



Osgoode Hall Law School of York University  
**Osgoode Digital Commons**

---

Comparative Research in Law & Political Economy

Research Papers, Working Papers, Conference  
Papers

---

Research Report No. 6/2011

# The Legacy of Critical Legal Thought and Transatlantic Endeavours

Christian Joerges

David M. Trubek

Peer Zumbansen

Osgoode Hall Law School of York University, [PZumbansen@osgoode.yorku.ca](mailto:PZumbansen@osgoode.yorku.ca)

Follow this and additional works at: <http://digitalcommons.osgoode.yorku.ca/clpe>

---

## Recommended Citation

Joerges, Christian; Trubek, David M.; and Zumbansen, Peer, "The Legacy of Critical Legal Thought and Transatlantic Endeavours" (2011). *Comparative Research in Law & Political Economy. Research Paper No. 6/2011.*  
<http://digitalcommons.osgoode.yorku.ca/clpe/44>

This Article is brought to you for free and open access by the Research Papers, Working Papers, Conference Papers at Osgoode Digital Commons. It has been accepted for inclusion in Comparative Research in Law & Political Economy by an authorized administrator of Osgoode Digital Commons.

**OSGOODE**

OSGOODE HALL LAW SCHOOL  
YORK UNIVERSITY

# OSGOODE HALL LAW SCHOOL

*Comparative Research in Law & Political Economy*

RESEARCH PAPER SERIES

Research Paper No. 06/2011

## The Legacy of Critical Legal Thought and Transatlantic Endeavours

Christian Joerges, David M. Trubek and Peer Zumbansen

**Editors:**

Peer Zumbansen (Osgoode Hall Law School, Toronto, Director,  
Comparative Research in Law and Political Economy)

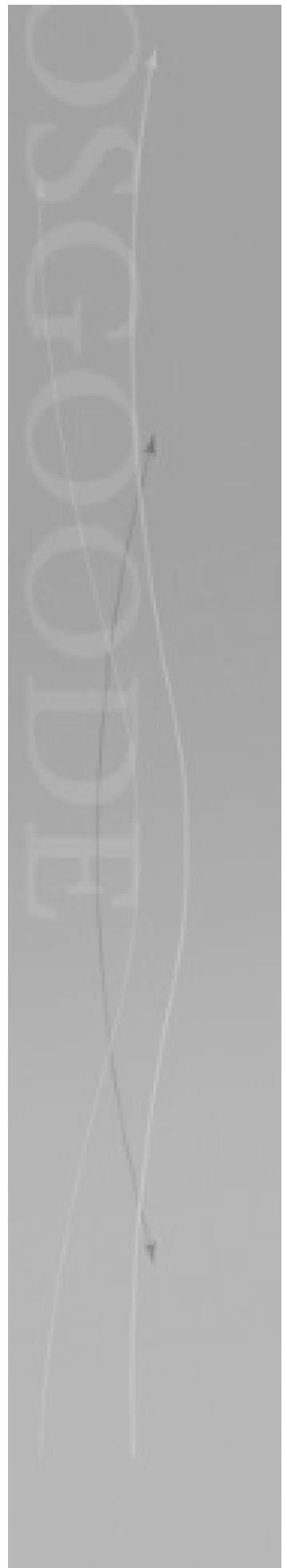
John W. Cioffi (University of California at Riverside)

Lisa Philipps (Osgoode Hall Law School, Associate Dean Research)

Nassim Nasser (Osgoode Hall Law School, Toronto,  
Production Editor)



Comparative Research in  
Law & Political Economy



Osgoode CLPE Research Paper 06/2011

Vol. 07 No. 03 (2010)

**Christian Joerges, David M. Trubek and Peer Zumbansen**

## **The Legacy of Critical Legal Thought and Transatlantic Endeavours**

**Abstract:** The following essay is the new introduction for a republication of the conference proceedings of the famous comparative legal theory conference, held in Bremen (Germany) in 1986, between scholars from the Law Schools at Bremen and the University of Wisconsin. The complete proceedings are now being made available – for the first time – online in the German Law Journal ([www.germanlawjournal.com](http://www.germanlawjournal.com)). The proceedings were originally published in 1989 in a much revered "blue" volume, by Nomos Publishing House in Baden-Baden, Germany. The conference had brought together leading figures in critical legal thought from both the United States and Germany for a series of discussions on the evolution of legal thought in both countries from the 19th century onwards into the present, reflecting on the roles of courts, parliaments, law schools, the profession and students in the shaping of legal culture. The conference occurred at a crucial time in the development of legal thought - and practice. The post-World War II social consensus and the welfare state had come under considerable pressure, 'law and economics' had begun its journey to become the most influential 'law & society' movement, deep-reaching political transformations were under way, in the United Kingdom, the US and in Germany conservative administrations had taken the reign, and meanwhile the globalization of markets had begun to unfold at breathtaking speed. Yet, the Berlin Wall was still standing – just about.

The new introduction offers reflections - and invites feedback - on the past, the future and the 'present' of the 1986 project as seen from today's perspective. In this new introduction, the two original conference conveners, David Trubek and Christian Joerges, are joined by Peer Zumbansen. The permission to prepare the original, not updated materials for online publication with the German Law Journal was generously granted by Nomos. The editorial responsibility for getting the issue into shape lay in the able hands of the GLJ Student Editorial Board at Osgoode Hall Law School in Toronto and to all of these hardworking students go our sincerest thanks. We are also grateful to our authors, who stood by to answer all arising questions in the process of preparing this Symposium Issue. The complete issue can be found here: <http://www.germanlawjournal.com/index.php?pageID=13&vol=12&no=1>

**Keywords:** Legal Positivism, Legal Realism, Critical Legal Studies, Rule of Law, Welfare State, Comparative Legal Theory, Legal Education, Legal History

**JEL Classifications:** K10, K20, K30, K40

**David M. Trubek**

Voss Bascom Professor of Law Emeritus  
Senior Fellow, Center for World Affairs and the Global Economy,  
University of Wisconsin-Madison  
Email: [dmtrubek@wisc.edu](mailto:dmtrubek@wisc.edu)

**Christian Joerges**

Research Professor  
Centre of European Law and Politics,  
Collaborative Research Centre “Transformations of the State”  
University of Bremen  
Email: [Christian.joerges@sfb597.uni-bremen.de](mailto:Christian.joerges@sfb597.uni-bremen.de).

**Peer C. Zumbansen**

Professor of Law and Canada Research Chair  
Osgoode Hall Law School, York University, Toronto  
Co-founding editor in chief, German Law Journal  
Founding Director, Critical Research Laboratory in Law & Society,  
Co-Director of the European Union Centre of Excellence  
([www.yorku.ca/euce](http://www.yorku.ca/euce))  
Email: [Pzumbansen@osgoode.yorku.ca](mailto:Pzumbansen@osgoode.yorku.ca).



## **The Legacy of Critical Legal Thought and Transatlantic Endeavours**

*By Christian Joerges, David M. Trubek and Peer Zumbansen*

Precisely 25 years ago, two of us, namely CJ and DT, initiated a conference project on “American and German traditions of sociological jurisprudence and critique of law” which was in fact realized in July 1986 in a somewhat romantic castle near Bremen where we had intense discussions which remained alive in the minds of the participants from both sides of the Atlantic. The conference proceedings were after considerable editorial efforts published in 1989 in the volume we are re-issuing now. The only contribution to the volume we have left out is the introduction by the editors, which reflected on the problems and accomplishments of our endeavors. We continue and renew these reflections in two, now separated, introductions, which are preceded by the remarks of the co-founding editor of the German Law Journal, Peer Zumbansen. We believe that the objectives our project require, and indeed deserve, to be explained more fully than this was done in the original joint introduction. We now add some reflections on the objectives of our endeavors, on what we believe we accomplished and also our disappointments with, or failures of, the project. There is no reason to gloss over failures or to camouflage disappointments. The very fact that the German Law Journal undertakes this reissue after so many years and that all the contributors from 1989 have supported this idea signals that our project was meaningful. It is up to a new generation to determine and evaluate its impact.

We would like to thank the Nomos Publishing House in Baden-Baden for their authorization of this publication. We are indebted to Monika Hobbie from the Centre of European Law and Politics in Bremen for technical assistance and to the students from Osgoode Hall Law School for their editorial help in preparing this comprehensive issue. Third year student and Senior Editor Nassim Nasser prepared the entire issue for online publication, while Visiting Student, Benedikt Reinke and Student Editor, had a watchful eye on the intricacies of German citations. A great thank you to everyone.

Bremen-Madison/WI-Toronto, January 2011, CJ, DT & PZ

## Critical Legal Studies and the German Law Journal: Remarks About the Lessons and Prospects of Comparative Legal Theory

By Peer Zumbansen<sup>+</sup>

### A. Travels back and forth in time

On the occasion of the republication of the “blue volume,” containing the proceedings of the 1986 “Critical Legal Thought: An American-German Debate” Conference at the University of Bremen Law School, much or little might be said as to the significance, promises or learned lessons of that event. The original conference conveners, like the editors of the ensuing volume, do much of that in the following pages. In fact, their recollection of the motivations and ideas driving the transatlantic event provides a marvelous view into the evolving mystery of legal thought, education and professionalism – on both sides of the Atlantic. The two accounts rightly embed the mid-1980s conference in a much larger historical context. Christian Joerges’ much-referenced account reaches back deep into the constituting phases of nineteenth-century German legal thought. David Trubek’s essay is a thoughtful critical assessment of both the gaps and the overlaps between the German and the American legal cultures in the lead-up to and of the globalizing aftermath of the event.

I am grateful to both Christian Joerges and David Trubek for the opportunity to add a few introductory remarks in the context of republishing the original, unchanged contributions in the *German Law Journal*. The republication exposes the oft-cited and yet no longer available texts to, literally, a world-wide audience in digital format. This, alone, is noteworthy because it will occur in a context in which the transatlantic, comparative thought exchange between the critical studies scholars in the United States and the adherents of “*Politische Rechtstheorie*” long have been taking place. Today it is possible to obtain even the rarest of texts, like those republished here, online and in no time at all through breathtakingly fast, evolving, and proliferating opportunities. This stands in contrast to the demanding manner – both in time and resources –relevant foreign materials once had to be acquired through law school librarians or bookstores. Sometimes these demands were made tolerable by memorable, if sometimes haunting or endearing hours in the law libraries in Cambridge, MA, Berkeley, CA, or Madison, WI. The present

---

<sup>+</sup> Professor of Law and Canada Research Chair, Osgoode Hall Law School, York University, Toronto. Founding Director, Critical Research Laboratory in Law & Society, Co-Director of the European Union Centre of Excellence ([www.yorku.ca/euce](http://www.yorku.ca/euce)). Co-founding editor in chief, German Law Journal. Email: [Pzumbansen@osgoode.yorku.ca](mailto:Pzumbansen@osgoode.yorku.ca). The author thanks Christian Joerges, Alexandra Kemmerer, Russell Miller and David Trubek for their helpful comments, and to Phillip Bevans, Tim Petrou Michael Slattery and Sujith Xavier for a careful reading of the text.

absence of all imaginable obstacles to instantaneously obtaining and reading almost any legal (or other) text renders absurd the memory of those former times, which always involved difficult conversations with airline check-in agents about the enormous weight of odd-looking suitcases. Back then it was paper, and paper over paper: feverishly taken notes, excerpts, acquired books, and photo-copied law review articles. It is inconceivable today, but imagine still having to make a photo-copy of Duncan Kennedy's "Blackstone Commentaries" article – that weighed down our bags!

Now, that all seems a thing of times long past. Today we find it most ordinary that we should be able to convene a group of scholars from different continents for a law review symposium on any legal topic – comparative or not! – exclusively through electronic communication. We see it just as ordinary that we can bring together and finally produce and publish the results of a symposium through online correspondence and text-transfer. The authors never actually have to meet each other in person. The amazing speed at which scholarly communication unfolds today is taken, too often, to mirror a similarly advanced and sophisticated knowledge on the part of the communicating, digital, scholars. The resulting, almost entirely unhampered availability of just about all reading materials in seconds, however, belies the fact that we read less today.<sup>1</sup> Simultaneously, the pressure to cite to both standard and also highly obscure, "rare" materials has grown incessantly. The 24/7 availability of sources on one's computer screen mandates no other result.

The 1986 conference, by contrast, speaks of (or from) another time. What shines through many of the contributions in the book, and is reiterated again in Joerges' and Trubek's introductory comments, is that the participating scholars were very aware of the unique opportunity to have actual "face-time" with each other. The conference allowed for an exchange amongst authors, many of whom had interacted with each other only very occasionally, if at all, in person. Otherwise, they "communicated" only in the classical form of reader-author at one's desk ("back then" it was less frequent to retreat to one of the world's now-ubiquitous Starbucks franchises with internet access to avoid students constantly "popping in") and in the run-up to the conference, by using TELEX communication.<sup>2</sup> What a scholar would bring "to the table" at an international conference was what she had prepared for the particular event and what scholars had read of each other in the months and years before coming to sit in the same room. Today, conference participants chat over lunch about speakers' recent "blog post" from that very morning (probably during a session!) on one of the many online fora.

