence, as were other factors such as federalism and the potential for conflict associated with it. Duncan Kennedy mentions another factor comparing the United States to Europe and the U.K., namely the greater social heterogeneity of U.S. lawyers that led to stark ideological contrasts, which in turn nourished the desire to fundamentally criticize the law. Apparently, U.S. law schools were sufficiently well-developed to allow this sort of criticism to flourish, which English law faculties apparently were not.

Although legal realism lost its vitality, U.S. legal scholarship never returned to the classical jurisprudence legal realism had dis-

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


102. *Id.* at 972.

103. *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 generally* Ronald Dworkin, *Hard Cases*, 88 Harv. L. Rev. 1057 (1975).


105. KENNEDY *id.* at 79-80.

106. In From 1938-19/39, there were only 1,515 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).

107. The 1950s were dominated by the legal process school, which focused on the decision-making 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 *passim*; Singer, *supra* note 58, at 505-06. 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).
credited. One of the legacies of legal realism was its demand that all policymakers, including judges, should take social sciences, including economics, into account when making judgments.

The U.S. law and economics movement is at times seen as heir to legal realism and the fulfillment of the Holmesian prophecy of lawyer as social scientist. Some legal realists also broadened their gaze to sociology, psychology and economics. One of the most well-known examples is the seminal 1932 book “The Modern Corporation and Private Property” by law scholar Adolf A. Berle and economist Gardiner Means, which to this day is considered one of the most important contributions to the discussion on conflicts of interest between shareholders and managers in publicly traded companies. Other studies had considerable influence on legislation, for example in the 1938 bankruptcy codification.

The characterization of law and economics as the progeny of legal realism is by no means undisputed. As other 20th century movements of U.S. legal scholarship (which include the legal process

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111. See Kronman, id. at 336-40 (discussing the “scientific branch” of realism). For example, some incipiences 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 2 THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 421 (Peter Newman ed., 2002).

112. See HORWITZ, supra note 55, at 166 (considering the book a legal realist work).

school, rights theory, law and society and, 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. Economic analysis of law can be considered a descendent of legal realism, as logical deductions from within the legal system are considered normatively undesirable. Admittedly, normative theories (as instruments of legal policy) maintained a subordinate position in legal realism. However, legal realism made inevitable the renunciation of pure doctrinalism as the lawyer’s exclusive tool, ultimately requiring the development of a normative program in order to supplement and replace the indeterminacy of interpretation.

As it became widely recognized that the orthodox doctrinal method in fact allowed for a variety of interpretations, other measures needed to be developed in order to guide judicial decision-making. These measures had to be geared to external, non-legal elements, leading to the emphasis on policy. Adherents of legal realism and its successor movements were slow to develop normative benchmarks on the basis of descriptive insights in order to assimilate them into the legal discourse. However, finally, normative benchmarks came to dominate, which is why legal policy takes the central role in American law schools.

Legal realism is based on a utilitarian understanding of the law, bent on a realization of specific social goals. This contributed to lawyers’ open discussion of the policy implications of judicial decision-making. Although several decades past between the heyday of legal realism and the spread of economic analysis of law in academia, a clear thread connecting the two movements can be identified. Law

114. See e.g., Singer, supra note 58, at 503-04 (distinguishing between liberal and critical movements).
115. See Singer, supra note 58, at 516-57; Wetlaufer, supra note 60, at 37 (describing law and economics as a direct descendent of legal realism).
116. Leiter, supra note 59, at 276-77 (speaking of “quietism”).
117. See Harold D. Lasswell & Myers S. McDougall, 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.
118. Leiter, supra note 59, at 59-60. Contrary to Ulen & Garoupa, supra note 9, at 8, we believe that the normative side of law and economics was the more important one.
and economics is based on the instruments of economics which allow for prognoses of the consequences of legal norms that can, and should be, subject to empirical scrutiny. Through this, and some recommendations about economically efficient proposals made by lawyer-economists, economic analyses of law apparently struck the right note with American legal scholarship so fundamentally transformed by realism. Thus, in spite of widespread criticism of law and economics, the movement managed to fill a gap torn open by legal realism, replacing the discredited legal formalism with an economic approach that permits, what is considered by many, scientific results.¹¹⁹

B. 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 U.S. 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. These include the law and society and the critical legal studies movements. However, the particular significance of law and economics and its widespread acceptance can be explained with a certain longstanding U.S. tradition.

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.¹²⁰ While Blackstone taught positive law,¹²¹ Bentham was a reformer.¹²² He intended to discredit traditional

¹¹⁹ See Singer, supra note 58, at 522 passim (considering law and economics an “exercise in formalism”); see also 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., 2d ed. 1993); Dau-Schmidt & Brun, supra note 9, at 615-16; see Richard A. Posner, The Problems of Jurisprudence 362 (1990) (arguing that economic formalism was prferable to legal formalism, as it can be empirically scrutinized).

¹²⁰ We will not go into the debate of 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).


and became particularly known for his aversion to theological and metaphysical bodies of thought. 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. 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.” 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.”

Although little attention was given to him in the 19th century, John Austin’s work was influenced by Bentham. However, Austin’s work 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. In the United States, he was in contact with various politicians. Bentham’s “greatest happiness” principle was recognized even by some of the founding fathers such as Thomas Jefferson and Benjamin Franklin as a goal of legal policy, and also taken up and developed further by American philosophers.

It is not surprising that he was cited by courts, including the United


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


125. 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.


127. BENTHAM, id. at 27.

128. Duxbury, supra note 106, at 39; see also DUXBURY, supra note 79, at 54-64 (discussing the marginal influence of American legal realism on English legal scholarship).

129. HALÉVY, supra note 122, at 296-97.

130. PETER KING, UTILITARIAN JURISPRUDENCE IN AMERICA 71 (1986).

131. KING, id. at 139-484, 142. Even Bentham though that this principle was already the driving force of US legislation. Id. at 62.
States Supreme Court, quite a number of times.\textsuperscript{132}

Bentham’s significance increased until the U.S. Civil War, more so in the North than in the South. Among others, Chief Justice Taney of the U.S. Supreme Court declared in an 1837 opinion that, “the object and end of all government is to promote the happiness and prosperity of the community by which it is established.”\textsuperscript{133} At the same time, newspaper editorials cited with approval Bentham’s ideas.\textsuperscript{134} 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.\textsuperscript{135} Bentham’s opponents tended to criticize his lack of originality rather than his ideas about legal policy.\textsuperscript{136} Some opposed his views for religious reasons, which is spurious as utilitarianism was seen as a means of banning theology from philosophy.\textsuperscript{137} All in all, the significant influence of Bentham’s ideas on the U.S. public can be identified as early as the first half of the 19th century.

In parts, his works influenced legal realism, however primarily in the analysis of consequences of legal norms and not as a policy program.\textsuperscript{138} 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.\textsuperscript{139} It was also

\textsuperscript{132} 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 twenty words. The courts typically use the term “greatest happiness principle.”) The search was last repeated November 28, 2005.

\textsuperscript{133} Charles River Bridge v. Warren Bridge, 36 U.S. 420, 547 (1837).

\textsuperscript{134} E.g., Editorial, 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 passim.

\textsuperscript{135} Mensch, supra note 96, at 27. Note that Bentham himself rejected the Common Law approach, developing a positivist theory of the law.

