DEVELOPMENTS

Review Essay - Some Realism about Rationalism: Economic Analysis of Law in Germany

By Viktor Winkler *

Michael Adams, Ökonomische Theorie des Rechts. Konzepte und Anwendungen* [Economic Theory of Law. Concepts and Applications], *Peter Lang Publishers 2002, 509 p., 35 €.

A. Economic Analysis of Law (EAL) in Germany – An Overview

In 1961 two articles changed the world of legal thinking. When Ronald Coase of the University of Chicago and Yale's Guido Calabresi, one being a lawyer and the other an economist, separately (and independently from each other) published their pioneering studies[1] on problems of tort law, they initiated what was to become one of the most successful legal movements in the history of the United States. Today the Economic Analysis of Law (EAL or, *law and economics*) looms everywhere in American legal discourses. There are numerous reviews devoted to the subject and EAL plays an essential role in legal education at virtually every law school in the country (even though, if I am not mistaken, Chicago and Yale have been successful in remaining the "capitols" of the movement). EAL appeared on the German scene during the 1970s initially as a part of smaller studies. However, perhaps as a sign of things to come, one of those studies was published in the prestigious and time-honoured *Archiv für die civilistische Praxis*.[2] In 1978 the publication of a textbook containing the essential works of Calabresi, Coase, Posner and others (translated into German and appended with in-depth introductions and important notes that

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[1] Ronald Coase, *The Problem of Social Cost*, 3 JOURNAL OF LAW & ECONOMICS 1 (1960); Guido Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 YALE LAW JOURNAL 499 (1961). The articles did appear simultaneously because the third volume of the JOURNAL OF LAW & ECONOMICS, even though dated 1960, had really appeared in 1961.

[2] Norbert Horn, *Zur ökonomischen Rationalität des Privatrechts – Die privatrechtliche Verwertbarkeit der Economic Analysis of Law*, 176 ARCHIV FÜR DIE CIVILISTISCHE PRAXIS 307 (1976).

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have maintained their timeliness) provided German readers with the manifestos of the movement and introduced a larger number of legal scholars to a more sophisticated debate with EAL.[3] Following the groundbreaking and thoughtful work of Peter Behrens in 1986[4], Horst Eidenmüller's 1995 doctoral thesis became the standard inquiry on the subject[5], and it remains the most exhaustive work on the matter to date, dealing not merely with the basic assumptions but with the philosophical context of EAL, be it legal realism, American pragmatism or English utilitarianism.

As for tort law, German scholarship has produced a vast amount of literature regarding liability and damage matters explicitly using the economic instruments provided by American Economic Analysis. From the work of luminous German scholar Hans-Leo Weyers in 1971[6], to current sophisticated studies[7] (one of the most influential being written by Michael Adams)[8] no scholar working on the field today can ignore EAL. When German scholar Nils Jansen recently undertook an exhaustive inquiry into the basic principles and theoretical foundations of tort law in his *Habilitation* thesis, he naturally included a discussion on economic analysis.[9] EAL has also been discussed within educational literature, having had not only a handful of descriptions published in the leading German law student periodical,[10] but

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[3] ÖKONOMISCHE ANALYSE DES RECHTS (HEINZ-DIETER ASSMANN/CHRISTIAN KIRCHNER/ERICH SCHANZE EDS. 1978).

[4] Peter Behrens, DIE ÖKONOMISCHEN GRUNDLAGEN DES RECHTS (1986).

[5] Horst Eidenmüller, EFFIZIENZ ALS RECHTSPRINZIP (2ND ED. 1998).

[6] Hans-Leo Weyers, UNFALLSCHÄDEN 492 (1971).

[7] See (in chronological order) Theodor Schilcher, THEORIE DER SOZIALEN SCHADENSVERTEILUNG 73 (1977); Gert Brüggemeier, DELIKTSRECHT (1986); Ulrich Magnus, SCHADEN UND ERSATZ (1987); Hein Kötz, *Zivilrechtliche Haftung aus ökonomischer Sicht*, in DIE ÖKONOMISIERUNG DER SOZIALWISSENSCHAFTEN 149 (H.-B. SCHÄFER ED; 1989); Gebhard Kirchgässner, *Das Verursacherprinzip – Leerformel oder regulative Idee?* JURISTEN ZEITUNG 104 (1991); Andreas Blaschczok, GEFÄHRDUNGSHAFTUNG UND RISIKOZURECHNUNG (1993); a thoughtful summary was then made by Jochen Taupitz, *Ökonomische Analyse und Haftungsrecht – eine Zwischenbilanz*, 196 ARCHIV FÜR DIE CIVILISTISCHE PRAXIS 114 (1996).