Why am I going on about this? This is all too well-known to merit attention. And yet, in the context of this introduction, it seemed worthwhile to at least cast a cursory glance at the

---

<sup>1</sup> <http://www.theamericanscholar.org/reading-in-a-digital-age/>

<sup>2</sup> <http://en.wikipedia.org/wiki/Telex>

odd discrepancy between the worlds of 1986 and 2011 – at least as the production, dissemination and “digestion” of (legal) scholarship is concerned. Of greater significance, however, is the substantive side of the debate, which is evident in two ways. The first is the fact that the original editors pushed for a republication of the original materials themselves. The second is that there are contemporary parallel inquiries into the prospects of critical legal thought and legal theory under way in a number of fields of research. As highlighted in the following two introductory essays by Christian Joerges and David Trubek, there is much to reflect upon as regards the prospects of ‘progressive’, ‘left’, or ‘critical’ legal thinking today. But what makes the following texts so intriguing and worthwhile, is their authors’ clear-headed perception of the changed circumstances, under which a reassessment or repositioning of legal thought would have to occur today. In that sense, neither author is very explicit about which “lessons” it might be possible to draw from the event and its place in the continuing evolution of critical legal thought. Instead, both authors contextualize the event, and the contributions that flowed from it, within a larger landscape of legal and social thinking. By itself, this landscape evades summary classification, labeling, and – even more – judgment. Both accounts of the fate of the critical legal movement allude to “internal” as well as “external” factors that have left a deep and lasting imprint on the movement.

Again, both are hard to pin down. Internally, the rise of law & economics as arguably the most successful “law & society” movement did not occur in a “heaven of pure legal concepts,”<sup>3</sup> but in a particular political-economic constellation marked by a decline in economic prosperity, partly brought about by the 1970s oil crisis, partly by the comparative ability/inability to adapt to fast-moving and fast-globalizing markets for goods, services and knowledge. The law and economics blaze that spread through law school programs, curricula, and academic careers is far from subsiding. As a consequence the gap between the perceived respective ‘applicability’ of law & economics (L&E) and critical legal thought (CLT) widened. While L&E scholars have been ready to suggest that an economic analysis promises to provide a “workable” solution to a legal issue the insistence by critical legal studies’ scholars (CLS) on law’s indeterminacy and fundamental openness appeared less suitable for the task of concrete problem solving. Certainly, the practical usefulness of the former was to no small degree purchased at the price of ignoring the fundamental indeterminacy of legal concepts to begin with. Who here is ‘right’, however? With the considerable pressure on law schools to design a curriculum with the task in mind of ‘educating lawyers’<sup>4</sup>, the space for engaging students in law’s indeterminacy has always been shrinking. No coincidence perhaps, that the two convening schools, Bremen and Wisconsin, had been among the very few law schools leading the development of a more

---

<sup>3</sup> Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809 (1935); reiterated also by Duncan Kennedy, *Comment on Rudolf Wiethölter’s “Materialization And Proceduralization in Modern Law”, and “Proceduralization of the Category of Law”*, in this issue, sub G.

<sup>4</sup> WILLIAM M. SULLIVAN ET AL, *EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW* (2007)



critical and theory/practice intertwining curriculum, and that they, too, had come under sensible pressure just for that.

Another “internal” factor that would tragically, but paradoxically, turn out to have eroding effects on the CLS movement was the continuing sophistication of social science and the tremendous rise in importance of inter-disciplinarity. Both may and in fact have been seen as equally strengthening as well as relativizing the CLS mandate. Eventually the encompassing “cultural turn” would above all result in a far-reaching proliferation of research fields, institutes and curricula with the focus on ‘culture’, without, however, effectively enhancing interdisciplinary research able to seriously affect the teaching of law. ‘Law and...’ seminars continue still to be too much a teaching choice preferably for long-tenured faculty members and their oddball students. So, rather than a decline of CLS, as has been sometimes asserted by conservative scholars – with none too little glee – it is more appropriate to highlight the transformation of the school in response to fundamentally changing regulatory landscapes, political climates and scientific classifications and distinctions. It is only in trying to answer the question “What is Left after Left?,” in an un-ironic, bitter fashion, that CLS appears to be a bust, pictured as lacking inspiration, insights and generally the ability to “come up with answers.”

The state of CLS today must be assessed however by taking a wider view of the epistemological landscape. Of course, CLS drew on legal realism’s attack on formalism and, in this sense, can be credited with inspiring a revival in empiricism and inter-disciplinarity. CLS also ushered in a diversification of progressive legal and social thought including, *inter alia*, feminist legal studies, critical race theory, property critique, post-colonial legal theory, and “third world approaches to international law” (TWAIL). It is this wider perspective that both justifies the republication of the proceedings from 1986 and inspires an upcoming conference in Frankfurt in July 2011. Already at the time of the Bremen conference the scholars arriving at the conference by train or by plane felt the need to clarify starting points, background assumptions, legacies, as well as potential misunderstandings and misinterpretations of similar sounding terminology or concepts. Today, the bar is even higher. The contours of the “left” have become less accentuated<sup>5</sup> and the association of a critical theory in law or the social sciences with a leftist agenda has become far more ambiguous than at earlier times.<sup>6</sup> A deconstruction of the public-private divide is no longer

---

<sup>5</sup> TONY JUDT, *ILL FARES THE LAND* (2010)

<sup>6</sup> Peer Zumbansen, *Law’s Knowledge and Law’s Effectiveness: Reflections from Legal Sociology and Legal Theory*, 10 GERMAN L.J. 417 (2010), 426-428, available at: <http://www.germanlawjournal.com/index.php?pageID=11&artID=1100>

a prerogative of “left” legal or social scholarship. The focus on context, on “social norms,” and on normative pluralism has long ceased to be an exclusively leftist program.<sup>7</sup>

### B. What, then, Is and Was at Stake?

The republication of the texts in their original form mandates an – admittedly intimidating reassessment of what was at stake then and what the questions are today. A comparative, transatlantic debate about the rise and transformation of a progressive legal theory, with roots in anti-formalist, nineteenth century legal thought and Marxist, post-Marxist social theory in 1986 is being catapulted into the present. But to what avail? Its publication in the *German Law Journal* reflects the *Journal's* (and the CLS movement's) commitment to context, the importance of place, history and political economy, which the authors from both sides of the Atlantic embraced at the 1986 conference.<sup>8</sup> Part of this commitment is expressed in the continuing inquiry into the promises and practice of comparative legal studies, to which scholars from around the world have been contributing in the *Journal* over the years.<sup>9</sup> It is also reflected in the *Journal's* efforts to continuously bring the invisible, the grey, the past, and the ambiguous into focus.<sup>10</sup>

Yet, what was and what is “at stake”? What does the 1986 conference stand for? How might it compare to conference undertakings today? Can such questions be raised at all? Can one expect an answer? Now and again, one has the impression of feeling the weight of too many things unsaid, of yet another conference, randomly thrown together, perhaps too hastily prepared for both the conveners and, as it turns out, some of the speakers. Yes, stepping out of a sometimes taxing routine of teaching, grading and administering, into the realm of idea-entrepreneurialism, can be a burden. But, can this explain the recurring feeling of “what am I doing here?” This creeps into much of today's conference and workshop culture; it often is evident after the delivery of the first round of papers. Somehow, there is this one facet in many of the original conference papers being

---

<sup>7</sup> Robert C. Ellickson, *Law and Economics Discovers Social Norms*, 27 J. LEG. STUD. 537 (1998); Stewart Macaulay, *Relational Contracts Floating on a Sea of Custom? Thoughts about the Ideas of Ian Macneil and Lisa Bernstein*, 94 NW. U. L. REV. 775 (2000)

<sup>8</sup> See the contributions to the 10<sup>th</sup> Anniversary Symposium for the German Law Journal, “THE TRANSNATIONALIZATION OF LEGAL CULTURES”, held at the German Federal Justice Ministry in Berlin, 2-3 July 2009, available at: [http://www.germanlawjournal.com/pdfs/TOC/pdf\\_table\\_of\\_contents\\_Vol\\_10\\_No\\_10.pdf](http://www.germanlawjournal.com/pdfs/TOC/pdf_table_of_contents_Vol_10_No_10.pdf)

<sup>9</sup> RUSSELL A. MILLER AND PEER C. ZUMBANSEN (EDS.), *COMPARATIVE LAW AS TRANSNATIONAL LAW: A DECADE OF THE GERMAN LAW JOURNAL* (Oxford University Press, 2011) – *in print*.

<sup>10</sup> Daniel Augenstein, Introduction: *The reluctance to ‘glance in the mirror’: ‘Darker Legacies of Law in Europe’ Revisited*, 7 GERMAN L.J. 71 (2006), available at: [http://www.germanlawjournal.com/pdfs/Vol07No02/PDF\\_Vol\\_07\\_No\\_02\\_71-82\\_Articles\\_Augenstein.pdf](http://www.germanlawjournal.com/pdfs/Vol07No02/PDF_Vol_07_No_02_71-82_Articles_Augenstein.pdf)

republished here that shines through and should set off perhaps an alarm for today's "small world" (if the reader will allow this pun at David Lodge's famous rendition of a frantically fast-paced, self-forgetting academic conference circuit). That facet marking the original Bremen papers seems to be a striking absence of a particular breathlessness, which characterizes much of today's legal scholarship. The latter can today be associated with the seemingly never-ending, never-sleeping production of scholarly papers posted on the Social Science Research Network, likely driven by the omnipresent pressure to 'be visible'.

In contrast to this, the papers from the republished conference volume seem to possess the lightly sensible presence of a certain engagement and persistence. "What was at stake," of course, was not more obvious or easy to grasp at that time than it would be now. But, still, the involvement of the speakers and their commentators, respectively from distinct legal and political cultures, with each others' perspectives, starting points and revealed and hidden idiosyncrasies sends signals into today's ongoing efforts of engaging with comparative insights.<sup>11</sup> That seems to be all that one can say. And already I risk oversimplifying and generalizing as regards the diversity that can be found in today's scholarship.

### C. Legal Education, Again

Perhaps, then, it might suffice to point to one other dimension that is prominent in these papers and in fact was explicit in some papers and formed the backdrop for others in Bremen. The connecting of research with conceptual and concrete effects for curriculum design and legal education reform is the dimension that, by contrast, seems to be missing at most of today's scholarly meetings. The link between what we have learned to call the "research agenda" (which informs a particular part of the job-talk, the request for a grant, or the solicitation from one's dean of a summer research fund) and what actually occurs in the class-room marks much of the scholars' work at and around the Bremen conference. Now, to be sure, curriculum reform has been a constant factor in the evolution of legal education. Then and now, the contestable nature of law school curricula, operating under the constraint of the foundational development of a lawyer in just three years, was and is still recognized as a pressing issue. Reform has consequences not merely for a law school's "ranking" and attractiveness for resourceful alumni, it is also a bellwether of profession.<sup>12</sup> At the same time, whatever the explicit or implicit political agenda is in one's scholarship,

---

<sup>11</sup> In this vein, Alexandra Kemmerer, *Constitutional Law as a Work of Art - Experts' Eyes: Judges of the World examine the Constitution of Europe*, 4 GERMAN L. J. 859 (2003), available at <http://www.germanlawjournal.com/index.php?pageID=11&artID=304>

<sup>12</sup> See eg <http://law.wlu.edu/news/storydetail.asp?id=376>.

one will likely try to see it influence the courses one teaches and, to a certain degree, the curriculum of one's law school.

But, where does this discussion take place? How often do we find ourselves speaking with colleagues about the political agenda of a course or, even more, the curriculum of the places where we are at? There are, of course, trends, we seem to align ourselves to or distance ourselves from. But, who is setting them? What, then, can we say is "left" of the earlier more visible concerns about legal education and the ability or inability of curriculum designers to come up with a program that teaches students to "think like a lawyer" in a grand way? This is a very hard issue to address – all the more so in the limited space available here. Would it suffice, then, to allude to the political consequences of curriculum reform, of any effort made to better bring together the practical and theoretical dimensions of "being a lawyer" in law school were somehow more tangible than seems to be the case today? Would that even be correct? Isn't the present concern of law schools, pretty much around the world, the effort to provide their students with the tools to operate in a globally connected, complex world?<sup>13</sup> Isn't that just a continuation of the charged battles over the "social justice" orientation of law schools in the 1970s and 1980s? Who is to provide a satisfying answer to the question whether the breathtaking expansion of offered courses in today's law schools, which mostly echoes the differentiation of both practice and theory of law, should be seen as a good or a bad development? The presently ubiquitous and potentially conflicting claims of making legal education both more "professional" and more "international" is perhaps today's terminological answer to the development of legal-curricular thinking as it made its way through the past two decades. Again, who is to say whether these terms are less political aims than the attempts to bring "critical" and "social" dimensions into the law school of the evolving welfare state?