\textsuperscript{136} King, supra note 130, at 218, 234-35.

\textsuperscript{137} King, id. at 240-42 (referring to John Neil).

\textsuperscript{138} 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.”)

\textsuperscript{139} Alfred Bohnen & Grehard Weisser, Die utilitaristische Ethik als Grundlage der modernen Wohlfahrtsökonomie (1964).
an important building block of the economic analysis of law. 140 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 less the sum of the pleasure created and the pain prevented." 141

While Jevons believed that there could be no common denominator for mere sentiment, 142 this could not stop him from engaging in interpersonal comparisons of utilities and aggregating them. 143 Bentham believed that happiness was homogeneous, independent from individuals and, could be compared and measured on a cardinal scale. 144 The idea of cardinal measurement of utility maintained its influence from the works of Bentham down to Arthur Cecil Pigou 145 and continued to ordinal comparisons of utility 146 which characterized the law and economics movement. 147 The most decisive factor was the

140. See, e.g., Charles K. Rowley, Wealth Maximization in Normative Law and Economics: A Social Choice Analysis, 6 GEO. MASON L. REV. 971, 981-84 (1998), cf. Lewis A. Kornhauser, A Guide to the perplexed claims of efficiency in the law, 8 HOFSTRA L. REV. 591, 598 (1980); Robert Cooter & Peter Rappoport, Were the Ordinalists Wrong About Welfare Economics?, 22 J. ECON. LIT. 511 (1984). 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).


142. Id. at 111.

143. See Rowley, supra note 140, at 971, 981.

144. E.g., Rowley, id. at 978-79 (discussing this in the context of law and economics).


146. 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 93-94 (1947); specifically, see VILFREDO PARETO, MANUALE DI ECONOMIA POLITICA (1906) (particularly chapters III §§ 12, 16, 29 and chapter II § 34 and following, discussing utilitarianism). Neoclassical consumer theory was developed on the assumption of individual ordinal preferences. SAMUELSON, id. at 97-98, 173, 226. See also 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 (1939). For a historical overview, see Cooter & Rappoport, supra note 140, at 507.

147. On the discussion about Pareto efficiency and the Kaldor-Hicks criterion, see
conviction that estimates about individual utility are a better approach than any alternative, which is shared between utilitarianism and the economic analysis of law.\textsuperscript{148} 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 and also can be traced back to Bentham.\textsuperscript{149}

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.\textsuperscript{150} 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”.\textsuperscript{151} Richard Posner, one of the pioneers of the economic analysis of law, concedes that Bentham’s utilitarianism exerted a decisive influence,\textsuperscript{152} although Posner distinguishes his own normative approach to law and economics from utilitarianism.\textsuperscript{153}

\textit{infra} notes 227-229 and accompanying text.

\textsuperscript{148} See, e.g., Rowley, supra note 140, at 981-84.

\textsuperscript{149} Jeremy Bentham, \textit{The Philosophy of Economic Science}, in JEREMY BENTHAM’S ECONOMIC WRITINGS 117 (W. Stark ed., 1952) (“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 33-34.


\textsuperscript{151} Gary Becker, \textit{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.”)

\textsuperscript{152} Id.

\textsuperscript{153} E.g., Posner, \textit{Utilitarianism}, supra note 18, at 103; Posner, supra note 120, at 425. See Parisi, \textit{Changing Contours}, supra note 18, at 46-47 (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, \textit{The New Economics Analysis
Similar to Bentham, Posner assumes that individuals are rational utility-maximizers, and that economic efficiency is a scientific concept.\textsuperscript{154} 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.\textsuperscript{155} In general, the method of aggregating all types of utility to one unit\textsuperscript{156} is not only the core of utilitarianism, but also of economic cost-benefit analysis.\textsuperscript{157} 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.\textsuperscript{158} 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.\textsuperscript{159} 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,\textsuperscript{160} and that the U.S. academic community felt largely appreciative of it.\textsuperscript{161} Even (U.S.) critics of utilitarianism did not distance themselves all too clearly from some of its fundamental ten-

\textit{of Law, supra} note 20, at 90; see also \textit{Mathis, supra} note 19, at 187.

\textsuperscript{154} Rowley, \textit{supra} note 140, at 990 (referring to Richard A. Posner, \textit{The Economics of Justice} (1981)).

\textsuperscript{155} See also Rowley, \textit{supra} note 140, at 992.


\textsuperscript{157} See, e.g., Kornhauser, \textit{supra} note 140, at 598.

\textsuperscript{158} A useful overview of these terms is provided by Gesang, \textit{supra} note 156, at 17.

\textsuperscript{159} Rowley, \textit{supra} note 140, at 981 \textit{passim}; see also Kornhauser, \textit{supra} note 140, at 591, 598-99 (discussing the close links between utilitarianism and the law and economics objective of maximizing total utility).


\textsuperscript{161} See Calabresi, \textit{The New Economics Analysis of Law, supra} note 20, at 104. See also John Broome, \textit{Modern Utilitarianism, in 2 The New Palgrave Dictionary of Economics and the Law} 651, 656 (Peter Newman ed., 2002); cf. Mark J. Roe, \textit{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).
As a preliminary result, we can identify two crucial reasons why economics was easily implemented into American legal scholarship: First, utilitarianism had gained considerable significance in American society and also influenced the modern law and economics movement. Second, the specific political context during the first half of the 20th 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. Much more than elsewhere, this allowed new movements, and most of all law and economics, to flourish.

B. Origins and Developments of the Modern Law and Economics Movement

Economists had taken an interest in the law long before the development of the modern economic analysis of law. At the same time, legal scholars have attempted to gain a better understanding of the law by studying economics. However, law and economics as a tool open to a larger group of 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. 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. Aaron Director, the second

162. Rawls' concept of justice was at times interpreted as utilitarian, to which, of course, Rawls objected. See JOHN RAWLS, JUSTICE AS FAIRNESS (2001).
164. For early examples in Austria, see VICTOR MATAJA, DAS RECHT DES SCHADENERSATZES VOM STANDPUNKT DER NATIONALÖKONOMIE (1888); FRIEDRICH KLEINWÄCHTER, DIE KARTELLE – EIN BETRAG ZUR FRAGE DER ORGANISATION DER VOLKSWIRTSCHAFT (1883).
165. See Mackaay, supra note 54, at 70-71 (discussing the decline of the 19th century law and economics movement).
166. See also Schanze, supra note 119, at 2 passim.
economist to be appointed to the University of Chicago Law School in 1946,168 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.169 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 1960,170 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 Pigou171 and the Pigovian idea of internalizing external costs by imposing damage payments on the party responsible to achieve a reduction in the economically efficient amount. By pointing out the effects of incentive on the purported victims of externalities, 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 its conception 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 discrimination172 or family life173 174. He is known for his work on rational and irrational behavior,175 on human capital176 and, his pioneering work on crime and punishment177 where he first applied an economic analysis that can be

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168. Duxbury, supra note 79, at 342; Mackaay, supra note 54, at 72.
177. Becker, supra note 151.
found in almost every law and economics textbook today.\footnote{178} 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 thought to be governed by markets. This scholarship also allowed greater depth in application of legal practice and scholarship to fields that had been discussed by economists for some time, such as industrial economics.\footnote{179}

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, publishing a series of articles\footnote{180} and a book on the costs of accidents.\footnote{181} Another important precursor of the law and economics movement in legal academia was Henry Manne, whose main fields were corporate and securities law, in which he became chiefly known as a proponent of anti-interventionist views\footnote{182} and as a critic of the prohibition of insider trading.\footnote{183} In 1976, Manne established a two-week intensive course on


microeconomics for judges. Although this program was often criticized as being biased in favor of the Chicago School and as sponsored by large corporations, about a third of federal judges had participated in it by 1983, 40% by 1990. 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, a journal which focuses on law and economics, but is mostly read and stocked with articles by members of law faculties. His monograph on the “Economic Analysis of Law,” first published in 1973, was the first standard textbook of law and economics. After more than forty years, the economic analysis of law has become an established element of America legal culture. This stature of the law and economics movement is also accepted by its critics.