[8] Michael Adams, ÖKONOMISCHE ANALYSE DER GEFÄHRDUNGS- UND VERSCHULDENSHAFTUNG (1985).

[9] Nils Jansen, DIE STRUKTUR DES HAFTUNGSRECHTS. GESCHICHTE, THEORIE UND DOGMATIK AUßERVERTRAGLICHER ANSPRÜCHE AUF SCHADENSERSATZ 151 (2003).

[10] See Patrick Burow, JURISTISCHE SCHULUNG 8 (1993); Bernd Holzwarth, JURISTISCHE SCHULUNG 437 (1985); and recently Hein Kötz, JURISTISCHE SCHULUNG 209 (2003); EAL is also covered in textbooks by Hein Kötz & Gerhard Wagner, DELIKTSRECHT, 9TH ED. 199 (2001); Manfred Wolf, SACHENRECHT AT RN. 32 (2004); Norbert Horn, EINFÜHRUNG IN DIE RECHTSWISSENSCHAFT UND RECHTSPHILOSOPHIE, 2ND ED. 131 (2001); Michael Kittner, SCHULDRECHT. RECHTLICHE GRUNDLAGEN – WIRTSCHAFTLICHE ZUSAMMENHÄNGE, 3RD ED. (2003); see also Wolfgang Weigel, RECHTSÖKONOMIK EINE METHODOLOGISCHE EINFÜHRUNG FÜR EINSTEIGER UND NEUGIERIGE (2003).

also a widely-used "Textbook of the Economic Analysis of Private Law" that – written for the student reader – was published in 1986.[11] And if we consider that the "*ratio scripta*" of German Private Law practice, the "PALANDT"- commentary to the German Civil Code (BGB), even though not particularly known for its passionate interest in the methodological and theoretical aspects of adjudication, explicitly lists EAL as one of the few post-1945 novelties in German (!) methodology[12] we might ask whether this is an sufficient indication of EAL being just as successful in Germany as it is in the United States. However, discussion of EAL in scholarly and educational literature has not lead to the acceptance of the approach in legal practice. As a matter of fact, not a single German court opinion *expressis verbis* contains Economic Analysis arguments. It is fair to say that EAL's success in German scholarship is one of begrudging engagement rather than approval. The publication of a German language "textbook" on EAL should not convey the impression that the average German law student will encounter EAL during her law school program. EAL in German law schools remains a subject for more or less secluded seminars that have to compete with other areas of study in the law school curriculum such as legal history, legal methodology, and sociology of law, among others. Still the prevalent conviction within legal education seems to be that law students should first learn *how* to do something before they be told *why* they are doing something. Duncan Kennedy once aptly described this as law schools' "endless attention to trees at the expense of forests"[13].

B. Michael Adams'Book

Of course that is not the whole picture with regard to EAL in Germany. A number of legal scholars, for example at the University of Hamburg, have made great efforts to advance the EAL research and teaching agenda. In a remarkable and unique environment of interdisciplinary teamwork between the law school and the economics department, both lawyers and economists of the faculty have created not only an LL.M program in law and economics but have also produced a steady output of literature concerning a variety of legal problems. One of these Hamburg scholars that are brave travellers between the economic and the legal world is Michael Adams. Having studied both law and economics, Adams completed an economic doctoral thesis and became an assistant professor at the law department of

[11] Hans Bernd Schäfer & Claus Ott, LEHRBUCH DER ÖKONOMISCHEN ANALYSE DES ZIVILRECHTS, 3RD ED. (2000).

[12] *Helmut Heinrichs,* in: PALANDT, BGB, [Commentary of the German Civil Code] (63rd ed 2004) at Einl Rn 32.

[13] Duncan Kennedy, *Legal Education and the Reproduction of Hierarchy*, 32 JOURNAL OF LEGAL EDUCATION (J. LEGAL EDUC.) 591 (1982).

The University of Bonn before becoming a professor for *Wirtschaftsrecht* at the economics department of the University of Hamburg in 1986. Apart from an intermediary tenure in Cologne he has taught private law in Hamburg ever since.