#### **D. Towards a Continuation of Dialogue**

Raising these questions and falling short of even suggesting an answer, however, may not appear a very effective way of inviting an internationally distributed journal's readership to revisit academic papers delivered at a conference some two and a half decades ago. And yet, our readers might be nudged to "re-visit" these papers if only in light of the fact that so many of the questions raised during the 1986 conference are still valid today, even if they are not raised in the same way. These questions may have become more difficult to spot and to pursue, which adds to their complexity to begin with. Well, if anything, turn around and ask yourself, how many of your colleagues are interested and in – one way or

---

<sup>13</sup> See, recently, Martha Minow, *Legal Education: Past, Present and Future*. Lecture delivered on 5 April 2010, available at: <http://www.law.harvard.edu/news/spotlight/classroom/related/legal-education-past-present-and-future1.pdf>; Rajish Bindal, *Legal Education – A Global Perspective*. Undated. Available at: [http://www.highcourtchd.gov.in/right\\_menu/events/events/GlobalSpeech.pdf](http://www.highcourtchd.gov.in/right_menu/events/events/GlobalSpeech.pdf)

the other – in the longer-term development of curriculum reform and legal education. How many are interested in, or perhaps even successful at, opening a space for questions concerning the connection between research and curriculum and professional-practical-critical-reflective training? Then, continue by asking yourself how many of those colleagues, about whom you could give a positive answer to these questions, seem to have fatigued and are resigned today from such engagement. What follows at that point is to ask yourselves why this might be the case.

In light of these slightly unsettling inquiries, what is – from the perspective of the *German Law Journal* – the motivation to republish the original conference’s papers? As editors of a journal that grew out of a spontaneous idea – between a U.S. trained, criminal defense lawyer and constitutional law scholar and a German-French-U.S. trained private law theory scholar – in the fall of 2000 to provide English-language commentaries on German case law and legislative developments, we are extremely pleased about the opportunity to bring these texts together anew and to make them available to a world wide web-based audience. We are, at the same time, very excited and curious in anticipation of the reactions, comments and impulses they might trigger. Clearly, one of the guiding ideas of this project has been to initiate various sorts of possible engagement with and responses to the question and its underlying rationale, namely: what is the future of the “left after the left?” Meanwhile, it has become clear that such inquiries require, then as today, the location of issues in their context. This effort becomes more manageable if we recognize that – already in 1986 – the (many) issues, which seem to have informed and shaped the comparative exchange between the conference participants, the critical legal scholars in Germany and in the United States, were not as easily confinable and distinguishable as the event’s title could have suggested. In hindsight (I was graduating from high school at the time of the conference!), “Critical Legal Thought” sought to capture a continuously evolving, diversified and complex inquiry into the place of law in society. One of the tasks connecting the 1986 event to its republication in 2011— and to what might ensue – will be to ask that question again – and again.

## German Perspectives and Fantasies

*By Christian Joerges\**

The motivation and agenda of the German contributors to the “German-American Debate on Critical Legal Thought”, were not, and certainly could not, be uniform, neither within the American nor the German group of participants, let alone between Americans and Germans. It seemed nevertheless obvious at the time that we shared a number of concerns. Four seemed obvious and particularly important: Uneasiness, albeit for different reasons, with our respective mainstream traditions; a concern for social justice, albeit in different societies and with different priorities; the critique of our educational systems though they differed so markedly; an awareness of the discrepancies between the law on the books and the law in action which generated contextual studies and all sorts of “law and...” endeavors. Neither during the laborious preparations of the 1986 conference nor during the equally demanding publication process and not even with hindsight is it conceivable to identify comprehensively and exactly our communalities and differences. This is why we have decided to write separate introductions. Mine will proceed in three steps. The first is a reconstruction of German, more precisely: my own, motivation and agenda (A). The second step reproduces in the form of an essay the proposal submitted to the Volkswagen Foundation in 1985, the funding organization for the conference (B). The third summarizes much more briefly what I see as accomplishments and failures – and ensuing challenges (C).

### **A. The Background Agenda**

The generation of academics which we gathered in Bremen back in 1986 was manifestly formed during a period of political unrest and protest, the Americans by the war in Vietnam, the Germans by student revolt of the late 60s. The student revolution in Germany was however, interwoven with a past and a milieu of a particular kind. That darker past was present, even though it was not directly addressed in our transatlantic agenda.

#### *I. The German Cohort and the presence of the German Past*

---

\* Research Professor, Centre of European Law and Politics and Collaborative Research Centre „Transformations of the State“, Bremen. Email: [Christian.joerges@sfb597.uni-bremen.de](mailto:Christian.joerges@sfb597.uni-bremen.de).

To me it was essential and this is easy to explain. The presence of the past is simply a fact of life for my generation. That past made itself felt in that generation's legal consciousness – and this with some strength in the mindset of someone, who started to study law at the Goethe University in Frankfurt only shortly before the beginning of the Auschwitz trial in 1963<sup>14</sup> and who then was confronted with the lectures and seminars of a certain Rudolf Wiethölter.<sup>15</sup> Wiethölter's arrival at the so far somewhat sleepy law faculty made a difference. The man started to question the integrity of Germany's *Rechtswissenschaft* and its democratic credentials -- and hence our identities as academics and citizens. This happened many years before the outbreak of the late 1960s, but it did occur by necessity in Frankfurt. Max Horkheimer and Theodor W. Adorno had returned to Frankfurt's legendary *Institut für Sozialforschung* already in the 1950s.<sup>16</sup> Thanks to the revival of the *Critical Theory*, which they initiated, thanks also to Jürgen Habermas presence in Frankfurt as Horkheimer's successor since 1964, Frankfurt was bound to become the intellectual core of the student revolt.

Frankfurt was not just politically 'excited' but also intellectually *exciting*. What Rudolf Wiethölter and his allies in the Law Faculty, which he had managed to attract to Frankfurt unfolded over the years was a specific mode of coping with Germany's past. Moral indignation to the many instances of collusion, opportunism and indifference among the Germany's professorial establishment was an agenda for the broader public. What only academics could and should try to accomplish was to find out was the cultural, social and political background conditions of Germany's intellectual "*Sonderweg*"<sup>17</sup> in the 20th century. His project, which he coined "*Political Legal Theory*"<sup>18</sup> inspired and encouraged a

---

<sup>14</sup> The legal proceedings against perpetrators at the Nazi concentration camp in Auschwitz were launched in 1963 before the Landgericht (Regional Court) in Frankfurt, Germany. See, for detail, KATALOG AUSCHWITZ-PROZESS 4 KS 2/63 FRANKFURT AM MAIN (Fritz-Bauer-Institut and Imtrud Wojak eds., 2004); Devin O. Pendas, *I didn't know what Auschwitz was. The Frankfurt Auschwitz-Trial and the German Press 1963-1965*, 12 YALE J. L. & HUM. STUDIES 397-446 (2000).

<sup>15</sup> Born 1929. Professor of Law emeritus, Johann Wolfgang Goethe-University, Frankfurt. Selected publications are available at: [http://www.jura.uni-frankfurt.de/Personal/em\\_prof/wiethoelter/index.html](http://www.jura.uni-frankfurt.de/Personal/em_prof/wiethoelter/index.html) (last visited 17 January 2011)

<sup>16</sup> For a comprehensive account, see MARTIN JAY, *DIALECTICAL IMAGINATION. A HISTORY OF THE FRANKFURT SCHOOL AND THE INSTITUTE OF SOCIAL RESEARCH 1923-1950* (1973).

<sup>17</sup> The term had been coined by German historians, prominently by Hans-Ulrich Wehler, to scrutinize the conservative-reactionary mindsets and policy approaches propagated by the German elite in the transition from the nineteenth to the twentieth century. See, eg, HANS-ULRICH WEHLER, *DEUTSCHE GESELLSCHAFTSGESCHICHTE. Vol. 3: VON DER „DEUTSCHEN DOPPELREVOLUTION“ BIS ZUM BEGINN DES ERSTEN WELTKRIEGES. 1849-1914* (1995); HEINRICH-AUGUST WINKLER, *DER LANGE WEG NACH WESTEN* (6TH. ED., 2005); KURT SONTHEIMER, *ANTI-DEMOCRATIC THOUGHT IN THE WEIMAR REPUBLIC* (1963).

<sup>18</sup> Rudolf Wiethölter, *Recht und Politik. Bemerkungen zu Peter Schwerdtners Kritik*, ZEITSCHRIFT FÜR RECHTSPOLITIK 155 (1969), at 155; see Christian Joerges, *Politische Rechtstheorie – Impulse und Suchbewegungen*, KRITISCHE JUSTIZ

considerable number of younger people – in Frankfurt and elsewhere – to embark on the search for a synthesis of social critique and critical legal thought, the examination of anti-liberals traditions in German legal and political thought, the rediscovery of strands of critical legal thought in the Weimar Republic, and to agitate for a new type of legal education which was to orient a new type of legal practice.<sup>19</sup>

The contours of the conference project from 1986 as I have understood it can quite directly be inferred from that background. My own elaboration was enormously favored by a fellowship from the *Netherlands Institute for Advanced Study* (NIAS) in Wassenaar, Holland, in 1985-1986. That place seemed predestined to facilitate the research on my project. The Netherlands is a country where the memory of the German occupation was, and is, more than alive and widely discussed. Situated at a very short distance is the University of Leiden with a collection of German legal materials, which is not short of comprehensive – up until the Dutch respect for Germany's academic culture became deeply disturbed in light of the occupation. Importantly, Leiden had given shelter to Hugo Sinzheimer, a scholar and politician with a resolute reformist agenda and a reference point for left leaning labor law scholarship until today.<sup>20</sup> Sinzheimer had written in Leiden after his emigration from Germany his *Jüdische Klassiker der deutschen Rechtswissenschaft* (Jewish Classics in German Legal Science)<sup>21</sup>, an incredibly noble reply to Carl Schmitt's infamous *Die deutsche Rechtswissenschaft im Kampf gegen den jüdischen Geist* (German legal science in its fight against the Jewish spirit).<sup>22</sup> In 1934, a year after Sinzheimer's emigration, the much younger comparative and private international law scholar Friedrich Kessler left Germany for the United States and was fortunate enough to commence an impressive career there.<sup>23</sup> Kessler built many new bridges after the war. His American

---

184 (1989); Guido Martin, Heidemarie Renk and Margaretha Sudhof, *Maßstäbe, Foren, Verfahren: Das Prozeduralisierungskonzept Rudolf Wiethölters*, KRITISCHE JUSTIZ 244 (1989).

<sup>19</sup> In this vein, also Peer Zumbansen, *Das gesellschaftliche Gedächtnis des Rechts oder: Die juristische Dogmatik als Standeskunst [The social memory of law, or: legal doctrine as the lawyers' state of art]*, in: RECHTSVERFASSUNGSRECHT: RECHT-FERTIGUNG ZWISCHEN PRIVATRECHT UND GESELLSCHAFTSTHEORIE 151, 172-9 (Chr. Joerges/G. Teubner eds., 2003), available at: <http://research.osgoode.yorku.ca/zumbansen>

<sup>20</sup> See the analysis by Hubert Rottleuthner, *Three Legal Sociologies: Eugen Ehrlich, Hugo Sinzheimer, Max Weber*, EUROPEAN YEARBOOK IN THE SOCIOLOGY OF LAW 277 (A. Febraro ed., 1988), , and more recently Luca Nogler, *In Memory of Hugo Sinzheimer (1875-1945): Remarks on the Methodenstreit in Labour Law*, Cardozo Law Bulletin (1996), available at <http://www.jus.unitn.it/cardoza/review/Laborlaw/Nogler-1996/nogler.htm> (last visited 17 January 2011), Sakari Hänninen, *Social Constitution in Historical Perspective: Hugo Sinzheimer in the Weimar Context*, in: THE MANY CONSTITUTIONS OF EUROPE, 219-20 (K. Tuori/S. Sankari eds., 2010).

<sup>21</sup> Amsterdam: Hertzberger 1938; Frankfurt a.M: Klostermann 1953.

<sup>22</sup> Carl Schmitt, 'Die deutsche Rechtswissenschaft im Kampf gegen den jüdischen Geist', *Deutsche Juristen Zeitung* 1936, 1195 et seq.

<sup>23</sup> See "Tributes: Friedrich Kessler" (Anthony T. Kronman/John K. McNulty/Christian Joerges/George L. Priest), 104 YALE L. J. 2129 (1995).



profile, however, was that of a legal realist with a reformist agenda. Precisely that synthesis of critical legal analysis and pragmatic reformism represented an enormously attractive alternative to the type of scholarship which he had left behind in Germany. Kessler's work was highly appreciated in the US. Among those who appreciated it deeply was a certain Duncan Kennedy. At that time, only a handful of people in Germany had noticed the Critical Studies Movement. Kennedy's seminal articles in the Harvard Law Review, however,<sup>24</sup> had received some attention – and to me his affinities with Kessler, his understanding of legal history as conceptual history (*Begriffsgeschichte*), to some degree his critique of legal education seemed akin to Wiethölter's project and practice.