It may be true that the Chicago School has already penetrated those fields readily open to this approach. However, other types of economic analysis have since evolved, which also have been able to influence legal thought in the United States.

D. American Legal Scholarship and Law and Economics Today

The very idea of a “legal science” was discredited by legal real-
ism in the earlier decades of the 20th century. However, while law was still recognized as an autonomous discipline in the mid-20th century, Richard Posner identifies a decline of this view in the 1960s. Posner argues that the reason for this decline is not the influence of economics and related disciplines, but the end of a political consensus among legal academics and the general loss of confidence in the ability of lawyers to solve the problems of modern society. This does not necessarily imply that U.S. 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.

As a consequence of the above, the work of legal scholars in the United States is fundamentally different from that of legal faculties elsewhere, including the work of academics in 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. 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. For this reason, law scholarship has occasionally been criticized for having lost its usefulness to practice (for example in finding analyzing and differentiating precedents); 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 interdisciplinary approaches gained so much ground in the U.S. 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. Students decide about the acceptance and rejection of

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196. Cheffins, id. at 198-99.
articles,\(^{199}\) and their gratuitous work allows authors to publish much longer articles than in German-speaking countries.\(^{200}\) 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.\(^{201}\) Furthermore, different from most other countries, law is a graduate degree in the United States, many students have an academic 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.\(^{202}\) U.S. 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.

**E. Law and Economics as a Political Program?**

An important criticism of economic analysis of law is its purported conservative slant in economic policy.\(^{203}\) 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, often described as a conservative\(^{204}\), is probably the best example: His


\(^{200}\) 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 generally Louis Kaplow & Steven Shavell, *Fairness versus Welfare*, 114 HARV. L. REV. 961 (2001).


theory that the common law tends towards efficiency\textsuperscript{205} 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.\textsuperscript{206} Posner, and not Guido Calabresi,\textsuperscript{207} 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.\textsuperscript{208} His proposals have sometimes been radical and often idiosyncratic\textsuperscript{209} and have made him a popular target of criticism.\textsuperscript{210}

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 Ronald 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\textsuperscript{211} found that a

\begin{itemize}
  \item \textsuperscript{205} 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, \textit{supra} note 189; see also Paul H. Rubin, \textit{Why is the Common Law Efficient?}, 6 J. LEGAL STUD. 51 (1977); George L. Priest, \textit{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, \textit{supra} note 140, at 591; Adam J. Hirsch, \textit{Comment: Evolutionary Theories of Common Law Efficiency: Reasons for (Cognitive) Skepticism}, 32 FLA. ST. U.L REV. 425 (2005); Nicola Gennaioli & Andrei Shleifer, \textit{The Evolution of Common Law}, 115 J. POL. ECON. 43 (2007) (differentiating).
  \item \textsuperscript{206} \textit{Cf.}, e.g., James R. Hackney, Jr., \textit{Law and Neoclassical Economics}, 15 LAW & HIST. REV. 275, 316 (1997).
  \item \textsuperscript{207} Guido Calabresi is generally considered a liberal. See Horwitz, \textit{supra} note 203, at 909.
  \item \textsuperscript{208} KELMAN, \textit{supra} note 203, at 117.
  \item \textsuperscript{210} \textit{Cf.} KELMAN, \textit{supra} note 203, at 117.
  \item \textsuperscript{211} Mitu Gulati & Veronica Sanchez, \textit{Giants in a World of Pygmies? Testing the
few judges, who were incidentally also law teachers, dominate the se-
lection of jurisprudence in case books, with Richard Posner, Frank
Easterbrook and Ralph Winter, who are all associated with the Chi-
cago School,\footnote{12} leading the field.

A second important point is the so-called "antitrust revolution,"
which accompanied the rise of law and economics. This term de-
scribes the abandonment of the extensive interpretation of the
Sherman Act, Clayton Act and the Federal Trade Commission Act\footnote{213}
that had dominated in the decades following World War II. This
allowed more leverage to the cleansing powers of the market; the Har-
vard 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 neo-
classical price theory and emphasized the inherent instability of mo-

From the 1980s onwards, the courts began to adopt Chicago
School views, such as the argument that antitrust should servealloca-
tive efficiency only and neglect other goals, such as the protection
of small business.\footnote{215} The Department of Justice merger guidelines began

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\begin{itemize}
\item \textit{Superstar Hypothesis with Judicial Opinions in Casebooks}, 87 \textit{Iowa L. Rev.} 1141, 1155 (2002).
\item Frank Easterbrook is known as an eminent scholar of corporate law and co-
author of a monograph on the subject, \textsc{Frank Easterbrook \& Daniel Fischel,
The Economic Structure of Corporate Law} (1991). Ralph Winter is a profes-
sor 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, \textit{State Law, Shareholder Protection and the Theory of the Corpo-
Yale background, many commentators consider Winter to be close in philosophy to
the Chicago brand of Law and Economics."); see also Stephan J. Choi \& G. Mitu Gu-
19 (2005) (identifying Judges Posner and Easterbrook as the ones with the largest
number of published opinions).
\item Sherman Antitrust Act, 15 U.S.C. §§ 1-7 (2000); Clayton Antitrust Act, 15
\item \textit{See} Michael S. Jacobs, \textit{An Essay on the Normative Foundations of Antitrust
Economics}, 74 N.C. L. Rev. 219, 226-66 (1995); \textit{cf.} Frank Easterbrook, \textit{The Limits of
\item \textit{ Cf.} Jacobs, \textit{id.} at 220-21; see, \textit{e.g.}, Matsushita Elec. Indus. Co. v. Zenith Ra-
dio Corp., 475 U.S. 574, 588-89 (1986); Northwest Wholesale Stationers, Inc. v. Pa-
cific 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); \textit{and particu-
\end{itemize}
to reflect these views as well. Meanwhile, a counter-movement has emerged, the so-called “post-Chicago” antitrust, whose influence is already reflected in the case law.

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, is the target of most of the criticism launched both inside and outside the United States. As practitioners 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 of thought that do not share this alleged political agenda. 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. Under a utilitarian objective function, total utility is


218. See, e.g., Rowley, supra note 18, at 24 (explaining that the Chicago approach dominated the early research program of L&E); Susan Rose-Ackerman, Law and Economics: Paradigm, Politics, or Philosophy, in LAW AND ECONOMICS 233, 237 (Nicholas Mercuro ed., Kluwer Academic Publishers 1989); supra note 19.