Adams' book is a collection of selected articles beginning with his work from the early 1980s. It contains economic analyses of a variety of legal topics. Starting with a rather abstract introduction, taken from an early defence of EAL in Germany,[14] the book covers neuralgic points of scholarly debate such as product liability, corporate governance, torts, anti-discrimination law, but also the legitimacy of the gambling industry, aspects of criminal law and how the government is supposed to deal with drug addiction. Adams' choice of applying economic analysis to concrete and especially controversial legal problems, instead of writing an abstract inquiry into the theoretical assumptions of EAL, has recently been reaffirmed by his passionate contribution to the Mannesmann/Ackermann case. Adams' commitment to putting theory to practice resulted in a severe criticism of Klaus Esser and Josef Ackermann from an economic standpoint, among others.[15]

The collection also indicates what indeed proves to be the very core of Adams' scholarly enterprise. Adams leaves no doubt that he shares the views of his fellow American EAL scholars who present Economic Analysis as a profound *legal theory* that questions most of the assumptions of established legal scholarship. Several articles in the collection contain sharp attacks on German legal scholarship as a whole. Adams' critique does not whittle away at minute details but attacks the foundational assumptions of German legal scholarship. According to Adams a comparison between the analytical precision of EAL and the established arguments in German legal discourses exposes the latter as nothing but a "suitcase full of bottled ethics from which one freely chooses his own type of justice".[16] Adams' argumentative aim, reflected in all of the articles in the volume, is to establish and to

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[14] Michael Adams, *Ist die Ökonomie eine imperialistische Wissenschaft?*, JURA 337 (1984), reprinted in Michael Adams, ÖKONOMISCHE THEORIE DES RECHTS. KONZEPTE UND ANWENDUNGEN 11 (2002) [Adams, ÖKONOMISCHE THEORIE DES RECHTS].

[15] Michael Adams, *Vorstandsvergütungen - Die Fälle Mannesmann und DaimlerChrysler*, in FESTSCHRIFT FÜR CARL-CHRISTIAN VON WEIZSÄCKER (2002); for an in-depth analysis of the Mannesmann case before the *Landgericht* Düsseldorf, see Peter Kolla, *The Mannesmann Trial and the Role of the Courts*, in: 5 GERMAN LAW JOURNAL 829-847 (2004); for an assessment of Josef Ackermann's early restructuring of Deutsche Bank's management board, see Peer Zumbansen, *Germany Inc. Eroding? Board Structure, CEO and Rhenish Capitalism*, in: 3 GERMAN LAW JOURNAL No. 6 (1 June 2002), available at: http://www.germanlawjournal.com/article.php?id=156.

[16] George J. Stigler, *The Law and Economics of Public Policy: A Plea to the Scholars*, 1 JOURNAL OF LEGAL STUDIES (J. LEGAL STUD.) 1 (1974) cited in Adams, ÖKONOMISCHE THEORIE DES RECHTS, *supra* note 14 at 11.

support his thesis that German scholarship not only lacks a necessary critical reflection of its foundational assumptions but also that the very goals German legal scholars seek to achieve lie beyond the grasp of members of that academic community because of the methods they employ.

The continuing debate over anti-discrimination policy might just be another illustration.[17] When the legislature attempts to protect women from labour discrimination, as it did in Germany with § 612 III BGB, it fails to do so because such institutions neglect the insights economic analysis can provide into the market implications of discrimination.[18] Adams makes a case for preventing public interference with distributive intentions, a strategy familiar to EAL scholars. Adams presents the German *Gesetz über Allgemeine Geschäftsbedingungen* (AGBG) [STANDARD CONTRACT FORMS LAW] –which was codified in 1977 and has recently been integrated into the German Bürgerliches Gesetzbuch (Civil Code)[19] – as being efficient, but he unveils the theory that forms the basis for the law as a not only naive but false assumption: the legislature's basic notion was to provide *Vertragsgerechtigkeit* (justice of contracts) for the allegedly "weaker" partner. Adams argues that such "justice arguments" lack any economic proof and are thereby not much more than "methodological *Biedermeier*"[20]. According to Adams, the underlying problem of standard contract forms is not one of an economic disequilibrium but one of information imbalance. Likewise, Adams argues an incorrect analysis of underlying problems is also present in the discussion on torts. According to his analysis German scholar-

