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

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

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Goethe University in Frankfurt only shortly before the beginning of the Auschwitz trial in 1963[14] and who then was confronted with the lectures and seminars of a certain Rudolf Wiethölter.[15] 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.[16] 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*"[17] in the 20th century. His project, which he coined "Political Legal Theory"[18] inspired and encouraged a 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-

[14] 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 didnt know what Auschwitz was. The Frankfurt Auschwitz-Trial and the German Press 1963-1965,* 12 YALE J. L. & HUM'TIES 397-446 (2000).

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

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

[17] 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).

[18] 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 184 (1989); Guido Martin, Heidemarie Renk and Margaretha Sudhof, *Maßstäbe, Foren, Verfahren: Das Prozeduralisierungskonzept Rudolf Wiethölters*, KRITISCHE JUSTIZ 244 (1989).

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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.[19]

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.[20] Sinzheimer had written in Leiden after his emigration from Germany his *Jüdische Klassiker der deutschen Rechtswissenschaft* (Jewish Classics in German Legal Science)[21], 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).[22] 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.[23] Kessler built many new bridges after the war. His American 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

[19] 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

[20] See the analysis by Hubert Rottleuthner, *Three Legal Sociologies: Eugen Ehrlich, Hugo Sinzheimer, Max Weber*, EUROPEAN YEARBOOK IN THE SOCIOLOGY OF LAW 277 (A. Febbrajo 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/cardozo/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).

[21] Amsterdam: Hertzberger 1938; Frankfurt a.M: Klostermann 1953.

[22] Carl Schmitt, 'Die deutsche Rechtswissenschaft im Kampf gegen den jüdischen Geist', *Deutsche Juristen Zeitung* 1936, 1195 *et seq.*

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

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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,[24] 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*.[25]

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 beginning of sociological jurisprudence on both sides of the Atlantic, an exploration which revealed "a history of transatlantic misunderstandings and missed opportunities".[26]

[24] 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)

[25] The title of the conference – "*American and German Traditions of Sociological Jurisprudence and Critique of Law*" – mirrored this twofold background.

[26] 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

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.

I. 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[27] from all its philosophical preconceptions, and through his "natural history" method established "constructive jurisprudence" as a fully-fledged specialist science.[28] In the 1860s he began to take a more self-ironic stance,[29] in 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

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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.

[27] *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).

[28] Rudolf von Jhering, GEIST DES RÖMISCHEN RECHTS AUF DEN VERSCHIEDENEN STUFEN SEINER ENTWICKLUNG, 2. THEIL, 2. ABTHEILUNG, 1852-65.

[29] The first of the "*Vertrauliche Briefe über die heutige Jurisprudenz*„ (Confidential Letters on Contemporary Jurisprudcence) 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.

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."[30]

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.[31] 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."[32] 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.[33] The same author treats Jhering much more gingerly.[34] 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[35] – and simply accepts that the *Realpolitik,* totalitarian aspect and the "progressive, social, indeed socialist"[36] 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.[37]

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

[31] 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."

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

[33] 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..

[34] W. FIKENTSCHER, METHODEN DES RECHTS IN VERGLEICHENDER DARSTELLUNG, VOL. 2 (Tübingen 1975); Vol. 3 (Tübingen 1976), 240-243.

[35] 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."

[36] W. Fikentscher, METHODEN DES RECHTS IN VERGLEICHENDER DARSTELLUNG (vol. 3, 1976), at 156.

[37] 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 RECHTSSOZIOLOGIE 47 (1972)*;* Mathias W. Reimann, *Holmes' "Common Law" and German Science*, in Robert Gordon (ed.), THE LEGACY OF OLIVER WENDELL HOLMES, JR. *(*1992).

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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.[38] 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.[39] 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

As is well known, Max Weber, in his sociological analysis of law that set modern law in the context of overall occidental rationalization processes[40], 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

[38] 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. Winckelmann, 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 SUBSUMTIONSAUTOMAT. 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.

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

[40] 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).

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evaluation of conflicts of interest.[41] 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.[42]

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.[43] The *Freirechtsbewegung* (free law movement) that formed around this manifesto was characterized by Lombardi Vallauri[44] 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.[45]

2. Early Sociological Jurisprudence

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[46] 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.[47] Arthur Nußbaum[48], in his

[41] PHILIPP HECK,DAS PROBLEM DER RECHTSGEWINNUNG (The Problematic of Creating Law) (1912).

[42] See HANS-MARTIN. PAWLOWSKY, METHODENLEHRE FÜR JURISTEN, THEORIE DER NORM UND DES GESETZES (1981), 58.

[43] HERMANN KANTOROWICZ, DER KAMPF UM DIE RECHTSWISSENSCHAFT (1906).