There was much more to explore. The devastating impact of Germany's National Socialism on the country's academic culture was extremely broad. The cleansing of universities had affected all Jews, part-Jews and those related to Jews by marriage ["Versippte"] regardless of their political orientation. It had also destroyed all intrinsic linkages between legal science and democratic constitutionalism, all of those methodological, legal, and social policy trends, which no longer suited the *völkisch* renewal. The fellowship at the Institute in Wassenaar enabled me to dig deeper into and to explore at some depth the history of Germany's cultures and which had been so much richer in its theoretical debates and interdisciplinary beginnings than what was left of it when my generation took entered University. Again the United States looked like the Promised Land. The heirs of legal realism had developed a fascinating rhapsody of contextual scholarship, strong legal sociology and countless approaches linking law and social sciences. And it all seemed to happen on the political left. There was a lot to learn not merely from *Critical Legal Studies*.<sup>25</sup>

## II. The Ensuing Project

How does one structure such a learning process? The apparent similarity of theoretical interests and practical intuitions can be misleading. Legal scholarship is, in normal as well as in unruly times, embedded into the fabric of national contexts, philosophical traditions, social history, historical experiences and political identities much more intensively and more intimately than its neighboring disciplines in the humanities and social sciences. As a result, continuities, discontinuities as well as ruptures in the development in legal thought need to be read in their respective contexts. It seemed hence appropriate to go back to the

---

<sup>24</sup> Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976); *ibid.*, *The Structure of Blackstone's Commentaries*, 28 BUFFALO L. REV. 205 (1979)

<sup>25</sup> The title of the conference – “*American and German Traditions of Sociological Jurisprudence and Critique of Law*” – mirrored this twofold background.

beginning of sociological jurisprudence on both sides of the Atlantic, an exploration which revealed “a history of transatlantic misunderstandings and missed opportunities”.<sup>26</sup>

## **B. German and American Encounters: A Record of Failures**

German sociological jurisprudence dates back to late 19th and early 20th century. At that early stage, one could observe a surprisingly intense “internationalization” of fundamental debate in legal science, in the sense of similarity of problems and of a parallelism of approaches and lines of debate. At closer inspection, however, these encounters seem at least as disappointing as they were encouraging.

### *1. The Early Critique of Formalism in Germany and the US*

The German and American pathfinders of sociological jurisprudence had much in common. They were disturbed by the discrepancies between the systematically structured conceptual world of legal science and the “real” social functions of law, by the contradictions between the formal style of legal self-descriptions and the informal substantive practice of legal decision-making – and they embarked on the search for practicable alternatives.

The key figure in Germany who partly anticipated that reorientation process and initially thought out its premises was Rudolf von Jhering. In his so-called ‘first’ period of work, von Jhering freed the science of the Pandects<sup>27</sup> from all its philosophical preconceptions, and through his “natural history” method established “constructive jurisprudence” as a fully-fledged specialist science.<sup>28</sup> In the 1860s he began to take a more self-ironic stance,<sup>29</sup> in

---

<sup>26</sup> Thus the subtitle of an essay in which I drew on the application for funding from the Volkswagen Foundation. The English translation of the conference proposal was included by Konstanze Plett in her collection of materials on “The German Traditions in Sociological Jurisprudence and Critique of Law” (Madison, Institute for Legal Studies, April 1986). That essay (*On the Context of German-American Debates on Sociological Jurisprudence and Legal Criticism: A History of Transatlantic Misunderstandings and Missed Opportunities*) was published in the EUROPEAN YEARBOOK IN THE SOCIOLOGY OF LAW 403 (A. Febbrajo/andD. Nelken, eds., 1993), (German original in Christian Joerges, *Amerikanische und deutsche Traditionen der soziologischen Jurisprudenz und der Rechtskritik*, EUI Working Paper 88/354, 1988, Reprint 1991, 3.

<sup>27</sup> *Pandektenwissenschaft* describes the school of study in the nineteenth century of extracting and formulating general rules and norms based on the rediscovery of and commentary on Roman Law sources. Prominent scholars were Georg Friedrich Puchta, Bernhard Windscheid and Heinrich Dernburg. For more detail, see FRANZ WIEACKER, *A HISTORY OF PRIVATE LAW IN EUROPE, WITH PARTICULAR REFERENCE TO GERMANY* (Tony Weir transl., 1995); see also *IBID.*, *DAS SOZIALMODELL DER KLASSISCHEN PRIVATRECHTSGESETZBÜCHER UND DIE ENTWICKLUNG DER MODERNEN GESELLSCHAFT* (1953).

<sup>28</sup> Rudolf von Jhering, *GEIST DES RÖMISCHEN RECHTS AUF DEN VERSCHIEDENEN STUFEN SEINER ENTWICKLUNG*, 2. THEIL, 2. ABTHEILUNG, 1852-65.

order then to proclaim the real birth of sociological jurisprudence, under a title with a rather martial ring. In his lecture “*Der Kampf ums Recht*” (The Fight for the Law), Jhering took a radical turn away from all attempts at natural-law or philosophical justification, from the historical philosophy of the historical legal school and not least from himself in his initial period of work as a systematic constructive jurist, and described law from its realistic side as a power concept”, as a “purposive concept, located in the middle of the chaotic interplay of human purposes, striving and interests.”<sup>30</sup>

Independently of Jhering, but in a similar position of confrontation to the systematic endeavors of “analytical jurisprudence”, Oliver Wendell Holmes in the United States identified practical experience as the real bearer of the development of Common Law.<sup>31</sup> Advocating a basic skepticism as to rules, he famously posited: “The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law.”<sup>32</sup> Among the most intensive German commentators on Holmes and his work is Wolfgang Fikentscher who stamped his thinking as nihilistic, atheist and Darwinist, hereby exposing it to painful questioning.<sup>33</sup> The same author treats Jhering much more gingerly.<sup>34</sup> He seems willing to put up with Jhering’s autodidactic dilettantism in dealing with non-legal areas of knowledge – which American commentators, pulling no punches, were very quick to point to<sup>35</sup> – and simply accepts that the *Realpolitik*, totalitarian aspect and the “progressive,

---

<sup>29</sup> The first of the “*Vertrauliche Briefe über die heutige Jurisprudenz*„ (Confidential Letters on Contemporary Jurisprudence) appeared in: PREUßISCHE GERICHTSZEITUNG Nr. 41 (16 June 1861), and was then reprinted in RUDOLF VON JHERING , SCHERZ UND ERNST IN DER JURISPRUDENZ. EINE WEIHNACHTSGABE FÜR DAS JURISTISCHE PUBLIKUM (Leipzig: Breitkopf und Härtel, 1884), reprint Darmstadt: Wissenschaftliche Buchgesellschaft 1988, at 3.

<sup>30</sup> RUDOLF VON JHERING, DER KAMPF UMS RECHT (5<sup>th</sup> ed. 1977); THE STRUGGLE FOR LAW (John J. Lalor transl.1879).

<sup>31</sup> See O.W. HOLMES, THE COMMON LAW (1881, , Dover Publications edition, 1991), 1: “The life of the law has not been logic; it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have a good deal more to do than the syllogism in determining the rules by which men should be governed.”

<sup>32</sup> O.W. Holmes, *The Path of the Law* (1897), reprinted in: ID., COLLECTED LEGAL PAPERS (New York: Harcourt, Brace and Company, 1921), 167.

<sup>33</sup> W. Fikentscher, *Gedanken zu einer rechtsvergleichenden Methodenlehre*, in: RECHT IM WANDEL: BEITRÄGE ZU STRÖMUNGEN UND FRAGEN IM HEUTIGEN RECHT: Festschrift Hundertfünfzig Jahre Carl Heymanns Verlag KG (C.H. Ule et al. Eds. 1965, 141 at 154; ID., RECHTSWISSENSCHAFT UND DEMOKRATIE BEI JUSTICE OLIVER WENDELL HOLMES. EINE RECHTSVERGLEICHENDE KRITIK DER POLITISCHEN JURISPRUDENZ, (Karlsruhe 1970), 34-48; ID., METHODEN DES RECHTS IN VERGLEICHENDER DARSTELLUNG, VOL. 2, (Tübingen 1975); Vol. 3, 212, 220..

<sup>34</sup> W. FIKENTSCHE, METHODEN DES RECHTS IN VERGLEICHENDER DARSTELLUNG, VOL. 2 (Tübingen 1975); Vol. 3 (Tübingen 1976), 240-243.

<sup>35</sup> Morris.R. Cohen, *On Continental Legal Philosophy (Reviews dating from 1914-1916)*, in *id.*, *Law and the Social Order. Essays in Legal Philosophy* (1982), 286, at 305: „Despite its great influence upon Continental Law and jurisprudence, Jhering’s ‘Zweck im Recht’ is a work of antiquated psychology and mediocre philosophic power.”

social, indeed socialist”<sup>36</sup> aspect of Jhering cannot properly be brought into harmony, while taking seriously the normative professions of faith in which Jhering reconciled his Darwinism and his equivocations of power and law. If he had treated Holmes similarly, he would have had to come to a more cautious verdict.<sup>37</sup>

## *II. Jhering's Legacy*

Jhering bequeathed a troublesome inheritance on German legal science: he had reinterpreted law as a political action program, thus taking upon himself a combination of normative legal work and “sociological” analysis – without being able in theoretical or methodological terms to deliver on these programmatic claims.<sup>38</sup> Unsurprisingly, opinions regarding the ambivalences of Jhering’s intentions and the unassimilated theoretical assumptions and methodological problems of his reorientation of legal science, had to differ.<sup>39</sup> It is at any rate possible, and revealing, to interpret the trends in the sociology of law and in sociological jurisprudence that emerged around the turn of the century and thereafter as the heritage of Jhering.

### 1. The Free Law Movement

---

<sup>36</sup> W. Fikentscher, *METHODEN DES RECHTS IN VERGLEICHENDER DARSTELLUNG* (vol. 3, 1976), at 156.

<sup>37</sup> See NORBERT REICH, *SOCIOLOGICAL JURISPRUDENCE AND LEGAL REALISM IM RECHTSDENKEN AMERIKAS* (1967), 44; Helmut Schelsky, *Das Jhering-Modell des sozialen Wandels durch Recht*, 3 *JAHRBUCH FÜR RECHTSTHEORIE UND RECHTSSTOZIOLOGIE* 47 (1972); Mathias W. Reimann, *Holmes' "Common Law" and German Science*, in Robert Gordon (ed.), *THE LEGACY OF OLIVER WENDELL HOLMES, JR.* (1992).

<sup>38</sup> Weber’s description of formal law as a system of abstract, general rules, free from lacunae, the application of which should require and permit merely „logical“ operations in accordance with intrinsic criteria (see MAX WEBER, *WIRTSCHAFT UND GESELLSCHAFT* (5TH ED. by J. Winkelmann, 1972), 865-869) reads like a paraphrase of the relevant passages from Jhering’s *GEIST DES RÖMISCHEN RECHTS AUF DEN VERSCHIEDENEN STUFEN SEINER ENTWICKLUNG* (1858), at 334-414). Sociological literature on Webers Legal Sociology has, if I understand correctly, not taken account of the fact that the exponents of formal law were very well aware of the freedoms they were taking in the name of *interpretatio logica* and of system thinking (see specifically on early Jhering, REGINA OGOREK, *RICHTERKÖNIG ODER SUBSUMPTIONSAUTOMAT. ZUR JUSTIZTHEORIE IM 19. JAHRHUNDERT* (1986), 221-229. Whether Max Weber himself saw through these legally creative and discretionary elements of formal law is doubtful, although the observations in his legal sociology, in which he at the time attributed the “antiformal tendencies” (also) to inherent problems of formal law (*WIRTSCHAFT UND GESELLSCHAFT*, at 884), show that at any rate he did not let himself be deceived by the ideologists of the subsumption technique.

<sup>39</sup> For a brief and instructive account see UWE WESEL, *GESCHICHTE DES RECHTS. VON DEN FRÜHFORMEN BIS ZUR GEGENWART* (3<sup>rd</sup> Ed. 2006). See the more comprehensive and balanced contributions to RUDOLF VON JHERING, 1993 (Okko Behrends ed.).