[17] See hereto the contributions by Susanne Baer, Rainer Nickel and Matthias Mahlmann, in: 1 ANNUAL OF GERMAN & EUROPEAN LAW (RUSSELL MILLER/PEER ZUMBANSEN EDS. 2004), 323, 334, and 353; see already the wide coverage of the debate in German Law Journal: Florian Stork, *Comments on the Draft of the New German Private Law Anti-Discrimination Act : Implementing Directives 2000/43/EC and 2004/113/EC in German Private Law*, in: 6 GERMAN LAW JOURNAL 533-548 (2005); Andreas Engert, *Allied by Surprise? The Economic Case for an Anti-Discrimination Statute*, in: 4 GERMAN LAW JOURNAL 685-699 (2003); Eduard Picker, *DEBATE: Anti-Discrimination as a Program of Private Law?*, in: 4 GERMAN LAW JOURNAL 771-784 (2003); Viktor Winkler, *The Planned German Anti-Discrimination Act: Legal Vandalism? A Response to Karl-Heinz Ladeur*, in: 3 GERMAN LAW JOURNAL No. 6 (1 June 2002), available at: http://www.germanlawjournal.com/article.php?id=158; Karl-Heinz Ladeur, *The German Proposal of an "Anti-Discrimination"-Law: Anticonstitutional and Anti-Common Sense. A Response to Nicola Vennemann*, in: 3 GERMAN LAW JOURNAL No. 5 (1 May 2002), available at: http://www.germanlawjournal.com/article.php?id=152; Nicola Vennemann, *The German Draft Legislation On the Prevention of Discrimination in the Private Sector*, in: 3 GERMAN LAW JOURNAL No. 1 (1 March 2002), available at: http://www.germanlawjournal.com/article.php?id=137.

[18] Adams, ÖKONOMISCHE THEORIE DES RECHTS, *supra* note 14 at 105; mainly following the seminal enquiry by Gary S. Becker, THE ECONOMICS OF DISCRIMINATION (1957).

[19] Peer Zumbansen, *Law of Contracts*, in: INTRODUCTION TO GERMAN LAW (MATHIAS REIMANN/JOACHIM ZEKOLL EDS., 2ND ED. 2005), 179, 190.

[20] *Ibid*. at 121.

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ship has failed to acknowledge that in cases of damages the major goal of tort law cannot be to compensate for the loss but, first and foremost, to deal with the societal consequences of damages that widely exceed *Schädiger und Geschädigten*.[21]

C. Pragmatism, Rationalism, Formalism

In an introduction to *Economic Analysis of Law* Richard Posner, perhaps the most prominent scholar of law and economics, wrote: "When I was a law student, the law seemed an assemblage of completely unrelated rules, procedures, and institutions. Economics reveals a 'deep structure' of law that exhibits considerable coherence."[22] Arguably, this statement accurately captures the core of EAL. Instead of being, as its label indicates, a mere analysis of one of law's many effects, EAL sees itself as a legal theory *proper*. EAL is truly an "American" invention in the broader sense of the word. EAL is essentially based on pragmatist foundations. The very core of pragmatism is an (often harsh) aversion of meta-arguments and complex theory debate. To put it more bluntly, pragmatism is deeply sceptical of overly philosophical answers to social, political, economic or legal problems. Tied to this skepticism is the affirmation of rationality. It is possible to trace pragmatist and rationalist roots within the history of legal thinking from Bentham to Holmes up to EAL, and EAL scholars have stressed these connections.[23] Even Posner has avowed to a "pragmatic" legal theory as the essence of EAL.[24]

My thesis is that this "American" preference for rationality has failed to take in German legal theory, and that the lack of this preference is the main reason for the absence of EAL in the world of German jurisprudence. Mostly, the aversion of a rational, non-transcendental jurisprudence is placed merely within the so-called German Renaissance of Natural Law from 1946 to the 1960s ("*Natur-rechts-Renaissance*"). Indeed, after the end of the Nazi Regime and in light of the atrocities committed before and after the Second World War, German legal scholars proclaimed the necessary rebirth of the "eternal" principles and values of natural law.

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[21] For the roots of this approach see Viktor Winkler, *Ökonomische Analyse des Rechts im 19.Jahrhundert: Victor Matajas „Recht des Schadensersatzes" revisited,* 26 ZEITSCHRIFT FÜR NEUERE RECHTSGESCHICHTE 262 (2004).

[22] Richard Posner, *Values and Consequences: An Introduction to Economic Analysis of Law*, CHICAGO WORKING PAPERS IN LAW AND ECONOMICS NO.53 at 9 (1998).