219. See, e.g., Minda, supra note 109, at 111, n.3; MERCuro & MEDEMA, supra note 60, at 79; Ejan Mackaay, Schools: General, in 0500 INTERNATIONAL ENCYCLOPEDIA OF LAW AND ECONOMICS 402, 410 (Boudewijn Bouckaert & Gerrit De Geest eds., 2000); see also Francesco Parisi, Positive, Normative and Functional Schools in Law and Economics, 18 EUR. J. L. & ECON. 259, 264-65 (2004); Rose-Ackerman, supra note 218, at 234; Susan Rose-Ackerman, Economics, Public Policy, and Law, 26 VICTORIA U. WELLEINGTON 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 and A. Mitchell Polinsky have been said to adhere to the “New Haven School” or “Reformist School.” See MERCuro & MEDEMA, supra note 60, at 80; Wetlaufuer, supra note 60, at 37; Mackaay, supra note 54, at 412; cf. Bruce A. Ackerman, Law, Economics, and the Problem of Legal Culture, 1986 DUKE L. J. 929 (1986); Rose-Ackerman, supra note 218, at 235-36, 255, n.19.

220. 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.
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,\(^221\) 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\(^222\) did not prevail in the debate.\(^223\) Many legal economists today aim at the maximization of total human utility or social welfare as such.\(^224\) 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,\(^225\) 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.\(^226\) 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)\(^227\) – essentially a minimum consensus position that should be ac-

\(^{221}\) See, e.g., Kaplow & Shavell, supra note 20, at 37.

\(^{222}\) Posner, Utilitarianism, supra note 18; Posner, Ethical and Political Basis, supra note 18.


\(^{224}\) 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, Changing Contours, supra note 18, at 44-48.


\(^{226}\) 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; see also Parisi, Changing Contours, supra note 18, at 47; Rowley, supra note 18, at 21-22. 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).

\(^{227}\) See, e.g., Andreu Mas-Colell, Michael D. Whinston & Jerry R. Green, Microeconomic Theory 313 (Oxford University Press 1995); Robert
ceptable 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 allows its beneficiary to compensate the loser, even if compensation does not actually take place).228 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.229

It suffices to conclude that the rapid spread of law and economics in the United States 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.

V. The Development in German-Speaking Europe

A. Law and Economics in the late 19th century

Early antecedents of modern law and economics date back to the end of the 19th century and can be traced to German-speaking Europe, particularly to Vienna, the capital of the Habsburg Empire.230 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

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229. Kornhauser, supra note 163, at 354.

230. Law and economics scholarship includes e.g. Mataja, supra note 164; Kleinwächter, supra note 164; Anton Menger, Das bürgerliche Recht und die besitzlosen Volksklassen (1890), available at <http://dlib-pr.mpier.mpg.de/ekleioc/0010/exec/books/%22172083%22>. 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.
Standpunkte der Nationalökonomie" ("The law of torts and contractual liability from the point of view of political economy"), published in 1988.231 Mataja anticipated central ideas of the 20th century law and economics movement. In spite of his revolutionary methodology, his book had no lasting influence on legal scholarship and practice.232

Similar to modern law and economics, Mataja emphasized the incentive effects of tort law which lead him to criticize the negligence rule.233 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.234 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.235

Mataja made several further arguments that were truly novel for his time236 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

231. 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).

232. For a more detailed discussion, see England, supra note 15, and Winkler, supra note 24.


235. MATAJA, supra note 164, at 27 (referring to Böhm-Bawerk).

236. See, e.g., his discussion on compulsory insurance for accidents at work and occupational disease, MATAJA, supra note 164, at 85, 111.
strict liability.\(^{237}\) Outside of German speaking countries, Mataja was picked up, among others, by the French scholar Teisseire in his 1901 book *Essai d'une théorie générale sur le fondement de la responsabilité*, and by the Hungarian scholar Géza Marton.\(^{238}\) 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,\(^{239}\) 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.\(^{240}\) 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.\(^{241}\) Any persisting fears of contact between scholars of the two disciplines\(^ {242}\) should have been overcome without great difficulty. Overall, the scholarly environment seemed downright cut out to initiate a school of law and economics.\(^{243}\) It almost comes as a surprise that Mataja did not spark a law and economics movement comparable to the one starting in the 1960s in the U.S.

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.\(^{244}\) Carl Menger, one of the founding fathers of

\(^{237}\) See, e.g., Max Rümelin, *Die Gründe der Schadenszurechnung und die Stellung des deutschen bürgerlichen Gesetzbuchs zur objektiven Schadensatzpflicht* (1896).


\(^{239}\) With regard to the marginalist revolution, see, e.g., Ernesto Scarpanti & Stefano Zamagni, *An Outline of the History of Economic Thought* 145 *passim* (1995); Hovenkamp, *supra* note 225, at 308 *passim* (arguing that marginalism had a strong impact on legal thought).

\(^{240}\) Sibylle Hober, *Freiheit ohne Grenzen* 98 (2001). Of course, details were mainly discussed in the legal discourse. *Id.*

\(^{241}\) Winkler, *supra* note 24, at 276.

\(^{242}\) See Böhm-Bawerk, *supra* note 39, at 418 *passim*.


the Austrian School of Economics, criticized the conservative attitude of the predominant Savignyan jurisprudence.\textsuperscript{245} 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.\textsuperscript{246} 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.\textsuperscript{247} Without further justification, Windscheid, Laband and other lawyers argued that ethical, political and economic considerations were not part of a lawyers’ work.\textsuperscript{248} Even Rümelin, a seemingly progressive thinker, argued that Mataja “whole train of thoughts was morbid”.\textsuperscript{249} 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\textsuperscript{250} and the perspective of the corporation as a nexus of contracts.\textsuperscript{251}

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


\textsuperscript{246} Menger, supra note 230, at 5, 10; cf. Hofer, supra note 240, at 134.

\textsuperscript{247} Englard, supra note 15, at 187.

\textsuperscript{248} 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 (2d. ed. 1888) (arguing that, even though he esteemed disciplines such as history, economics, politics and philosophy, they were irrelevant for legal interpretation).

\textsuperscript{249} Rümelin, supra note 237, at 7 (1896); cf. Knut W. Nörr, Zwischen den Mühlstielen 38 (1988) (arguing that economics had little influence on the legal discussion).

\textsuperscript{250} Erwin Steinitzer, Ökonomische Theorie der Aktiengesellschaft 55 passim (1908).

\textsuperscript{251} Id. at 48; 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).
results” to the law would have led to an increased uncertainty. 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 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 committed to systematization and coherence in the interpretation of legal norms. A 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. 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; 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 19th century conceptual formalism. Unsurprisingly, Mataja’s proposal for strict liability was criticized and eventually rejected.

252. 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).

253. See Mercuro & MeDemA, supra note 60.

254. Cf. Schäfer & Ott, supra note 24, at 52; for a critical assessment of this argument see MatTei, supra note 5, at 82.

255. Wieacker, supra note 62, at 401. Compare the struggle for legal positivism and coherence, e.g., Claus-Wilhelm Canaris, SystemDenken und SystemBegriff in der Jurisprudenz 121 (1969) (arguing that the judge must strictly abide the law but also acknowledging that statutes are not always coherent).

256. 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 1. Einleitung in die Rechtswissenschaft und Geschichte des Rechts bey dem römischen Volk 36 (1841).