As is well known, Max Weber, in his sociological analysis of law that set modern law in the context of overall occidental rationalization processes<sup>40</sup>, defended the achievements of formal law, thus as it were seeking to rehabilitate the early Jhering in contrast to his later work. Max Weber's rehabilitation of formal law, which was in line with his recognition of legal science as an independent discipline and with his program of an understanding sociology, did not leave lasting impressions on either the contemporary successors of Jhering or the prevailing theory and practice of legal science. Jhering's interpretation of law as a political action program was taken up, by contrast and with lasting success, by the Tübingen School of Interest Jurisprudence, though admittedly also disciplined by the idea that the application of law had to be oriented to legislative programs, to legislative evaluation of conflicts of interest.<sup>41</sup> This program, which as it were methodologically split Jhering's legal theory in half, has continued to dominate the law's self-image in Germany until today.<sup>42</sup>

By contrast, the actual founders of "sociological jurisprudence" operated much less fortunately. In 1906, under the pseudonym Gnaeus Flavius, there appeared a polemic by Hermann Kantorowicz, aimed at bringing the "struggle for law" into legal science.<sup>43</sup> The *Freirechtsbewegung* (free law movement) that formed around this manifesto was characterized by Lombardi Vallauri<sup>44</sup> as the prophetic, eschatological movement of Jews and socialists. In actual fact it was a movement of innovators and outsiders, from the academic and professional worlds, that took shape initially as a protest against "the prevailing ideal conception of the jurist", seeking to "unmask and destroy" the "illusion" of the subsumption technique in order to propagate the idea that "only free law, with the spontaneity of its decisions and the intuitiveness of its content" could do justice to the constraints and the social tasks of judicial decision.<sup>45</sup>

## 2. Early Sociological Jurisprudence

---

<sup>40</sup> MAX WEBER, *ECONOMY AND SOCIETY. AN OUTLINE OF INTERPRETIVE SOCIOLOGY*, 2 VOLS. (1968); see WOLFGANG SCHLUCHTER, *DIE ENTWICKLUNG DES OKZIDENTALEN RATIONALISMUS: EINE ANALYSE VON MAX WEBERS GESELLSCHAFTSGESCHICHTE* (The Development of Occidental Rationalism: an Analysis of Max Weber's History of Society) (1979).

<sup>41</sup> PHILIPP HECK, *DAS PROBLEM DER RECHTSGEWINNUNG* (The Problematic of Creating Law) (1912).

<sup>42</sup> See HANS-MARTIN. PAWLOWSKY, *METHODENLEHRE FÜR JURISTEN, THEORIE DER NORM UND DES GESETZES* (1981), 58.

<sup>43</sup> HERMANN KANTOROWICZ, *DER KAMPF UM DIE RECHTSWISSENSCHAFT* (1906).

<sup>44</sup> LUIGI LOMBARDI VALLAURI, *GESCHICHTE DES FREIRECHTS* (1971), at 41

<sup>45</sup> HERMANN KANTOROWICZ, *DER KAMPF UM DIE RECHTSWISSENSCHAFT* (1906). at 7, 13, 15.

In retrospect, this program may appear as downright naïve. But it was formulated on the basis of intensive debate around the traditions of German jurisprudence and of thinking about the general development of the science. With its associated demands for a realistic and scientific finding of the law, it promoted a broad spectrum of approaches, the working out (and problems) of which are still contemporary today. Eugen Ehrlich<sup>46</sup> has sought in his theory of “living law” for a synthesis of empirical legal sociological and normative legal science – the consequences of a “scientific” treatment of law, for the relationships between legal sociology and legal science have continually been rethought in succession to Jhering, but nevertheless remain an inexhaustible theme.<sup>47</sup> Arthur Nußbaum<sup>48</sup>, in his program for “*Rechtstatsachenforschung*” (research into legal facts) abstracted from the theoretical and methodological problems of the social sciences and instead oriented himself towards the practical decision-making needs of lawyers<sup>49</sup> – the type of approach to the reality of the law to which recourse may still fortunately be had today as an alternative to the wanderings and confusions of sociological theoretical debates.<sup>50</sup> Hugo Sinzheimer<sup>51</sup> and his successors have transferred the social critical themes of free law into a social reformist program aimed at a legal transformation of liberal capitalist social structures.<sup>52</sup> Debate among critical jurists has continued up to the present to turn around the consequences of social critical analyses for law and the role of law in reforming on changing social structures.<sup>53</sup>

---

<sup>46</sup> EUGEN EHRLICH, *GRUNDLAGEN DER SOZIOLOGIE DES RECHTS (Fundamental principles of the sociology of law)* (1913).

<sup>47</sup> See the attempts at an update by Klaus A. Ziegert, *The Sociology behind Eugen Ehrlich's Sociology of Law*, 7 *INTERNATIONAL JOURNAL OF THE SOCIOLOGY OF LAW* 225 (1979), 225; David Nelken, *Law in Action or Living Law? Back to the Beginning in Sociology of Law*, 4 *LEGAL STUDIES* 157 (1984),.; see also Gunther Teubner, “*Global Bukowina*”: *Legal Pluralism in the World Society*, in G. Teubner (ed.), *GLOBAL LAW WITHOUT A STATE* 3 (1996)

<sup>48</sup> ARTHUR NUßBAUM, *RECHTSTATSACHENFORSCHUNG, IHRE BEDEUTUNG FÜR WISSENSCHAFT UND UNTERRICHT (Research into Legal Facts; its Importance for Legal Science and Legal Education)* (1914).

<sup>49</sup> On the differences between Ehrlich and Kantorowicz see KLAUS F. RÖHL, *RECHTSSOZIOLOGIE* (1987), 47-49.

<sup>50</sup> See Aristide Chiotellis and Wolfgang Fikentscher, *Zur Einführung: Rechtssachenforschung – Ein heute noch erfüllbares Programm?* in: A. Chiotellis & W. Fikentscher (eds.), *RECHTSTATSACHENFORSCHUNG. METHODISCHE PROBLEME UND BEISPIELE AUS DEM SCHULD- UND WIRTSCHAFTSRECHT* 1 (1985); Andreas Heldrich, *Die Bedeutung der Rechtssoziologie für das Zivilrecht*, 186 *ARCHIV FÜR DIE CIVILISTISCHE PRAXIS* 74 (1986).

<sup>51</sup> HUGO SINZHEIMER, *DIE SOZIOLOGISCHE METHODE IN DER PRIVATRECHTSWISSENSCHAFT (The sociological method in the science of private law)* (1909).

<sup>52</sup> See Hubert Rottlenthner, *Three Legal Sociologies: Eugen Ehrlich, Hugo Sinzheimer, Max Weber*, *EUROPEAN YEARBOOK IN THE SOCIOLOGY OF LAW* 277 (A. Febbrajo ed., 1988) at 232-237, 245, 253-254.

<sup>53</sup> Thomas Raiser, *Keynote Address: Sociology of Law in Germany*, 11 *GERMAN L.J.* 391 (2010), available at: [http://www.germanlawjournal.com/pdfs/Vol11-No4/Vol\\_11\\_No\\_04\\_391-398\\_Raiser.pdf](http://www.germanlawjournal.com/pdfs/Vol11-No4/Vol_11_No_04_391-398_Raiser.pdf); Peer Zumbansen, *Law's Knowledge and Law's Effectiveness: Reflections from Legal Sociology and Legal Theory*, 10 *GERMAN L.J.* 417 (2009),

### *III. Missed Opportunities*

The history of the relationships between the approaches of German sociological jurisprudence, legal sociology and sociology of law and the development of American legal thought following Holmes is a history of missed opportunities and delayed non-contemporary response.

Max Weber had dealt intensively, but with obvious irritation, with the Common Law.<sup>54</sup> For him the task was to reconcile what he saw – by comparison with continental legal systems – as the Common Law’s underdeveloped rationality, especially in light of the advanced development of British capitalism and his own assumptions about the interdependence between formal law and capitalism.<sup>55</sup> Weber’s legal sociology initially met with scarcely any attention, and the opportunities for a critique of Weber’s predictions about the future of formal law and the “anti-formal tendencies” in modern law on the basis of experience in the English-speaking have remained challenging.<sup>56</sup>

The other side of Weber’s legal science from Weber was from the outset in a difficult position, which was subsequently to become still more dramatic. The “fight for legal science” introduced by Hermann Kantorowicz in 1906 was waged extremely energetically by its mainstream opponents, including the leading figures of the new interest jurisprudence, which was just taking shape. But it was not this counter-criticism, but the First World War and its consequences that marked the beginning of the end of the free law movement.<sup>57</sup> After the war and the replacement of the Wilhelmine monarchy by the

---

available at: [http://www.germanlawjournal.com/pdfs/Vol10No04/PDF\\_Vol\\_10\\_No\\_04\\_417-438\\_SI\\_Articles\\_Zumbansen.pdf](http://www.germanlawjournal.com/pdfs/Vol10No04/PDF_Vol_10_No_04_417-438_SI_Articles_Zumbansen.pdf)

<sup>54</sup> MAX. WEBER, *WIRTSCHAFT UND GESELLSCHAFT* (5th ed. by J. Winckelmann, 1972), at, 889-892.

<sup>55</sup> See David M. Trubek, *Max Weber on Law and the Rise of Capitalism*, WISCONSIN L. REV. 720 (1972), 746-748; Hubert Treiber, “Wahlverwandtschaften” zwischen Webers Religions- und Rechtssoziologie, in *id.*, and S. Breuer (eds.), *ZUR RECHTSSOZIOLOGIE MAX WEBERS. INTERPRETATION, KRITIK, WEITERENTWICKLUNG* 6 (1984), 49-55; Duncan Kennedy, *The Disenchantment of Logically Formal Legal Rationality, or Max Weber’s. Sociology in the Genealogy of the. Contemporary Mode of Western Legal Thought*, 55 HASTINGS L. J. 1031 (2004).

<sup>56</sup> An example: to elucidate his concept of formality in law of contract, M. Weber, *op.cit.* (note 19), 869 refers to the case law of the Supreme Court, according to which legal limitations on working hours are invalid even “on the purely formal ground that it is incompatible with the natural law preambles of the constitution”. Weber evidently had in mind here the infamous *Lochner* decision (*Lochner v. New York*, 198 U.S. 45 [1905]). In connection with Weber’s diagnoses and evaluations of the “antiformal” tendencies in modern law, it would have been rewarding to compare him with corresponding American developments, for instance the fact that the Supreme Court, in *Muller v. Oregon*, 208 U.S. 412 (1908), let itself be influenced by the “substantive” argumentation of a “Brandeis brief”.

<sup>57</sup> See, Rüdiger Lautmann and Michael Meuser, *Verwendungen der Soziologie in Handlungswissenschaften am Beispiel von Pädagogik und Jurisprudenz*, 28 KÖLNER ZEITSCHRIFT FÜR SOZIOLOGIE 686 (1986) at 697.

Weimar Republic, the free law movement had first of all to deal with itself. It was now that Max Weber's critique of the "antiformalistic tendencies of modern legal development"<sup>58</sup> took on new importance in the light of new conflictual setups between a democratically legitimated legislator, a largely antidemocratic and antirepublican society and a conservative justice that laid claim on the law to put a check on the legislator. The free law school fell into suspicion of promoting "class justice",<sup>59</sup> and Kantorowicz, its leading representative, had every reason to clarify his objectives.<sup>60</sup>

Under those circumstances, an internationalization of this fundamental debate in legal science was hardly to be expected. Eugen Ehrlich, whose work had, already very early on, met with considerable interest among scholars in the United States, had to renounce an American visiting professorship on the eve of the First World War.<sup>61</sup> All that remained was publication of a few articles in English;<sup>62</sup> Ehrlich's main work, his *Fundamental Principles of the Sociology of Law*, published in German in 1913, was to appear in English only posthumously in 1936 – with a foreword by Roscoe Pound, who rather too unceremoniously laid claims on Ehrlich's anti-statist "living law" on behalf of his own version of sociological jurisprudence.<sup>63</sup> By contrast with Ehrlich, Kantorowicz was a thoroughly political animal. Even during the First World War, he became interested not so much in Anglo-Saxon legal theory as in the "Spirit of English Politics"<sup>64</sup> and his lecture trips to Britain in the 1920s and early 1930s had general political aims. The presentation of his free law program in 1928<sup>65</sup> ought perhaps to have been able, at the time it was originally

---

<sup>58</sup> MAX WEBER, *WIRTSCHAFT UND GESELLSCHAFT* (5th ed. by Johannes Winckelmann, 1972), 88-89.

<sup>59</sup> See ERNST FRAENKEL, *ZUR SOZIOLOGIE DER KLASSENJUSTIZ* 36 (1927).

<sup>60</sup> See, KARLHEINZ MUSCHELER, *RELATIVISMUS UND FREIRECHT. EIN VERSUCH ÜBER HERMANN KANTOROWICZ*, (1984), 125-141, 161-173.

<sup>61</sup> See Klaus A. Ziegert, *The Sociology behind Eugen Ehrlich's Sociology of Law*, 7 *INTERNATIONAL JOURNAL OF THE SOCIOLOGY OF LAW* 225 (1979), at 228.

<sup>62</sup> Eugen Ehrlich, *Montesquieu and Sociological Jurisprudence*, 29 *HARV. L. REV.* 582 (1915/16); *Judicial Freedom of Decision: Its Principles and Object*, in: *SCIENCE OF LEGAL METHOD. THE MODERN LEGAL PHILOSOPHY SERIES*, (Vol. 9, Boston 1917)

<sup>63</sup> *FUNDAMENTAL PRINCIPLES OF THE SOCIOLOGY OF LAW* (Walter L. Moll transl., introduced by Roscoe Pound, 1936),

<sup>64</sup> See HERMANN KANTOROWICZ, *DER GEIST DER ENGLISCHEN POLITIK UND DAS GESPENST DER EINKREISUNG DEUTSCHLANDS* (1929); *The Spirit of British Policy and the Myth of the Encirclement of Germany* (1931).