[23] See Richard Posner, *Bentham's Influence on the Law and Economics Movement*, 51 CURRENT LEGAL PROBLEMS 425 (1998); *id.*, *Utilitarianism, Economics, and Legal Theory*, 8 J. LEGAL. STUD. 103 (1979).

[24] Richard Posner, *Pragmatic Adjudication*, 18 CARDOZO LAW REVIEW 1 (1996).

These principles and values were to serve as a remedy to the allegedly overly positivist adjudication of the Third Reich. Scholars held that the manner in which the positivist tradition had been manipulated during the Nazi Regime had enabled the Regime to achieve its criminal goals.[25] To confront this history of legal corruption jurists and scholars argued that despite the reliance on legal positivism in the past decades there remained undeniable natural law tenets within the history of mankind. That is the reason why almost all the contributions of the Natural Law Renaissance were essentially made from the standpoint of legal history.[26]

But the dominant historical interpretation of the Natural Law "Renaissance" in post- Second World War Germany is simply incorrect. It is not positivism but anti-positivism that is and has been the dominating force in German legal scholarship—anti-positivist views did not need to be "reborn" after 1945.[27] Already the allegedly "positivist", Nineteenth Century German jurisprudence did, in fact, see an ongoing perpetuation of natural law arguments despite Savigny's successful struggle against the Seventeenth Century's "law of reason."[28] The main effort towards establishing a metaphysical approach, however, descends from the battle fought by the generation born during the first decade of the twentieth century against the political and philosophical tenets of the previous century.[29] This later generation developed their intellectual and academic identity at the end of the Weimar Republic and during the Third Reich and largely dominated German jurisprudence after 1945

[25] Important contributions include Gustav Radbruch, *Gesetzliches Unrecht und übergesetzliches Recht*, SÜDDEUTSCHE JURISTENZEITUNG 105 (1946); Wilhelm R. Beyer, RECHTSPHILOSOPHISCHE BESINNUNG (1947); Helmut Coing, DIE OBERSTEN GRUNDSÄTZE DES RECHTS (1947); Hans Welzel, NATURRECHT UND MATERIALE GERECHTIGKEIT (1951); Hans Rommen, DIE EWIGE WIEDERKEHR DES NATURRECHTS, 2ND ED. (1947); for a collection of contributions to the "Naturrechts-Renaissance" see also NATURRECHT UND RECHTSPOSITIVISMUS (WERNER MAIHOFER ED., 1966).

[26] See Hans Thieme, DAS NATURRECHT UND DIE EUROPÄISCHE PRIVATRECHTSGESCHICHTE (1947); Ludwig Mitteis, VOM LEBENSWERT DER RECHTSGESCHICHTE (1947); Paul Koschaker, EUROPA UND DAS RÖMISCHE RECHT (1947). A brillant inquiry into this connection is Heinz Mohnhaupt, *Zur „Neugründung" des Naturrechts nach 1945: Helmut Coings „Die obersten Grundsätze des Rechts" (1947)*, in RECHTSGESCHICHTSWISSENSCHAFT IN DEUTSCHLAND 1945 BIS 1952, 97 (HORST SCHRÖDER ED., 2001).

[27] An exhaustive critique on the dominance of the Natural Law Renaissance in German legal history is lacking. For many important rectifications, see Kristian Kühl, *Kontinuitäten und Diskontinuitäten im Naturrechtsdenken des 20. Jahrhunderts*, in ERKENNTNISGEWINNE - ERKENNTISVERLUSTE 605 (KARL ACHAM, KNUT WOLFGANG NÖRR, BERTRAM SCHEFOLD EDS., 1998), and Joachim Rückert, *Zu Kontinuitäten und Diskontinuitäten in der juristischen Methodendiskussion nach 1945*, in ERKENNTNISGEWINNE - ERKENNTISVERLUSTE 113 (KARL ACHAM, KNUT WOLFGANG NÖRR, BERTRAM SCHEFOLD EDS., 1998).

[28] see NATURRECHT IM 19.JAHRHUNDERT (DEITHELM KLIPPEL ED., 1997).