[44] LUIGI LOMBARDI VALLAURI, GESCHICHTE DES FREIRECHTS (1971), at 41

[45] HERMANN KANTOROWICZ, DER KAMPF UM DIE RECHTSWISSENSCHAFT (1906). at 7, 13, 15.

[46] EUGEN EHRLICH, GRUNDLAGEN DER SOZIOLOGIE DES RECHTS (*Fundamental principles of the sociology of law*) (1913).

[47] See the attempts at an update by KlausA. 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)

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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[49] – 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.[50] Hugo Sinzheimer[51] 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.[52] 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.[53]

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.[54] 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

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

[49] On the differences between Ehrlich and Kantorowicz see KLAUS F. RÖHL, RECHTSSOZIOLOGIE (1987), 47-49.

[50] 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).

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

[52] See Hubert Rottleuthner, *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.

[53] 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; Peer Zumbansen, *Law's Knowledge and Law's Effectiveness: Reflections from Legal Sociology and Legal Theory*, 10 GERMAN L.J. 417 (2009), available at: http://www.germanlawjournal.com/pdfs/Vol10No04/PDF_Vol_10_No_04_417-438_SI_Articles_Zumbansen.pdf

[54] MAX. WEBER, WIRTSCHAFT UND GESELLSCHAFT (5th ed. by J. Winckelmann, 1972), at, 889-892.

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between formal law and capitalism.[55] 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.[56]

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.[57] After the war and the replacement of the Wilhelmine monarchy by the 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"[58] 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",[59] and Kantorowicz, its leading representative, had every reason to clarify his objectives.[60]

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,

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[55] See DavidM. Trubek, *Max Weber on Law and the Rise of Capitalism*, WISCONSIN L. REV. 720 (1972), 746-748; Hubert Treiber, *"Wahlverwandschaften" zwischen Webers Religions- und Rechtssociologie*, 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).

[56] 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".

[57] *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.

[58] MAX WEBER, WIRTSCHAFT UND GESELLSCHAFT (5th ed. by Johannes Winckelmann, 1972), 88-89.

[59] See ERNST FRAENKEL, ZUR SOZIOLOGIE DER KLASSENJUSTIZ 36 (1927).

[60] See, KARLHEINZ MUSCHELER, RELATIVISMUS UND FREIRECHT. EIN VERSUCH ÜBER HERMANN KANTOROWICZ, (1984), 125-141, 161-173.

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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.[61] All that remained was publication of a few articles in English;[62] 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.[63] 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"[64] 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[65] ought perhaps to have been able, at the time it was originally developed, to command wider attention; in 1928, however, legal realism had already worked out its own intellectual premises.[66]

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.[67] Even the appearance of Karl N. Llewellyn as visiting lecturer in Leipzig in the winter term of 1928/29[68] did not have any further effect. At any rate, the year his "*Präjudizienrecht und Rechtsprechung in Amerika*" (1933) (Law of Precedent and

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[61] 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.

[62] 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)

[63] FUNDAMENTAL PRINCIPLES OF THE SOCIOLOGY OF LAW (Walter L. Moll transl.,, introduced by Roscoe Pound, 1936),

[64] 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).

[65] Hermann. Kantorowicz, *Legal Science. Summary of its Methodology*. With Notes by ErnestW. Patterson, 28 COLUMBIA L. REV. 679 (1928)

[66] 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 JamesE. Herget and Stephen Wallace, *The German Free Law Movement at the Source of American Legal Realism*, 73 *Virg. L. Rev.* 399 (1987).

[67] BERND.H. OPPERMANN, DIE REZEPTION DES NORDAMERIKANISCHEN RECHTSREALISMUS DURCH DIE DEUTSCHE TOPIK-DISKUSSION (1985), 42-44.

[68] 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*, Prajudizienrecht und Rechtsprechung in Amerika (book review)*, 43 YALE L. J. 516 (1934).

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Case Law in America) was published marked the end of all possible debate.[69] Subsequently, the debate around legal realism[70] – like the working out of the program of sociological jurisprudence[71] – remained restricted to the German émigrés.[72]

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,[73] and was stimulated above all by Josef Esser's "*Grundsatz und Norm*" (Principle and Rule),[74] which brought legal realism once again to a kind of late flourishing in the 1960s,[75] it had long lost its nature as an academically critical and/or politically reforming movement.[76] Accordingly, the German response had to remain academic, in a twofold sense: it was able,

[69] 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.

[70] 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 INTERNATIONAL DE LA THEORIE DU DROIT 28 (1936).

[71] See, e.g., HUGO SINZHEIMER, DIE AUFGABE DER RECHTSSOZIOLOGIE (1935)

[72] 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 Nationalisozialismus-Forschung des Instituts für Sozialforschung – ihre wissenschaftsgeschichtliche Stellung und ihre gegenwärtige Bedeutung*, in: WIRTSCHAFT, RECHT UND STAAT IM NATIONALISOZIALISMUS. 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).