<sup>65</sup> Hermann Kantorowicz, *Legal Science. Summary of its Methodology*. With Notes by Ernest W. Patterson, 28 *COLUMBIA L. REV.* 679 (1928)



developed, to command wider attention; in 1928, however, legal realism had already worked out its own intellectual premises.<sup>66</sup>

In Germany, with the strenuous efforts to work out a sociological jurisprudence, and the debates in the Weimar Republic, the American development towards legal realism was obviously hardly noticed.<sup>67</sup> Even the appearance of Karl N. Llewellyn as visiting lecturer in Leipzig in the winter term of 1928/29<sup>68</sup> did not have any further effect. At any rate, the year his “*Präjudizienrecht und Rechtsprechung in Amerika*” (1933) (Law of Precedent and Case Law in America) was published marked the end of all possible debate.<sup>69</sup> Subsequently, the debate around legal realism<sup>70</sup> – like the working out of the program of sociological jurisprudence<sup>71</sup> – remained restricted to the German émigrés.<sup>72</sup>

<sup>66</sup> See John H. Schlegel, *American Legal Realism and Empirical Social Science: From the Yale Experience*, 28 BUFFALO L. REV. 459 (1979),. Against Fikentscher’s thesis in his *METHODEN DES RECHTS IN VERGLEICHENDER DARSTELLUNG* (vol. 2, 1975) at 282, that legal realism had taken over the heritage of free law, see KARLHEINZ MUSCHELER, *RELATIVISMUS UND FREIRECHT. EIN VERSUCH ÜBER HERMANN KANTOROWICZ*, (1984) at, 13 ,and above all Kantorowicz himself: *Some Rationalism about Realism*, 43 YALE L. J. 1239, 1241 (1934); but see also James E. Herget and Stephen Wallace, *The German Free Law Movement at the Source of American Legal Realism*, 73 *Virg. L. Rev.* 399 (1987).

<sup>67</sup> BERND.H. OPPERMANN, *DIE REZEPTION DES NORDAMERIKANISCHEN RECHTSREALISMUS DURCH DIE DEUTSCHE TOPIK-DISKUSSION* (1985), 42-44.

<sup>68</sup> And in the winter term 1931/2; see, Manfred Rehbinder, *Karl N. Llewellyn als Rechtssoziologe*, 16 KÖLNER ZEITSCHRIFT FÜR SOZIOLOGIE 532 (1964) , 533; Llewellyn’s invitation had apparently been promoted by Kantorowicz (see Samuel Klaus, *Karl Llewellyn, Präjudizienrecht und Rechtsprechung in Amerika (book review)*, 43 YALE L. J. 516 (1934).

<sup>69</sup> In the same year there also appeared the outstanding analysis by Angèle Auburtin, *Amerikanisches Rechtsauffassung und die neueren amerikanischen Theorien der Rechtssoziologie und des Rechtsrealismus*, 3 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 3 529 (1932/33); obviously, this article was unable to exert any further effects.

<sup>70</sup> The best-known contribution, though a problematic one, is by Hermann Kantorowicz, *Some Rationalism about Realism*, 43 YALE L. J. 1239,1934; see also Fritz Morstein-Marx, *Juristischer Realismus in den Vereinigten Staaten von Amerika*, 10 REVUE INTERNATIONALE DE LA THEORIE DU DROIT 28 (1936).

<sup>71</sup> See, e.g., HUGO SINZHEIMER, *DIE AUFGABE DER RECHTSZOLOGIE* (1935)

<sup>72</sup> The history of German émigré legal science was long only fragmentary. – See on Kantorowicz KARLHEINZ MUSCHELER, *HERMANN ULRICH KANTOROWICZ. EINE BIOGRAPHIE* (1984), 106-124; Vivian A. Curran, *Rethinking Hermann Kantorowicz: Free law, American legal realism and the legacy of anti-formalism*, in: *RETHINKING THE MASTERS OF COMPARATIVE LAW* (A. Riles ed., 2001), 66; on Franz L. Neumann see A. Söllner, *Franz L. Neumann – Skizzen zu einer intellektuellen und politischen Biographie*, in F.L. NEUMANN, *WIRTSCHAFT, STAAT, DEMOKRATIE. AUFSÄTZE 1930-1954*, 7 (A. Söllner ed., 1978) , ; see also Helmut Dubiel and Alfons Söllner, *Die Nationalsozialismus-Forschung des Instituts für Sozialforschung – ihre wissenschaftsgeschichtliche Stellung und ihre gegenwärtige Bedeutung*, in: *WIRTSCHAFT, RECHT UND STAAT IM NATIONALISIZALISMUS. ANALYSEN DES INSTITUTS FÜR SOZIALFORSCHUNG 1939-1942*, 7 (H. Dubiel and A. Söllner eds., 1981),. For more recent contributions see, Marcus Lutter, Ernst C. Stiefel and Michael H. Hoeflich, (eds.), *DER EINFLUß DEUTSCHSPRACHIGER EMIGRANTEN AUF DIE RECHTSENTWICKLUNG IN DEN USA UND IN DEUTSCHLAND* (1993).

In the period after the Second World War, in all internationally oriented fields of law, transatlantic contacts developed more intensively than ever before, spanning even contested issues. Comparative law presentations, in which American scholars had always been leaders, became a matter of course. But the preconditions for exchange specifically in the area of sociological jurisprudence and legal criticism had changed dramatically.

When German legal theory once again began to become interested in legal realism,<sup>73</sup> and was stimulated above all by Josef Esser's "*Grundsatz und Norm*" (Principle and Rule),<sup>74</sup> which brought legal realism once again to a kind of late flourishing in the 1960s,<sup>75</sup> it had long lost its nature as an academically critical and/or politically reforming movement.<sup>76</sup> Accordingly, the German response had to remain academic, in a twofold sense: it was able, with proverbial thoroughness, to trace the theoretical preconditions *for* and practical achievements *of* legal realism, but it was unable from such distance to have any impact on reality.<sup>77</sup>

For German legal sociology, with its argumentative power, policy influence and institutional embeddedness in law faculties around the country seriously eroding, the response to the American approaches was no less than constitutive. The stimuli for the revival of German legal sociology that did surface belong into the context of the intellectual and political unrest, which at the end of the 1960s spread over into legal science.<sup>78</sup> Just as in 1906 Gnaeus Flavius's "Fight for Law" had acted as a signal, so the appearance of Rudolf Wiethölter's *Rechtswissenschaft* (Legal Science), and his oxymoron

---

<sup>73</sup> Helmut. Coing, *Neue Strömungen in der nordamerikanischen Rechtsphilosophie*, 38 ARCHIV FÜR RECHTS- UND SOZIALPHILOSOPHIE 537 (1959/50)

<sup>74</sup> JOSEF ESSER, GRUNDSATZ UND NORM (*Principle and Rule*, 1956), at 18-23.

<sup>75</sup> NORBERT. REICH, SOCIOLOGICAL JURISPRUDENCE AND LEGAL REALISM IM RECHTSDENKEN AMERIKAS (1967); GERHARD CASPER, JURISTISCHER REALISMUS UND POLITISCHE THEORIE IM AMERIKANISCHEN RECHTSDENKEN (1967); WOLFGANG. FIKENTSCHER, METHODEN DES RECHTS IN VERGLEICHENDER DARSTELLUNG,(vol.1 1975); WERNER KRAWIETZ, JURISTISCHE ENTSCHEIDUNG UND WISSENSCHAFTLICHE ERKENNTNIS (1978), 97-132.

<sup>76</sup> JohnH. Schlegel, *American Legal Realism and Empirical Social Science: From the Yale Experience*, 28 BUFFALO L. REV. 459 (1979)..

<sup>77</sup> BERND.H. OPPERMAN, DIE REZEPTION DES NORDAMERIKANISCHEN RECHTSREALISMUS DURCH DIE DEUTSCHE TOPIK-DISKUSSION (1984)records a direct influence of legal realism on so-called topic theory (THEODOR VIEHWEG, TOPIK UND JURISPRUDENZ, 4th ed., 1969); but this would form a somewhat strange alliance since topic theory in particular cannot do much with the scientific, empirical and social critical elements of legal realism.

<sup>78</sup> An example is: Hubert Rottleuthner, *Rechtswissenschaft als Sozialwissenschaft*, Frankfurt a.M. 1973; previously, Ernst E. Hirsch, who had gone back to Berlin, acted as a lone crier in the desert (see E.E. Hirsch, Was kümmert uns die Rechtssoziologie? *Juristen-Jahrbuch* 3 (1962/63), 131 *et seq.*); in general, see the references in KLAUS F. RÖHL, RECHTSOZIOLOGIE (1984), at 57-63.

of “political jurisprudence”, sparked off a new debate on principles.<sup>79</sup> In the course of these debates the social critical traditions of German legal science were rediscovered;<sup>80</sup> relationships with the “prevailing” tendencies became tense and polemical,<sup>81</sup> although it very quickly became apparent that the formula of “political” jurisprudence and its cognitive consequence, the demand for a reorientation of “legal science as a social science”<sup>82</sup> potentially extended to a wide multiplicity of differing and conflicting approaches, from Marxism via analytical philosophy to empirical legal sociology.<sup>83</sup> Eventually, it further became clear that the attempts by the new “legal ideologists” to liberate themselves from the darker legacy of law in Germany and to reconstitute legal science as a project of democratic constitutionalism and contribution to social reform met with political resistance and intellectual skepticism.

### C. What is Left and what is Next?

What if anything, did we accomplish? Somewhat ironically, only a few months after the *American-German Debate* had been published, the Berlin Wall broke down and the Soviet empire disintegrated. A *Zeitenwende*, no doubt, and every reason to start the kind of debate which Stephen Lukes, then Professor at the European University Institute in Florence, launched in the *Frankfurter Allgemeine Zeitung* under the title “What is Left”. Remarkably, he raised this question around a time that so many observers predicted the end of history after something like an *Endsieg* of economic liberalism and political democracy.<sup>84</sup> Since then, the times have changed again in a no less than dramatic form. In the throes of the world-wide financial crisis and crises in Europe we are left to speculate on what will happen. Today, we wonder instead about “life after bankruptcy” and the sustainability of neo-liberalism.<sup>85</sup>

---

<sup>79</sup> RUDOLF WIETHÖLTER, RECHTSWISSENSCHAFT (1968)

<sup>80</sup> Namely the works of Ernst Fraenkel, Otto Kahn-Freund, Otto Kirchheimer, Franz Neumann, Hugo Sinzheimer.

<sup>81</sup> SEE, WOLFGANG FIKENTSCHER, RECHTSWISSENSCHAFT UND DEMOKRATIE BEI JUSTICE OLIVER WENDELL HOLMES. EINE RECHTSVERGLEICHENDE KRITIK DER POLITISCHEN JURISPRUDENZ, KARLSRUHE (1970)..

<sup>82</sup> HUBERT ROTTLEUTHNER, RECHTSWISSENSCHAFT ALS SOZIALWISSENSCHAFT (1973) and ID., RICHTERLICHES HANDELN. ZUR KRITIK DER JURISTISCHEN DOGMATIK (,1973).

<sup>83</sup> N. LUHMANN, RECHTSZOLOGIE, VOL. 1 AND 2, (1972)

<sup>84</sup> See, eg, FRANCIS FUKUYAMA, THE END OF HISTORY AND THE LAST MAN (1992)

<sup>85</sup> “Life after bankruptcy” is the heading of an interview with Jurgen Habermas, published in 16: 2 CONSTELLATIONS 16, No 2, 2009, 224-234; This interview was conducted by Thomas Assheuer and originally appeared in DIE ZEIT on November 6, 2008.

*1. What was left after 1989?*

Each of the affinities between American and German debates since the late 1960s identified above was part of a longer history of more or less fortunate legal cultures. With our project we have added another page to this history. None of the contributors to the “American-German Debate” claimed to have accomplished some transcultural synthesis, each and every essay and comment documents and mirrors discrepancies, the non-convergence of perspectives and aspirations. We should not call this a failure. To contrast strands of American Critical Legal Studies and the German debates on materialization of formal law, on proceduralization and reflexive law; the various reconstructions of our traditions, the discussion of the critical potential of legal sociology, the critical exploration of rights discourses and the instrumental use of rights by social movements was fascinating and instructive. But we can hardly call all this an accomplishment if the mutual interest and partial understanding of our differences had no impact beyond a deliberative moment. In that respect our balance sheet looks quite ambivalent. On the one hand, we can claim to have contributed to the move beyond the methodological nationalism of legal disciplines and (re-)constitution of “legal science” as a transnational exercise. That trend continues to manifest itself in many ways, not the least in the success story of the *German Law Journal*.<sup>86</sup> Much more modesty, however, is in place when it comes to our critical cause: There is not much left of the Left in Bremen of 1986 and of the American Critical Legal Studies Movement.