[29] The most prominent scholars were Franz Wieacker (1908—1994), Karl Larenz (1903—1993), Hans Welzel (1904—1977), and Ernst Rudolf Huber (1903—1990).

until their deaths during the 1990s. The Weimar Republic had seen a vehement rejection of positivism, in public law scholarship and generally in the "*geisteswissenschaftliche*" movement, the latter being an eminently metaphysical argument, built on the assumption that the legal order was in need of a set of meta-legal values and guiding models.[30] When the Nazi dictatorship came to power in 1933, this metaphysical approach achieved its ascendance.[31] By way of the infamous *Radbruch* myth[32], according to which German jurists had been defenceless against Hitler because of their lack of metaphysical values, the metaphysical approach magically continued its reign and the positivist school was denounced.[33] Hans Kelsen, who had made a case for the separation of rational and transcendental arguments, was *persona non grata* at all academic events, and from 1945 until the 1970s, German legal scholarship was dominated by the schools of anti-positivist scholars such as Rudolf Smend and Carl Schmitt.[34] The most momentous decision of the German FCC to date, the *Lüth* case,[35] was in keeping with the anti-positivists when it established the basic rights catalogue of the *Grundgesetz* as an "objective order of values" (*objektive Wertordnung*).[36] Elsewhere, I have tried to show that the metaphysical approach is still virulent in many of today's discourses between law professors,

[30] See Alexander Somek, *Politischer Monismus versus formalistische Aufklärung: Zur Kontroverse zwischen Carl Schmitt und Hans Kelsen*, in UNTERSUCHUNGEN ZUR REINEN RECHTSLEHRE 109 (STANLEY L. PAULSON/ROBERT WALTER EDS., 1986), and the profound, provoking analysis Izhak Englard, *Nazi-Criticism Against the Normativist Theory of Hans Kelsen – Its Intellectual Basis and Post-Modern Tendencies*, in HANS KELSEN AND CARL SCHMITT – A JUXTAPOSITION 133 (DAN DINER/MICHAEL STOLLEIS EDS., 1999).

[31] Oliver Lepsius, DIE GEGENSATZAUFHEBENDE BEGRIFFBILDUNG (1994). In my view one of the best inquiries is still RECHT, RECHTSPHILOSOPHIE UND NATIONALSOZIALISMUS (HUBERT ROTTLEUTHNER ED., 1983).

[32] Gustav Radbruch, Gesetzliches Unrecht und übergesetzliches Recht, Süddeutsche Juristenzeitung 105 (1946) [The Süddeutsche Juristenzeitung is a law journal that, to my knowledge, lacks a volume number]; Lon Fuller, *The Legal Philosophy of Gustav Radbruch*, 6 J. LEGAL EDUC. 481 (1953/1954); H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARVARD LAW REVIEW (HARV. L. REV.) 593 (1958).

[33] See for a more recent application of the Radbruch thesis in the Berlin wall trials, Russell A. Miller, *Rejecting Radbruch: The European Court of Human Rights and the Crimes of the East German Leadership*, in: 14 LEIDEN JOURNAL OF INTERNATIONAL LAW 653-663 (2001).

[34] Frieder Günther, DENKEN VOM STAAT HER (2004); Dirk van Laak, GESPRÄCHE IN DER SICHERHEIT DES SCHWEIGENS: CARL SCHMITT IN DER POLITISCHEN GEISTESGESCHICHTE DER FRÜHEN BUNDESREPUBLIK (1993); *Richard Saage, Neokonservatives Denken in der Bundesrepublik*, in id., RÜCKKEHR ZUM STARKEN STAAT? 229 (1983).

[35] BVERFGE [short title for the collected opinions of the German Federal Constitutional Court] vol. 7, 198.

[36] See DAS LÜTH-URTEIL IN (RECHTS-)HISTORISCHER SICHT (THOMAS HENNE/ARNE RIEDLINGER EDS., 2005).

especially in those of high political importance.[37] It is probably fair to attribute this metaphysical notion to a tradition of cultural pessimism that has been ingrained in Germany since the writings of Nietzsche,[38] which proclaimed the return of "values" and "morals" into political and legal discourse—a pessimism that significantly forged Germany's perception of North America.[39]

It is important to be aware of this long history of metaphysical approaches in German scholarship in order to comprehend the difficulties that a mere rational, not to mention economic-rational, approach faces in German academia. At the same time within the United States, where EAL has gained such enormous success, there exists a strong anti-positivist tradition as well. Not only has American jurisprudence never ceased to discuss natural law models,[40] the rejection of a strict paper rule positivism has been perhaps *the* driving force since Holmes´ famous attacks on Langdell for overcoming what Duncan Kennedy called "classical legal thought"[41]. This anti-positivist position seems to be even more apparent by considering the specific influence that German scholars had on American legal thought. The same German thinkers that most severely attacked legal positivism in Germany were those who had a remarkable influence in the United States, especially Ernst Kantorowicz's contributions to legal realism and Rudolf von Jhering's influence on Oliver Wendell Holmes and Roscoe Pound.[42] Even the strong connection between