257. Rümelin, supra note 237, at 6.
This "methodological" rejection was supported by political factors. The law and economics scholars of the late 19th century, other than some of their American descendents 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. Interdisciplinary research was often rejected by those who preferred the existing law. By contrast, a significant part of the later U.S. 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.

B. An Internal View of Policy and Interpretation

Several critics have repeatedly pointed to the marginalization of policy in German legal scholarship. This is relevant for our theory since law and economics was a normative movement that introduced

258. Menger, supra note 230, passim (criticizing the draft on a German Civil Code).
260. This approach is borne by the theory that the common law moves towards efficiency; For references, see supra note 205.
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 19th century Historical School of Savigny, which proposed to take the customs of ancient Roman law as a model, and reemerged in a different shade in Hans Kelsen’s 20th century Pure Theory of Law.

Whereas Savigny proposed to make policy considerations dependent on the existing law, Kelsen argued that policy should be entirely be excluded from “legal science.” 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 sub-systems of society. This focus on systematization was coined both by the natural law approach as well as by the Historical School 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.

A decisive development preceding the Historical School of Law was the rise of historicism towards the end of the 18th century. Johann Gottfried Herder and others sparked the separation of the humanities from philosophy. 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 respective age and understand the problem “from within.” Whereas Leo-

262. See Kaufmann, supra note 261, at 124-25.
263. See, e.g., GUNTER TEUBNER, RECHT ALS AUTOPOIETISCHES SYSTEM (1989).
264. Kaufmann, supra note 261, at 82. WIEACKER, supra note 62, at 372 passim (arguing that the Historical School of Law and the Natural Law approach were quite similar in this respect).
265. See HERGET, supra note 1, at 104-06, 110 (arguing that, in Germany, system, structure and coherence were disproportionately important compared to American legal thought).
266. See, e.g., GUNNAR SKIRBEKK & NILS GILJE, GESCHICHTE DER PHILOSOPHIE VOL II 552 passim (1987).
267. 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
pold von Ranke contributed to the "science of history," 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 Volksgeist (Spirit of the People).

Savigny's Historical School was the basis for today's approach to policy. In his influential 1814 work, Vom Beruf unserer Zeit für Gesetzgebung und Rechtswissenschaft (On the Vocation of Our Time for Legislation and Legal Science) 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. 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.

In fact, Savigny had written Vom Beruf in reaction to Anton Friedrich Justus Thibaut's Über die Notwendigkeit eines allgemeinen bürgerlichen Rechts in Deutschland (On the Necessity of a General Civil Law in Germany), 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 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

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268. See, e.g., Skirbekk & Gilje, supra note 266, at 559.
269. See Wieacker, supra note 62, at 356 (explaining the influence of Herder on Savigny).
270. Bullesbach, supra note 261, at 416.
273. 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").
economic order.\textsuperscript{274} He criticized the fact that there were few scholars sufficiently knowledgeable to draft such general, abstract laws.\textsuperscript{275}

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.

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 \textit{Volksgest} was presumed to be independent of social and political movements. Savigny did not believe that the law had an end in itself.\textsuperscript{276} 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.\textsuperscript{277}

From today's perspective, Savigny's approach was strictly conservative in the sense that it was opposed to change and progress.\textsuperscript{278} 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.\textsuperscript{279} 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.\textsuperscript{280} Over the course of the 19th century, the jurist

\begin{itemize}
\item \textsuperscript{274} Id. at 58.
\item \textsuperscript{275} Id. at 38.
\item \textsuperscript{276} SAVIGNY, supra note 271, at 18 (explicitly stating that the law had no end in itself).
\item \textsuperscript{277} Grimm, supra note 42, at 476-77. SCHRÖDER, supra note 272, at 215-218 \textit{pattim} (explaining how Savigny suppressed philosophical inquiries in his theory).
\item \textsuperscript{278} See WIEACKER, supra note 62, at 383, 385. Cf. JOACHIM WEGE, \textsc{Positives Recht und sozialer Wandel im demokratischen und sozialen Rechtsstaat} 132 \textit{passim} (1977) (arguing that legal positivism is used to maintain the status quo).
\item \textsuperscript{279} 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.
\item \textsuperscript{280} GEORG F. PUCHTA, \textsc{Das Gewohnheitsrecht} (1828, 1837). WIEACKER, su-
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.\(^{281}\) 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.\(^{282}\) 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.\(^{283}\)

Due to the inherent indeterminacy of the law, personal, moral views of jurists were ultimately allowed to enter the legal system.\(^{284}\) 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.\(^{285}\)

Several scholars criticized the Historical School, among others, Hegel in his treatise on legal philosophy of 1821\(^ {286}\) and Kirchmann in his famous speech of 1847\(^ {287}\). Much later, the free-law movement at-

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pra note 62, at 399; Grimm, supra note 42, at 478 (both arguing that Puchta consolidated the lawyers' monopoly).

281. Grimm, supra note 42, at 475.


283. See, e.g., Karl Marx & Friedrich Engels, Die Deutsche Ideologie (1845-46; published 1932); Menger, supra note 230, at 12-14; Hermann Kantorowicz, Savigny and the Historical School of Law, 53 L. Q. Rev. 335 (1937); Reimann, supra note 62, at 95, 110. For an extensive elaboration of the political components of Savigny's theory see Schröder, supra note 272.

284. Cf. Grimm, supra note 42, at 482, 484.

285. Schröder, supra note 272, at 221-22, 276.


tacked Savigny’s methods but the Historical School had already too thoroughly penetrated the legal community for subsequent change to be possible. Puchta, Windscheid, 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. Their methods were clearly directed at restating the existing law and not at reform. With Puchta, the emphasis on the jurists’ law resulted in an ever growing belief in coherence, systematization and constructivism. Puchta’s emphasis of legal terms led to a separation of law from social circumstances, something that Savigny had predicted would happen. Even the “Germanistic” branch of the Historical School, which was concerned about 19th century industrialization, widely approved of legal science as an instrument independent from social consequences.

Ironically, the codifications of the early 19th 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. Clearly, the presumption was that external criteria were accounted for through legislation and once accepted would not be

288. See, e.g., Kantorowicz, supra note 283, at 326.
289. 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.
292. Carl F. Gerber, System des deutschen Privatrechts (1848); Carl F. Gerber, Gesammelte juristische Abhandlungen (1872).
293. See, e.g., Carl F. Gerber, Über öffentliche Rechte (1852). Other proponents were Laband und Jellinek; see Alexander Somer, 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).
294. Grimm, supra note 42, at 479 (with reference to Puchta).
295. Id. at 478.
296. Puchta, supra note 256, at 36-37.
298. Grimm, supra note 42, at 480 passim (with reference to Gerber).
299. Id. at 472.
questioned. New legal norms could then only be created within the boundaries of the legal constructs. In a way, 19th century legal science returned to a similar kind of formalism of which they had accused the earlier natural law movement. The *Kodifikationsfrage* (the dispute about codification) 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.

This separation of legal science from social circumstances was supported by an engrained anti-consequentialist 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. Kant thought that the moral value of something could not be judged by the consequences, but that there was a value in itself, which was subject to pre-empirical and not empirical knowledge.