What kind defeat, however, do we have to deplore when observing such defeats? James Gordley, a PhD student at Harvard during the critical years, in the context of a brief essay on European endeavors in the field of private law, observes rather sarcastically “Mysteriously, by 1990, [after the CLS earthquake at Harvard and elsewhere] the ground ceased to shake. The questions the movement raised had still not been answered, but legal academia had turned its attention elsewhere”.<sup>87</sup> Rudolf Wiethölter’s comments on Germany’s critical moment sound very similar.<sup>88</sup> On both sides of the Atlantic self-destructive idiosyncrasies within the critical cohorts and external pressures been quite successful in containing the political impact of the critical projects. But does this mean that the respective jurisprudential *Leitkulturen* [guiding cultures] have regained their intellectual authority? The American and the German constellations differ again significantly. Anthony Kronman, in his book “*The Lost Lawyer*”, devotes a lengthy section to Critical Legal Studies where he describes CLS as an academic endeavour on par with legal

---

<sup>86</sup> See the *laudationes* offered at the 10<sup>th</sup> Anniversary Symposium of the German Law Journal at the German Federal Ministry of Justice, 2 July 2009, available at [http://www.germanlawjournal.com/pdfs/TOC/pdf\\_table\\_of\\_contents\\_Vol\\_10\\_No\\_10.pdf](http://www.germanlawjournal.com/pdfs/TOC/pdf_table_of_contents_Vol_10_No_10.pdf)

<sup>87</sup> James Gordley, *The State's Private Law and Legal Academia*, 56 AM. J. COMP. L. 639 (2008)

<sup>88</sup> See, recently his *Utinam...*, in: SUMMA. FESTSCHRIFT FÜR DIETER SIMON (R.M. Kiesow *et al.* eds., 2005), , 641.

realism on the one hand and economic analysis of law on the other.<sup>89</sup> Kronman, writing in 1993, may have been too close an observer and too much under the impression of the events at Yale in the late 1960s and early 1970s. But even more recent compendia on legal theory continue to take the academic contribution of the movement quite seriously.<sup>90</sup>

The development in Germany can be characterized as a thinning out of institutional accomplishments. The reform of legal education was reversed. Frankfurt and Bremen, once the stronghold of liberals and leftists did not defend that profile. Meanwhile, interdisciplinarity, once the methodological Trojan horse of subversive theorizing, had come en vogue, albeit mainly transformed into a poor application of American economic analysis<sup>91</sup> or offered as a Chinese menu.<sup>92</sup> All the defenses of German traditions, however, will not reconstitute the glory of Legal Science in the “German Century”.

## II. What is Next?

Critical legal thought was more visible and more vibrant in 1986 than it is today. The paradox, however, is that today crises are much more visible than 25 years ago. Reflections on failure and their reasons are omnipresent in place and some of them are even interesting. The very real challenges we are facing today provide much food for thought and require renewed analytical efforts. Such endeavors are in fact under way on both sides of the Atlantic and beyond the horizons of 1986. They may look as ‘fragmented’ as international law<sup>93</sup> and they cannot be uniform.

It makes sense for all concerned to start from what they have left out and what they may have gotten wrong. On the side of the German conference organizers, the absence of globalization and even of Europeanization on the program, organized by the *Center of European Law and Politics*, today appears as the most striking gap in the program of 1986.

---

<sup>89</sup> ANTHONY T. KRONMAN, *THE LOST LAWYER. FAILING IDEALS OF THE LEGAL PROFESSION* (1993), 241-264.

<sup>90</sup> Two contributions to DENNIS. PATTERSON, *COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY*, (2<sup>nd</sup> ed., 2010), discuss CLS, namely Guyora Binder, *Critical legal studies* (267-278), Lawrence B. Solum, *Indeterminacy* (479-492), many others refer to the movement and/or its topics.

<sup>91</sup> See Viktor Winkler, *Some Realism About Rationalism: Economic Analysis of Law in Germany*, 6 *GERMAN L.J.* 1033 (2005), available at: [http://www.germanlawjournal.org/pdfs/Vol06No06/PDF\\_Vol\\_06\\_No\\_06\\_Developments\\_1033-1044\\_Winkler.pdf](http://www.germanlawjournal.org/pdfs/Vol06No06/PDF_Vol_06_No_06_Developments_1033-1044_Winkler.pdf)

<sup>92</sup> The terms is from Friedrich Kratochwil, *How (Il)liberal is the Liberal Theory of Law? Some Critical Remarks on Slaughter’s Approach*, 9 *COMPARATIVE SOCIOLOGY* 120 (2010), at 122.

<sup>93</sup> Martti Koskenniemi and Paivi Leino, *Fragmentation of International Law? Postmodern Anxieties*, 15 *LEIDEN J. INT’L. L.* 553 (2002)

By contrast, why did we take the fight against the Prussian legacy in our legal education so seriously? Why did we discuss the regulatory crisis, implementation failures, the advent of reflexive law and the proceduralization of the category of law without becoming aware of the dawn of the “golden age” of the nation state<sup>94</sup> and its “embedded liberalism”?<sup>95</sup> Why did we treat the legacy of political economy with such benign neglect?<sup>96</sup> Embarrassing as such questions may be, we can also note, that the intellectual lenses through which we observed the 1980s were soon beginning to be directed towards new horizons – on both sides of the Atlantic. Suffice it here to mention the long-term and ongoing projects of both Kennedys,<sup>97</sup> of Gunther Teubner’s turn to the Global Bukowina in 1996<sup>98</sup>, of so much of his ensuing work since the 1990s<sup>99</sup> or of the theorizing of Europeanization by both of the organizers of the 1986 Symposium.<sup>100</sup> Very remarkable are the moves of an attentive participant and important reference point for German theorizing, namely Jürgen Habermas, who was in 1986 engaged in the elaboration of his discourse theory of law and democracy, and right after the publication of his majeur d’oeuvre,<sup>101</sup> devoted so much of his energy to the ‘postnational constellation’<sup>102</sup> and to the project of European

---

<sup>94</sup> See ACHIM HURRELMANN, STEPHAN LEIBFRIED, KERSTIN MARTENS AND PETER MAYER (EDS.), *TRANSFORMING THE GOLDEN-AGE NATION STATE* (2007).

<sup>95</sup> John Gerard Ruggie, *International Regimes, Transactions, and Change: Embedded Liberalism in the Postwar Economic Order*, 36 INT’L ORG. 379 (1982)

<sup>96</sup> See, eg, STEVEN WEBER ED., *GLOBALIZATION AND THE EUROPEAN POLITICAL ECONOMY* (2001).

<sup>97</sup> See Duncan Kennedy, [Three Globalizations of Law and Legal Thought: 1850-2000](#), in David M. Trubek and A. Santos (eds.), *THE NEW LAW AND ECONOMIC DEVELOPMENT. A CRITICAL APPRAISAL*, 19 (2006); the theme is the *leitmotif* of his work ever since *INTERNATIONAL LEGAL STRUCTURES* (1987) and of his network building through activities such as the Workshop on “Global Law and Economic Policy” in June 2010 at Harvard Law School.

<sup>98</sup> [Global Bukowina: Legal Pluralism in the World-Society](#), in G. Teubner (ed.), *GLOBAL LAW WITHOUT A STATE*, 3 (1996)

<sup>99</sup> Most recently: *A Constitutional Moment? The Logics of ‘Hit the Bottom’* in P. Kjaer, G. Teubner and A. Febbrajo (eds), *THE FINANCIAL CRISIS IN CONSTITUTIONAL PERSPECTIVE: THE DARK SIDE OF FUNCTIONAL DIFFERENTIATION* (Oxford: Hart forthcoming).

<sup>100</sup> In the case of Ch. Joerges: from *Markt ohne Staat?* (The Market without a State?), in: R. Wildenmann (ed.), *STAATSWERDUNG EUROPAS?*, 225 (1991), to *Unity in Diversity as Europe’s Vocation and Conflicts Law as Europe’s Constitutional Form*, in R. Nickel and A. Greppi (eds), *THE CHANGING ROLE OF LAW IN THE AGE OF SUPRA- AND TRANSNATIONAL GOVERNANCE* (2011 – forthcoming (chapter 5), available at <http://papers.ssrn.com/abstract=1723249>

<sup>101</sup> *BETWEEN FACTS AND NORMS* (William Rehg transl., 1996, German orig.: 1992).

<sup>102</sup> *THE POSTNATIONAL CONSTELLATION. POLITICAL ESSAYS* (2001; German orig. 1996).

integration,<sup>103</sup> intellectual projects, which the Frankfurt legal scholar and philosopher Klaus Günther has been pursuing with great promise.<sup>104</sup>

It is not by chance that much of the pioneering critical work on further dimensions of globalization, such as 'law and development' and postcolonial studies was undertaken beyond German horizons and to an increasing degree in the Third World.<sup>105</sup> It is, however, in particular for Germans who tried to address their *Vergangenheitsschuld* [guilt about the past]<sup>106</sup> fascinating to observe in what form their concerns transformed into a theoretically multi-faceted topic with pan-European dimensions,<sup>107</sup> and how they were complemented by world-wide debates on transitional justice.<sup>108</sup> Law and development debates, post-colonial studies, and the migration *problématique* are inextricably linked to the history of what is not such a bright European past and present.

Transformations have taken place and new patterns of debate emerged in various other fields such as feminist legal theory, critical race theory, and last but not least, the enormously dynamic debates on rights. In all of these fields, we witness a denationalization of legal discourses and the emergence of transnational discourses and regimes. How significant are failures of academic political movements and efforts to reform legal education? Questions and queries, however, have something in common with

---

<sup>103</sup> His work on Europe started with STAATSBÜRGERSCHAFT UND NATIONALE IDENTITÄT, (*Citizenship and national identity*) (1991), reprinted as Annex II to BETWEEN FACTS AND NORMS, 491-516 and continuing up to his EUROPE: THE FALTERING PROJECT (2009).

<sup>104</sup> See, e.g., his RECHT, KULTUR UND GESELLSCHAFT IM PROZESS DER GLOBALISIERUNG (2001) (co-authored with Shalini Raniera); *The Legacies of Injustice and Fear: A European Approach to Human Rights and their Effects on Political Culture*, in: Philip Alston (ed.), THE EU AND HUMAN RIGHTS, 117 (1999); *World Citizens between Freedom and Security*, 12 CONSTELLATIONS 379 (2005); *Legal Pluralism or Uniform Concept of Law? Globalisation as a problem of legal theory*, 5 NOFO – JOURNAL OF EXTREME LEGAL POSITIVISM, 5 (2008).

<sup>105</sup> See, eg, Bhupinder .S. Chimni, *Third World Approaches to International Law: A Manifesto*, 8 INT'L COMM. L. REV. 3 (2006).

<sup>106</sup> The term has been coined by BERNHARD SCHLINK, VERGANGENHEITSSCHULD UND GEGENWÄRTIGES RECHT (2002).

<sup>107</sup> See Christian Joerges and Navraj S. Ghaleigh eds., DARKER LEGACIES OF LAW IN EUROPE: THE SHADOW OF NATIONAL SOCIALISM AND FASCISM OVER EUROPE AND ITS LEGAL TRADITIONS (2003); see the German Law Journal's Symposium issue on 'Darker Legacies': "EUROPEAN INTEGRATION IN THE SHADOW OF EUROPE'S DARKER PAST: THE 'DARKER LEGACIES OF LAW IN EUROPE' REVISITED, 7 GERMAN L.J. 71-256 (2006), available at: [http://www.germanlawjournal.com/pdfs/FullIssues/pdf\\_Vol\\_07\\_No\\_02.pdf](http://www.germanlawjournal.com/pdfs/FullIssues/pdf_Vol_07_No_02.pdf)

<sup>108</sup> To cite just the work of David Fraser which does not only cover national attempts in Europe to deal with Nazi and collaborationist regimes, but also transitional justice mechanisms with a view to learn about law out of its encounters with the evils of the past; see, e.g., his *Law After Auschwitz: Towards A Jurisprudence of the Holocaust*(2005); *The Fragility of Law: Constitutional Patriotism and the Jews of Belgium, 1940-45*, London 2009, and most recently, *Daviborshch's Cart: Narrating the Holocaust in Australian War Crimes Trials*, forthcoming in 2011 with Nebraska Press.

a silenced past: they do not pass away but tend to resurface. The critique of the theoretical poverty of mainstream legal thought is alive, even if unwell. It is unwell in that it is dispersed over so many places and fragmented in its theoretical foundations and political orientations. Preoccupations with social justice at national and international level persist, however, and theoretical efforts to understand the postnational constellation and to cope with its challenges are under way. What changed are the constellations in which such queries can be articulated anew. Critical legal thought did not fade away but is operating in a great variety of arenas and with highly particularistic fragmented discourses. The strengthening of mutual awareness and communality of moral intuitions, the re-opening of the search for critical theory seems to be the order of the day.