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[37] Viktor Winkler, *Dubious Heritage. The German Debate on the Anti-Discrimination Law*, 15 IOWA JOURNAL OF TRANSNATIONAL LAW AND CONTEMPORARY PROBLEMS (forthcoming, 2005); for this particular discussion see *id.*, *The Planned German Anti-Discrimination Act: Legal Vandalism? A Response to Karl-Heinz Ladeur*, 3 GERMAN LAW JOURNAL NO. 6 (2002).

[38] See the "classic" Fritz Stern, THE POLITICS OF CULTURAL DISPAIR (1961); Ulrich Kronauer, GEGENWELTEN DER AUFKLÄRUNG (2003).

[39] See Georg Kamphausen, DIE ERFINDUNG AMERIKAS IN DER KULTURKRITIK DER GENERATION VON 1890 (2002).

[40] Robert George, IN DEFENSE OF NATURAL LAW (1999); Michael Zuckert, *Do Natural Rights Derive From Natural Law?*, 20 HARVARD JOURNAL OF LAW AND PUBLIC POLICY 695 (1997); Philipp Soper, *Making Sense of Modern Jurisprudence: The Paradox of Positivism and the Challenge for Natural Law*, 22 CREIGHTON LAW REVIEW. 67 (1988); see also Roscoe Pound, THE IDEAL ELEMENT IN LAW (1948); *ibid.*, *Idea of an Universal Law*, 1 UCLA LAW REVIEW 7 (1953).

[41] See Duncan Kennedy, *Two Globalizations of Law and Legal Thought: 1850-1968*, 36 SUFFOLK UNIVERSITY LAW REVIEW 631 (2003).

[42] James E. Herget & Stephen Wallace, *The German Free Law Movement as the Source of American Legal Realism*, 73 VIRGINIA LAW REVIEW (VA. L. REV.) 399, 413-414 (1987); Roscoe Pound, THE SPIRIT OF THE COMMON LAW (1921); Oliver Wendell Holmes, THE COMMON LAW 165 (1888; repr. 1968) [Holmes, COMMON LAW]. Holmes called Jhering a "man of genius", see Matthias Reimann, *Holmes' Common Law and German Legal Science*, in THE LEGACY OF OLIVER WENDELL HOLMES JR. 72 (ROBERT GORDON ED., 1992); for an overview of the contributions of Karl Llewellyn to American jurisprudence and his German influences [this article does contain a true "overview of the contributions of

critical legal studies and the Frankfurt school of philosophy[43] can be viewed as a congruity in the anti-positivism of both theoretical communities.[44] However, I believe that the key to an understanding of this particular anti-positivist trait in American legal thinking can be found by tracing it back to a deep scepticism of formalism. It was not so much a critique anti-positivism, but a critique of legal formalism, that German thinkers such as Kantorowicz or von Jhering contributed to the historical development of American legal thought.[45] From Oliver Wendell Holmes to Duncan Kennedy, formalism has not been criticized in favour of a "value-based", transcendental jurisprudence, but in favour of a non-metaphysical jurisprudence that realizes that the main role in law is not played by the positive legal text (the "law in books") but, in Holmes' famous words, by what the "courts will do in fact"[46]. The frequent critique of Holmes as being a nihilist seems more than coincidental.[47] Looking at "what the courts will do in fact", especially when merged with a moral relativism, is, in its essence, a "positivist" approach.[48] In this

Llewellyn to American jurisprudence" but is "only" a biographical sketch regarding Llewellyn's ties to Germany] see Michael Ansaldi, *The German Llewellyn*, 58 BROOKLYN LAW REVIEW (BROOK. L. REV.) 705, 708-710 (1992).

[43] Raymond Guess, THE IDEA OF A CRITICAL THEORY: HABERMAS AND THE FRANKFURT SCHOOL (1981).

[44] See the brilliant analysis by Jeffrey A. Standen, *Critical Legal Studies as an Anti-Positivist Phenomenon*, 72 VA. L. REV. 983 (1986); for important divergences from Standen, see Alexander Somek, *Unbestimmtheit: Habermas und die Critical Studies*, 41 DEUTSCHE ZEITSCHRIFT FÜR PHILOSOPHIE 343 (1993).