300. Gerber, System, supra note 292, at XI (5th ed. 1955) (1848). This was closely connected to the decreasing use of a historical interpretation of legal norms; cf. Dawson, supra note 62, at 444-45.

301. Wieacker, supra note 62, at 372-401 (arguing that legal positivism and the natural law approach had a similar methodology).

302. For a short summary see Wieacker, supra note 62, at 390 passim.

303. See 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.”; cf. Bernhard Windscheid, RECHT UND RECHTSWISSENSCHAFT, GRIEFSWALDER 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.

304. Concerning the influence of German Philosophy on Savigny, see Schröder, supra note 272, at 215-27, (arguing, however, that Savigny often misunderstood philosophical writings). Regarding the influence of Kant and Fichte on Savigny, see Knut W. Nörr, Savignys Anschauung und Kant's Urteilskraft in Festschrift für Helmut Coing Vol I 615 passim (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).

305. Immanuel Kant, Grundlegung der Metaphysik der Sitten (1795):
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.

formed the basis of influential 20th century writing and clearly ran contrary to utilitarianism, and thus, contrary 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. 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. Critics of legal positivism such as Scheler und Hartmann developed approaches based on natural law and explicitly turned against utilitarianism. Virtually all important legal writings were based on idealistic approaches and were clearly anti-utilitarian.

Few lawyers in the German-speaking area of Europe were pro-utilitarian, with Jhering as a prominent exception. 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. An infringement of rights was an injury to one’s sense of justice or one’s moral integrity. This violation, however, Jhering argued, was not a certain utility loss

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


309. MARX & ENGELS, supra note 283, at 394 passim (arguing that utilitarianism is a “theory of mutual exploitation”).

310. MAX SCHELÉR, 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 passim (arguing that there is an anti-hedonistic attitude).


312. RUDOLPH VON JHERING, DER KAMPF UMS RECHT 20-46 (23d ed. 1946).

313. Id. at 18.
but rather a violation of the concept of law as such. Only in a second step, he explained the deterrence effects of a social norm which established a duty to sanction misbehavior. Altogether, there was a clear anti-utilitarian attitude which did not exclusively come from German idealism. It is one reason for the general dismissal of law and economics.

C. 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 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 positivist side, lawyers needed to find better tools for predicting the consequences of the law. There was a similar movement in German-speaking Europe, collectively the free-law school, which, however, was not as successful as legal realism. The free-law movement managed to temporarily undermine the prevailing formalism to some degree, but it eventually received a deadly blow by the Nazi regime. As ‘Interessenjurisprudenz’ (interest-oriented jurisprudence) 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.

314. Id. at 40.
315. JHERING, supra note 312, at 46 passim.
317. LARENZ, supra note 24, at 19 passim. 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.
318. 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”); 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,
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.\textsuperscript{319} 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 19th century, as a critique on the theory of lacunae\textsuperscript{320} and reached its peak in the years preceding World War I.\textsuperscript{321} At the same time, the closely connected law and sociology movement\textsuperscript{322} criticized the dominant understanding of the law. The free-law movement emerged from a discussion group of a small number of people around Kantorowicz and Radbruch in 1903 and 1904.\textsuperscript{323} Its name can be traced to a speech given by Eugene Ehrlich in 1903.\textsuperscript{324} 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.\textsuperscript{325} Similarly to American Legal Realism, members of the free-law movement understood judicial opinions as discretionary acts, which were only justified by a cha-

\textsuperscript{319} In particular, Jhering's Law as a Means to an End (1877-83) had an immense influence on the legal discourse. \textit{I Rudolph von Jhering, Der Zweck im Recht} 250 (3d ed. 1893) argued, \textit{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." \textit{Cf.} Winkler, \textit{supra} note 24, at 262, 276-77. Regarding Marx, see \textit{Wage}, \textit{supra} note 278, at 47 passim.

\textsuperscript{320} \textit{See}, \textit{e.g.}, Ehrlich, Lücken, \textit{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; \textit{id.} at 112. \textit{See also} Oskar Bülow, Gesetz und Richteramt (1885). Regarding the free-law critique on the presumed determinacy of the law, see Dawson, \textit{supra} note 62, at 442-43; \textit{see generally} Luigi Lombardi, Geschichte des Freirechts 54 (1967).

\textsuperscript{321} Martin Kriele, Grundprobleme der Rechtspolitik 43, n.4 (2003) (arguing that the main works of the free-law school were written between 1906 and 1915).

\textsuperscript{322} Max Weber, Wirtschaft und Gesellschaft (5th ed. 1976); Eugen Ehrlich, Grundlegung der Soziologie des Rechts (1913).

\textsuperscript{323} The participants surrounding Kantorowicz and Radbruch discussed writings by Ehrlich, Savigny and others; \textit{see} Muscheler, \textit{Einführung, in Hermann Kantorowicz (Gnaeus Flavius), Der Kampf um die Rechtswissenschaft VIII} (Nomos: 2002 (reprint)). \textit{Cf.}, comprehensively discussing Kantorowicz, Karlheinz Muscheler, Hermann Ulrich Kantorowicz: Eine Biographie (1984). The name Freirecht (free-law) goes back to Eugen Ehrlich, Freie Rechtsfindung und Freie Rechtswissenschaft (Leipzig, 1903).

\textsuperscript{324} \textit{See} Ehrlich, \textit{id.}

\textsuperscript{325} Kantorowicz, \textit{supra} note 243, \textit{Foreword}. 
rade of legal methods after the actual decision had been taken.\footnote{326} Analogies and justifications for extensive and restrictive modes of interpretation were considered to be pseudo-logic arguments.\footnote{327} Hermeneutics played a major role in that the prejudices of the judge were considered to be decisive for legal intuition and thus for the outcome of the case.\footnote{328} Free-law scholars argued that an objective interpretation, assuming that legal norms could have a unique meaning, was an impossibility. In Ehrlich's words: "The one who speaks always wants to say something different from what the one who listens understands."\footnote{329} Others such as Kantorowicz likewise attacked dogmas such as objectivism and predictability of the case law.\footnote{330} Kantorowicz's primary goal was to explain the extent of freedom judges already had\footnote{331} and not, contrary to some of his critics,\footnote{332} to facilitate arbitrary jurisprudence.\footnote{333} From these insights, free-law scholars such as Fuchs derived a fact-base approach to the law.\footnote{334} Moreover, they encouraged lawyers to engage in interdisciplinary work.\footnote{335}

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326. KRIELE, supra note 321, at 43. A good example of this critique is HERMANN ISAY, RECHTSNORM UND ENTSCHEIDUNG 61-62 (1929).
327. 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.
329. Ehrlich, Rechtsfindung supra note 317, at 207 (criticizing objectivity in the law). BYDILNSKI, supra note 19, at 69 passim is a good example of how hermeneutics have influenced contemporary legal methods.
330. 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 (criticizing legal dogma); cf. Kaufmann, supra note 261, at 121.
331. KANTOROWICZ, supra note 243, at 35.
332. See, e.g., HECK, supra note 318, at 116 passim, see also PHILIPP HECK, DAS PROBLEM DER RECHTSGEWINNUNG 23-24 (2d ed. 1932) (1912).
333. 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 passim.
334. Fuchs, supra note 261, at 7.
335. See, e.g., KANTOROWICZ, supra note 243, at 38; Fuchs, supra note 261, at 7; KARL G. WURZEL, RECHTSWISSENSCHAFT ALS SOZIALWISSENSCHAFT: JURISTISCHES DENKEN UND SOZIALDYNAMIK DES RECHTS 5-6, 70 (photo. reprint 1991) (1904); KARL G. WURZEL, DIE SOZIALDYNAMIK DES RECHTS 182 (photo. reprint 1991) (1924). See also Müller-Erzbach, supra note 287, at 107 (arguing that German corporate law did not account for the economic implications of dispersed ownership in publicly held corporations, and referring to the failure of the general meeting as a corporate decision-maker body.
Prior to World War II, the free law school was not only accepted among academics, but also widely recognized by judges, including a Chief Justice of the Austrian Supreme Court. Some even understood, contrary to a long tradition, that judicial decisions had the same legal power and validity as a statute.