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

[74] JOSEF ESSER, GRUNDSATZ UND NORM (*Principle and Rule*, 1956), at 18-23.

[75] 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.

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

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 .[77]

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.[78] 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 of "political jurisprudence", sparked off a new debate on principles.[79] In the course of these debates the social critical traditions of German legal science were rediscovered;[80] relationships with the "prevailing" tendencies became tense and polemical,[81] 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"[82] potentially extended to a wide multiplicity of differing and conflicting approaches, from Marxism via analytical philosophy to empirical legal sociology.[83] 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.

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[77] BERND.H. OPPERMANN, 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.

[78] 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, RECHTSSOZIOLOGIE (1984), at 57-63.

[79] RUDOLF WIETHÖLTER, RECHTSWISSENSCHAFT (1968)

[80] Namely the works of Ernst Fraenkel, Otto Kahn-Freund, Otto Kirchheimer, Franz Neumann, Hugo Sinzheimer.

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

[82] HUBERT ROTTLEUTHNER, RECHTSWISSENSCHAFT ALS SOZIALWISSENSCHAFT (1973) and ID., RICHTERLICHES HANDELN. ZUR KRITIK DER JURISTISCHEN DOGMATIK (,1973).

[83] N. LUHMANN, RECHTSSOZIOLOGIE, VOL. 1 AND 2, (1972)

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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.[84] 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.[85]

I. 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.*[86] Much more modesty, however, is in place when it comes to our critical cause:

[84] See, eg, FRANCIS FUKUYAMA, THE END OF HISTORY AND THE LAST MAN (1992)

[85] "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.

[86] See the *laudationes* offered at the 10th 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

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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".[87] Rudolf Wiethölter's comments on Germany's critical moment sound very similar.[88] 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 describess CLS as an academic endeavour on par with legal realism on the one hand and economic analysis of law on the other.[89] 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.[90]

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[91] or offered as a Chinese menu.[92] All the defenses of German traditions, however, will not reconstitute the glory of Legal Science in the "German Century".

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

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

[89] ANTHONY T. KRONMAN, THE LOST LAWYER. FAILING IDEALS OF THE LEGAL PROFESSION (1993), 241-264.

[90] Two contributions to DENNIS. PATTERSON, COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY, (2nd 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.

[91] 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

[92] 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.

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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[93] 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. 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[94] and its "embedded liberalism"?[95] Why did we treat the legacy of political economy with such benign neglect?[96] 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,[97] of Gunther Teubner's turn to the Global Bukowina in 1996[98], of so much of his ensuing work since the 1990s[99] or of the theorizing of Europeanization by both of the

[93] Martti Koskenniemi and Paivi Leino, *Fragmentation of International Law? Postmodern Anxieties*, 15 LEIDEN J. INT'L. L. 553 (2002)

[94] See ACHIM HURRELMANN, STEPHAN LEIBFRIED, KERSTIN MARTENS AND PETER MAYER (EDS.), TRANSFORMING THE GOLDEN-AGE NATION STATE (2007).

[95] John Gerard Ruggie, *International Regimes, Transactions, and Change: Embedded Liberalism in the Postwar Economic Order*, 36 INT'L ORG. 379 (1982)

[96] See, eg, STEVEN WEBER ED., GLOBALIZATION AND THE EUROPEAN POLITICAL ECONOMY (2001).

[97] See Duncan Kennedy, *Three Globalizations of Law and Legal Thought: 1850-2000,* in DavidM. 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 (198)7 and of his network building through activities such as the Workshop on "Global Law and Economic Policy" in June 2010 at Harvard Law School.

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

[99] 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*).

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organizers of the 1986 Symposium.[100] 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,[101] devoted so much of his energy to the 'postnational constellation'[102] and to the project of European integration,[103] intellectual projects, which the Frankfurt legal scholar and philosopher Klaus Günther has been pursuing with great promise.[104]

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.[105] It is, however, in particular for Germans who tried to address their *Vergangenheitsschuld* [guilt about the past][106] fascinating to observe in what form their concerns transformed into a theoretically multi-faceted topic with pan-European dimensions,[107] and how they were complemented by world-wide debates on transitional justice.[108] Law and development debates, post-

[100] 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

[101] BETWEEN FACTS AND NORMS (William Rehg transl., 1996, German orig.: 1992).

[102] THE POSTNATIONAL CONSTELLATION. POLITICAL ESSAYS (2001; German orig. 1996).

[103] 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).

[104] 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).

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

[106] The term has been coined by BERNHARD SCHLINK, VERGANGENHEITSSCHULD UND GEGENWÄRTIGES RECHT (2002).

[107] 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

[108] 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,

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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 de-nationalization 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 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.

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and most recently, *Daviborshch's Cart: Narrating the Holocaust in Australian War Crimes Trials*, forthcoming in 2011 with Nebraska Press.