## Looking Back and to the Left: From the Bremen Conference to the Present

*By David M. Trubek\*\**

It is not easy to remember the thoughts and feelings that accompanied the American contingent's participation in the 1986 Bremen conference and which led to this volume. Time has eroded memories. But more than that, there is no single "American" set of thoughts and feelings to recall. Although we shared a desire to explore critical legal thought with colleagues from Germany, we were, in fact, a very heterogeneous group. We came together -- momentarily -- for the Bremen conference but we approached it from different perspectives, participated from different motives, and went different ways in the years after the publication of the book.

Hard as it is to reconstruct my own feelings about an event so long in the past; it is harder still to speak for the whole American contingent. Sure, we all thought it would be neat to go to Europe and exchange ideas with European scholars, famous or not so famous. Sure, some of us realized that by meeting in Germany we could not only break bread with scholars from another tradition but also advance purely US agendas. But beyond that we were driven by separate motives, separate dreams. These differences came from within the various strands of the American tradition and played out in the years following the conference as we went our separate ways in the US and global legal academic scenes.

But I did not know that at the time. I came to this project after a decade of struggle on the American scene. As a leading figure in law and society, one of the founders of CLS, and a sponsor of some of the early efforts to create critical race theory and feminist jurisprudence, I had worked hard to unite the several strands of the legal left in America. The Bremen conference looked like an opportunity to bring these strand together in a productive way.

Because of this dream, I could not see the deep fragmentation that was already there and would grow with time. Rather, I hoped that the trip to Germany would help us form a common discourse, a new form of critical legal thought in the U.S. that would emerge from the fusion of older traditions like "law and society" with newer movements like CLS and

---

\*\* Voss Bascom Professor of Law Emeritus, Senior Fellow, Center for World Affairs and the Global Economy, University of Wisconsin-Madison

the related strands of feminist and critical race theory. The Bremen conference occurred at a moment in which some in the American legal left still thought we could create a big tent for progressive scholars and believed that such a group could become a force not just in the academy, but also in national life. That was, I must confess, the dream that animated me as I worked with our colleagues in Germany to organize the Bremen event and the subsequent publication, which is being reissued here.

I knew that there were differences among the Americans but I thought that if we presented ideas from the various legal lefts in the US to a foreign audience we would see that all of the Americans shared a common discourse. After all, we were all the heirs of legal realism, shared a view that law is in some way politics by another name, ascribed to progressive values of equality and community, and were strong critics of the *status quo* in America. These commonalities, I thought, might be harder to see at home when we were divided into such sects as law and society, CLS, femcrits, critical race theory, and other movements. But I hoped they would become more apparent when we addressed an audience, which, while it came from a different legal culture, shared some of the theoretical and political ideas that animated people in our country.

I speak for myself here. While I think that a lot of Americans shared the idea that the visit to Germany would help consolidate the left legal academy in the US there were very different ideas what issues and ideas should be central, what kind of alliance should occur, and how it would come about in the U.S. Some looked primarily to alliances among academics while others dreamed of linkages with unions, social movements and other activist groups. Some saw the road to unity as one based on compromise and consensus, while others thought ironically that debate, fragmentation, and dissensus would be the best way to promote progressivism.

The idea of meeting with left legal scholars in Germany was not motivated simply by a search for a neutral venue that might bring to light what I thought were the common strands in American legal thought or others saw as an opportunity to continue and sharpen internal debates. Rather, it was also driven by a kind of provincial American eurocentricism. It is ironic that Christian speaks of America as a sort of "promised land" for German legal intellectuals; for many of us, *Europe* was the promised land, the home of great theoretical and political traditions in law and social theory. We knew about von Jhering through Karl Llewellyn, some of us had studied Jurisprudence with Fritz Kessler, many had read Marx, Weber, Habermas, and Adorno. Indeed, CLS had appropriated the term "critical" as a way to signal our debt to the inheritance of the Frankfurt School and to stake out a position on the left of the ideological spectrum -- although it was not clear that we understood the Frankfurt School's theories or, if we did, whether we were ready to follow them.

From afar, Germany looked like a place where there existed a theoretically informed left legal culture of great sophistication. We wanted to learn more about it but also show that

we could play the same game. Like ambitious provincial actors performing for the first time on the metropolitan stage we were both awed by high European culture and desperate to prove we were just as good as our European counterparts -- or even better.

Perhaps there was another dream held by some on the American side. For a long time, US left intellectuals had looked at the European political scene with jealousy. In Europe, they thought, you could find organized parties on the left that had a role for intellectuals. These parties, we imagined, were really guided by a social theory—usually some version of Marxism—and looked to intellectuals to help orient their activities. This was true, it was believed, of German Social Democrats, French Socialists, and Communist parties in France and Italy. And what a far cry this was from the US scene. Our parties were pragmatic alliances of disparate interests tied together more by calculations of electoral chances than any shared ideology or communal spirit. And they had little if any room for intellectuals. Perhaps, a few of us dreamed, we could learn from the European political model as we sought to build a unified left in America.<sup>109</sup>

Again, this view was not shared by all of us. Indeed, for some this whole idea seemed to come from an earlier era in the world of ideas and politics. For them the idea of organized parties controlled by bureaucratic elites and committed to totalizing ideologies was a relic of the past. This model, it seemed, was based on social and political conditions that no longer existed and flawed ideas that had been further corrupted by being used as a justification for bureaucratic domination. People like this had no dreams of recreating the politics of European socialism: rather, they looked to post-structuralism, preferred Foucault to the later Marx, talked about anarchist models of organization, favored multiplicity and dissension over doctrinal unity and bureaucratic discipline.

Divided through they were, the Americans were all drawn to Europe by complex and powerful motives that included admiration, longing for an imagined utopia, and opportunities for self assertion and a chance to prove that we had come of age culturally. We also shared with our German colleagues a vague hope that we might create a transnational left legal network that might continue the work begun at the Bremen event.

All that helps explains why we were able to assemble such a strong group of scholars from the US and produce a volume with so many outstanding essays by German and American scholars. Many of the articles that were published in 1989 are still being read: Rudolph Wietholters's essay is a classic and it, as well as Gunter Frankenberg and Gunther Teubner's chapters, are still being cited today. On the US side, David Kennedy and Kim Crenshaw's chapters are still read and referred to (Kim's has been cited over 1500 times since it was published in an expanded version) and my own contribution, written with John

---

<sup>109</sup> See the discussion in Kennedy, Duncan, *Radical Intellectuals in American Culture and Politics, or My Talk at the Gramsci Institute*, 1 RETHINKING MARXISM 100 (1988).

Esser, was the subject of a special panel at the 2010 meeting of the Law and Society Association that was devoted to reclaiming the critical tradition in socio-legal studies.<sup>110</sup> While the Bremen conference and the volume that followed created a record of many shared – and some divergent -- ideas, it neither led to fusion of left scholarly movements in the U.S. nor did it build a strong transatlantic network of progressive legal scholars. The Americans returned to our shores as divided as when we left. While feminist legal studies and critical race theory flourished in the years after Bremen, CLS as an organized entity did not last into the 1990s. And while Law and Society grew apace, became much more international, and occasionally hosted some panels on left topics, officially it kept its distance from policy issues and from movements with political agendas.<sup>111</sup>

The causes of the fragmentation of the legal left in America are manifold and have been written about elsewhere. Among them were the pull of the social movements, the pressures of academic careers, disciplinary divergence between lawyers and social scientists, and in some cases actual repression. Law and Society was the oldest of the progressive movements, having started in the 1960s, while CLS started in 1977 and feminism and critical race theory really got going in the early 1980s. Law and Society always tried to maintain a balance between left liberal politics and scientific neutrality. In the 1960s when such issues as civil rights and anti-poverty were accepted by the mainstream, there wasn't much apparent tension between progressive values and "science". But when faced with demands to embrace more radical objectives and admit openly to political agendas the Law and Society Association and its leading figures retreated behind the wall of scientific objectivity and all efforts to unite LSA and CLS came to naught.

Feminists and critical race scholars were not hampered by scientism and were willing to embrace a more radical agenda. But they were devoted primarily to issues deemed important by the social movements they spoke for and less interested in alliances with other "left" groups. CLS had started as an effort to be a "large tent" embracing a variety of left causes including racial and gender equality but the feminists and critical race scholars split off from CLS early on. At the same time, the CLS project of radicalizing law schools, announced with glee in such publications as Duncan Kennedy's *Legal Education and the Reproduction of Hierarchy*<sup>112</sup>, led to a backlash. One prominent critic went as far as to call

---

<sup>110</sup> Trubek, David and John Esser, 'Critical Empiricism' in *American Legal Studies: Paradox, Program, or Pandora's Box?*, reprinted at 14 *LAW AND SOCIAL INQUIRY* (1989)

<sup>111</sup> For an effort to align CLS and law and society, see Trubek, David, *Back to the Future: The Short Happy Life of the Law and Society Movement*, 18 *Fl. St. U. L. Rev.* 1 (1990) and works cited therein.

<sup>112</sup> KENNEDY, DUNCAN, *LEGAL EDUCATION AND THE REPRODUCTION OF HIERARCHY: A POLEMIC AGAINST THE SYSTEM A CRITICAL EDITION, WITH CONTRIBUTIONS FROM PAUL HARRINGTON, PETER GABEL, ANGELA HARRIS, DONNA MAEDA AND JANET HALLEY, AND WITH A NEW INTRODUCTION AND AFTERWORD BY THE AUTHOR* (1983/2004)

for removing CLS scholars from the law schools because they did not believe in the “rule of law”. Even if no one was actually fired, some scholars associated with CLS saw their careers blocked, at least temporarily, by this backlash and junior scholars –probably including some feminists and critical race scholars-- figured it was best to downplay any connection with the movement or its leading figures. For this and other reasons CLS as an organized movement came to an end not long after the Bremen conference.<sup>113</sup>

While CLS as a movement was over by the dawn of the 1990s, it has left its mark on the legal academy in the US and made significant contributions to world legal thought. CLS permanently transformed academic legal discourse in the US, opening space that has been occupied by multiple left ideas and approaches. It launched a scholarly tradition that made important contributions during the life of CLS as a functioning movement and continues on long after the organizational phase ended. Original CLS texts figure in the canon of American legal thought<sup>114</sup> and are read around the world while the several “post-CLS” movements continue to work along lines pioneered during the movement’s heyday.

If Bremen did not lead to a unified academic left in the US, neither did it launch a genuine transatlantic network of radical legal scholars. To be sure, individual scholars moved back and forth across the Atlantic, some as a result of links created in Bremen. But until very recently, progressive scholars in the US focused on US issues and Europeans thought primarily about domestic and EU issues. There was little sense that there were common issues and certainly no thought that we needed to do collaborative work. American scholars had enough to contend with in their efforts to bring about at least limited reforms in the law schools, protect some progressive legislative and judicial gains that came under attack from conservative forces in the Reagan years and afterwards, and explore new issues like Lesbian, Bisexual, Gay and Transgender rights. Europeans had a lot of their hands as neo-liberalism began to take hold in some places and the EU expanded into every corner of European legal life.

It seems however, that the situation may be changing. In the two-plus decades since we met in Germany globalization has changed the legal landscape on both sides of the Atlantic. New issues confront legal scholars everywhere and universities have begun to invest more in international and comparative scholarship. This has created conditions that could foster not just transatlantic but possibly even global networking among progressive legal scholars. Human rights have become a major issue world wide, attracting critical scholars from all over the world. The impact of globalization on labor markets north and south, east and west, has created issues for labor law scholars everywhere. EU law and

---

<sup>113</sup> For reflections on CLS as idea and movement by a leading figure, see Zamboni, Mauro, Interview with Duncan Kennedy, Harvard Law School (USA), May 2008, available at <http://duncankennedy.net/documents/interview-may-2008-Mauro%20Zamboni.pdf>

<sup>114</sup> Kennedy, David and William Fisher eds., THE CANON OF AMERICAN LEGAL THOUGHT (2006)

international economic law have begun to make deep inroads into domestic legal orders everywhere creating another set of common issues. The old field of law and development, which collapsed under strong criticism of its complicity with power and its reliance on simplistic neo-evolutionary theory, has revived in new forms generating several working North-South scholarly networks. Law students are beginning to look and study abroad. Some post-CLS scholars, including David and Duncan Kennedy who attended the Bremen meeting, have sought to create a global network of progressive scholars that is based at the Harvard Institute for Global Law and Policy (IGLP) and whose statement of purpose echoes central CLS themes. IGLP is described as:

*"...a collaborative faculty effort to nurture innovative approaches to global policy in the face of a legal and institutional architecture manifestly ill-equipped to address our most urgent global challenges. Global poverty, conflict, injustice and inequality are also legal and institutional regimes. The IGLP explores the ways in which they are reproduced and what might be done in response" (IGLP 2011)<sup>115</sup>*

Perhaps the time is ripe to build on these efforts to form even more inclusive global networks of progressive legal scholars. Of course, this globalization scenario may be just one of the dreams that left intellectuals are prey to—but maybe it is not.

---

<sup>115</sup> IGLP, the Harvard Institute for Global Law and Policy, (2011) website at <http://www.harvardiglp.org/>