Today, free-law notions appear infrequently in recognized textbooks of legal history, legal outlines of law and philosophy, and legal textbooks on methodology. The decline and eventual fall of the movement was partly due to a misunderstanding of the main propositions. More importantly, free-law scholars, such as Kantorowicz, were professionally pretermitted. In spite of these obstacles, the movement might still have persisted if the Nazis had not come to power. Due to the Jewish heritage of some of the free-law school adherents, it was often subject to derision. 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. Other

336. A very well-known free-law work of the 1920s includes ISAY, supra note 326.
337. See ISAY, supra note 326, at 62 passim for citations of the mentioned lawyers. See also NORR, supra note 249, at 30 (with reference to decisions). See generally the decision of the former German Federal Court of Justice, Reichsgericht, June 27, 1922, 104 Entscheidungen des Reichsgerichts in Zivilsachen [RGZ] 397 (German Reich) (explaining the inventive role of judges).
338. NORR, supra note 249, at 30 passim. Cf. DAWSON, supra note 62, at 432-63 (arguing that in the 1920s courts increasingly cited precedents as a results of the “case-law revolution”).
339. WIEACKER, supra note 62; VERDROSS, supra note 308; Kaufmann, supra note 261, at 1 passim.
340. BYDLINSKI, supra note 19, with few sporadical references; PAWLÓWSKI, supra note 19, at n.137 with a short reference to Isay. See also 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 (2d ed. 1992).
341. Rehbinder, Vorwort, supra note 317; Muscheler, Einführung, supra note 323, at XIII-IX. BYDLINSKI, supra note 19, at 152.
342. See LOMBARDI, supra note 320, at 41 (briefly analysing the ancestry of some free-law proponents). See also NÖRR, supra note 249, at 31.
343. See, e.g., Philipp Heck, Die Interessenjurisprudenz und ihre neuen Gegner, in 22 ARCHIV FÜR CIVILISTISCHE PRAXIS 129, 129-51 (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).
344. Muscheler, Einführung, supra note 323, at XXII; Foulkes, Vorwort in FOULKES, supra note 261, at 9. Contra Behrends, Von der Freirechtsbewegung zum Ordnungs- und Gestaltungsdanken in RALF DREIER & WOLFGANG SELLERT, RECHT UND JUSTIZ IM “Dritten Reich” 34 passim (1989) (arguing that the free-law move-
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 II\textsuperscript{345} does not mean that the Nazi regime did not have any influence. On the contrary, it prevented a change in legal thought that developed elsewhere, and especially in the United States.\textsuperscript{346}

After World War II, free-law scholars such as Radbruch\textsuperscript{347} and Esser\textsuperscript{348} were quite successful in the academic debate\textsuperscript{349} but were unable to deploy any serious influence on the daily practice of law.\textsuperscript{350} 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.\textsuperscript{351} 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.\textsuperscript{352} Some free-law scholars mitigated their own views which partly led to a convergence of the two schools.\textsuperscript{353}

\begin{footnotesize}
\begin{enumerate}
\item Kantorowicz was suspended on April 13, 1933; see Jörn Eckert, \textit{Was war die Kieler Schule?}, in FRANZ JÜRGEN SÄCKER, \textit{RECHT UND RECHTSLERHRE IM NATIONALSOZIALISMUS} 44 (Franz Jürgen Säcker ed., 1992).
\item For a discussion on whether the Nazi’s legal theory was based on positivism or natural law see Kaufmann, \textit{Rechtsphilosophie und Nationalsozialismus} in ROTTLEUTHNER, \textit{supra} note 345, at 1.
\item GUSTAV RADBRUCH, \textit{EINFÜHRUNG IN DIE RECHTswissenschaft} 161 (9th ed. 1952) (arguing that the methods of interpretation are chosen after the decision has been made).
\item ESSER, \textit{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); \textit{cf. id.}, at 14-15, 23-24, 41-42.
\item See, e.g., LARENZ, \textit{supra} note 307, at 24. See also PAWLowski, \textit{supra} note 19, at n.757 \textit{passim} with reference to Esser, Harenburg and others.
\item Kaufmann, \textit{supra} note 261, at 82-83; \textit{see also infra} Section 0.
\item HERGET, \textit{supra} note 1, at 111; \textit{infra} note 318. See above all Heck’s critique on the free-law school: Heck, \textit{supra} note 318, at 104 \textit{passim}; Heck, \textit{supra} note 332, at 23 \textit{passim}. Heck, \textit{supra} note 343, at 129.
\item ESSER, \textit{supra} note 33, at 116 .
\item HECK, \textit{supra} note 318, at 105-06 with reference to Ehrlich; HECK, \textit{supra} note 332, at 25-26 with reference to Kantorowicz (arguing that the term “free-law method” should be dropped). \textit{Cf.} Muscheler, \textit{Einführung, supra} note 323, at XVII; Karlheinz Muscheler, \textit{Ein Klassiker der Jurisprudenz: “Der Kampf um die Rechtswissenschaft”}
\end{enumerate}
\end{footnotesize}
The fall of the free-law school was an important factor for today's aversion against law and economics.\textsuperscript{354} 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.

D. Reproduction in "Interessenjurisprudenz" and "Wertungsjurisprudenz"

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

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 the 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.\textsuperscript{356} For him, the appropriateness of a norm was often much less important than the coherence with the legal system.\textsuperscript{357} 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.\textsuperscript{358} It was justified on the premise that legal certainty was more important than justice.\textsuperscript{359}

The battle over the heritage of Begriffsjurisprudenz resulted in a

\textit{von Hermann Kantorowicz, NEUE JURISTISCHE WOCHENSCHRIFT} 567 (2006); see also Lombardi, \textit{supra} note 320 (discussing the free-law school and the Interessenjurisprudenz as one movement).

\textsuperscript{354} Cf. Somek, \textit{Kennedy}, \textit{supra} note 318, at 763-64 (discussing the aversion of Critical Legal Studies).

\textsuperscript{355} Larenz, \textit{supra} note 24, at 120; Bydlinski, \textit{supra} note 19, at 116-17, 123.

\textsuperscript{356} Heck, \textit{supra} note 318, at 111, 118; Heck, \textit{supra} note 343, at 144. See also Julius Binder, \textit{Bemerkungen zum Methodenstreit in der Privatrechtswissenschaft}, 100 \textit{ZEITSCHRIFT FÜR DAS GESAMTE HANDELSRECHT UND WIRTSCHAFTSRECHT} 82 (1934).

\textsuperscript{357} Heck, \textit{supra} note 318, at 105; Heck, \textit{supra} note 332, at 5.

\textsuperscript{358} Grimm, \textit{supra} note 42, at 469 \textit{passim}, cf. Bydlinski, \textit{supra} note 19, at 123, 126.

\textsuperscript{359} Kriele, \textit{supra} note 321, at 44.
general acceptance of social norms as part of legal methods – but only if they were mentioned in legislative documents. Interestenjurisprudenz 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. Judges were said to be bound by the “legislators’ views,” instead of their own intuition. Scholarship should support judicial decision-making by organizing legal materials and filling in lacunae in the legal system.

With this internal view of the law, Interestenjurisprudenz 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. According to Heck, solely legal tools were permitted in interpretation, which should be totally independent from external moral views. Clearly, Interestenjurisprudenz promoted a constructivist, internal view of the law, much like 19th century Begriffsjurisprudenz, and left little space for interdisciplinary studies.

Part of this approach was the immense emphasis placed on coherence. Heck thought that the interpreter should always take into account the entirety of the statutes when reading legal norms. Any gap had to be filled from within the legal system in strict faith to the statutes, 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. This anti-interdisciplinary view pre-

360. BYDLINSKI, supra note 19, at 114.
361. Cf. BYDLINSKI, supra note 19, at 115.
362. HECK, supra note 332, at 8.
363. HECK, supra note 318, at 126.
364. Id. at 127-28.
365. Id. at 28-29.
366. Id. at 107.
367. See, e.g., id. at 111. Cf. HERGET, supra note 1, at 115-16.
368. HECK, BEGRIFFSBILDUNG, supra note 318, at 21.
vails even today.\textsuperscript{369}

Today’s \textit{Wertungjurisprudenz} picked up the internal view of the law from \textit{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.\textsuperscript{370} Proponents of \textit{Wertungjurisprudenz} 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.\textsuperscript{371} According to \textit{Wertungjurisprudenz}, 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.\textsuperscript{372} Many believe that legislation serves as a compromise normalizing divergent values.\textsuperscript{373} 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, the 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.\textsuperscript{374} Most think that external criteria may not be used to interpret the law: Pawlowski argues that the authority of judgements can only be based on legal, that is, statutory norms.\textsuperscript{375} Larenz states that a lawyer has an advantage over an ethicist because, unlike the ethicist, he is bound by “the values predetermined by the legal system, the constitution and

\begin{thebibliography}{99}
  \bibitem{369} \textsc{Alexander Somek & Nikolaus Forgó}, \textit{Nachpositivistisches Rechtsdenken. Inhalt und Form des positiven Rechts} (1996) (fiercely attacking contemporary legal education).
  \bibitem{370} \textsc{Bydlinski, supra} note 19, at 123-24, 127, 131; Larenz, \textit{supra} note 24, at 318. \textit{But see} Heck, \textit{supra} note 318, at 96 (mentioning “objective” elements). \textit{See also Alexander Somek, Rechtssystem und Republik} 193 \textit{passim} (1992).
  \bibitem{371} \textsc{Bydlinski, supra} note 19, at 128, 131.
  \bibitem{372} \textsc{Robert Alexy}, \textit{Theorie der juristischen Argumentation} 329-30 (1996) (discussing the “exoneration function” of legal methods and the various ways of internal justifications).
  \bibitem{373} \textit{Id}.
  \bibitem{375} \textsc{Pawlowski, supra} note 19, at n. 95.
\end{thebibliography}
the generally accepted legal standards." 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. 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. 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.

E. 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 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 pre-democratic 19th century, an internal view of the law had been used to maintain the current law. On the contrary, in post-World War I 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. For our purposes, however, the effect was the same – law and economics was rejected as a legal discipline.

Different from Savigny, Kelsen emphasized the distinction be-

376. LARENZ, supra note 24, at 291; cf. LARENZ, supra note 307, at 25.
377. 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”).
381. See NOLL, supra note 5, however, without reference to law and economics.
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, Kelsen argued that normative theories were not scientific and thus lacked valid arguments. 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. Since normative arguments were not verifiable or falsifiable, policy was arbitrary. In his view, any natural law was utopian.

The purity of Kelsen’s theory was precisely the exclusion of other disciplines. This way, a lawyer was thought to be able to make apolitical and impartial decisions when interpreting the law or deciding a case. As a relativist, Kelsen had personal moral views, but he denied its general validity or even the possibility of general validity. 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. Whereas Bentham defined the maximization of happiness as the objective of legislation, Kelsen avoided any guidelines to the law regarding contents.

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. Naturally, this precludes an open policy discussion as part of “legal science.” An internal view of the law was quite welcome by the legal community. First, it gave

382. Kaufmann, supra note 261, at 124.
383. HANS KELSEN, Die Philosophischen Grundlagen der Naturrechtslehre und des Rechtspositivismus 64, 70 (1928).
384. Id. at 67, 71.
385. SKIRBEKK & GILJE, supra note 266, at 834-35.
386. KELSEN, supra note 15, at 43, 52; KELSEN, supra note 383, at 68.
387. HANS KELSEN, Reine Rechtslehre 1 (photo. reprint 2000) (1960) (arguing that psychology, sociology, ethics and political sciences should be excluded from legal science); see also KELSEN, supra note 15, at 52.
388. KELSEN, supra note 15, at 51-52.
389. See, e.g., KELSEN, supra note 15, at 52.
390. See generally, id. (discussing Plato, Aristotel, Kant, Bentham and others).
391. See LEE, supra note 124, at 165, 185. GERALD J. POSTEMA, supra note 122.
393. Cf. Weinberger, supra note 261, at 175.
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 executers 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.\textsuperscript{394} Radbruch proposed that statutory law should not be binding where it stood in clear contradiction to justice.\textsuperscript{395} The revival of natural law in the postwar period led to an intermittent revival of an external perspective of the law,\textsuperscript{396} but the movement did not survive. Soon, the prevailing opinion held that positivism and non-positivism had been irrelevant for Nazi jurisprudence.\textsuperscript{397} 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.\textsuperscript{398} As a result, a critique of legal positivism can no longer credibly invoke the devel-


\textsuperscript{395} Radbruch, \textit{supra} note 394, at 83, 89.

\textsuperscript{396} Kaufmann, \textit{supra} note 361, at 81 \textit{passim}; \textit{see generally} HERGET, \textit{supra} note 1.


opment of Nazi jurisprudence in support. 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.

This evolution of legal thought reflects the fact that many lawyers argued that their work was merely technical and that their profession was apolitical. This was probably an important factor facilitating the reconstruction of the law and the legal professions after World War II. 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.

VI. Conclusion

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. German legal thought of the 19th century was deeply systematic and coherence-based, which left little space for changes due to external 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 discredited 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 but the judge's personal views. Not surprisingly, there was a demand

399. Cf. RÜTHERS, supra note 398, at 442 passim (arguing that the legal methods are per se inadequate as a defence against a totalitarian perversion of the law).
400. Kaufmann, supra note 261, at 82-83.
401. 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).
402. 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 20th century).
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 post-war period. 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. Unlike in the case of the United States, in Germany a deep aversion to utilitarian ethics emanated not only from German Idealism but also from materialistic concerns. As far as policy analysis was done it had to include something else than law and economics.