[45] Compare the overview by Duncan Kennedy, *Legal Formalism*, THE INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL AND BEHAVIORAL SCIENCES 8634 (2001); For Jhering's formalist notions, however, see Alexander Somek, *Legal Formality and Freedom of Choice, A Moral Perspective on Jhering's Constructivism*, 15 RATIO JURIS 52 (2002).

[46] Oliver Wendell Holmes Jr., *The Path of the Law*, 10 HARV. L. REV., 457, 461 (1897); Duncan Kennedy, *Legal Formality*, J. LEGAL STUD. 351 (1972); Remember the famous opening lines of Holmes, COMMON LAW, *supra* note 39 at 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 had a good deal more to do than the syllogism in determining the rules by which men should be governed".

[47] For Holmes' skepticism see Oliver Wendell Holmes Jr., *Ideals and Doubts*, 10 UNIVERSITY OF ILLINOIS LAW REVIEW 1 (1915); see also Grant Gilmore, THE AGES OF AMERICAN LAW 48-49 (1977): "The Real Holmes was savage, harsh and brutal, a bitter and lifelong pessimist who saw in the course of human life nothing but a continuing struggle in which the rich and powerful impose their will on the poor and weak [...] In this black and terrifying universe, the function of law, as Holmes saw it, is simply to channel private aggressions in an orderly, perhaps in a dignified fashion." This aspect of Holmes' thought motivated some daring but convincing comparisons, see David Dyzenhaus, *Holmes and Carl Schmitt – an Unlikely Pair?* 63 BROOK. L. REV. 165, 195 (1997).

[48] Holmes' "positivist" convictions are documented in his dissent to *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 221-22 (1917). The famous case for the alleged "dualism" in Holmes' positivism was made by H.L.A. Hart, *Holmes' Positivism – An Addendum*, 64 HARV. L. REV. 929 (1951).

light, it is remarkable that critics in Germany repeatedly attack EAL as too "positivist".[49] Maybe, then, it should surprise us less a collection of papers by the American "positivist", Holmes, was edited by none other than Richard Posner.[50]

EAL shares the main tenets of an American realist tradition that promotes clearer guidelines for dealing with legal problems and therefore, by promoting analytical clarity and acknowledging moral relativity, promotes rationality. In every article in this collection Adams aims for greater clarity in deciding cases. His main target is the unclear, irrational, often emotive arguments employed in legal decision-making which obscure the issues that lie at the centre of legal conflicts. The anti-formalist tradition in America aims for a somewhat higher formality when the form legal arguments are put into provide for higher transparency. Maybe, as a possible example, the formalist tendencies of such a renowned anti-formalist as Roscoe Pound could become more plausible in this light.[51] Thus, even those American scholars that heavily criticize the theoretical premises and judicial findings of EAL, stress that the basic *approach* contained in EAL leads to a more rational adjudication: "The discussion about whether not to [promote social change using legal rules] gains enormously, first, from the clarification of the issues that the economic analysis provides and, second, from the opening up of the non-efficiency dimensions once [it] is rejected as the criterion for action".[52]

D. Hope for the Classroom

In this light, it is obvious why EAL has failed to gain ground in German jurisprudence. And it is fair to say, that probably Adams' book, even though peppered with concrete proposals and critique, will – again? - not invite and provoke appropriate analysis. Even though most EAL findings may be more than questionable,[53] its methodology is able to draw the curtain on a more rational jurisprudence and contribute to the dismantling of what Felix S. Cohen once mocked as "transcendental

[49] Karl-Heinz Fezer, *Aspekte einer Rechtskritik an der economic analysis of law und am property rights approach*, JURISTEN ZEITUNG 817 (1986).

[50] THE ESSENTIAL HOLMES: SELECTIONS FROM THE LETTERS, SPEECHES, JUDICIAL OPINIONS, AND OTHER WRITINGS OF OLIVER WENDELL HOLMES JR. (RICHARD POSNER ED.; 1992).

[51] I have tried to make a case for Pound's "formalism" in Viktor Winkler, *The Great Protector: Roscoe Pound (1870-1964) zum 40.Todestag*, 24 NEWSLETTER OF THE GERMAN-AMERICAN LAWYERS-ASSOCIATION 104 (2004); *Id.*, IN MEMORIAM ROSCOE POUND, ZEITSCHRIFT FÜR EUROPÄISCHES PRIVATRECHT 105 (2005).

[52] Duncan Kennedy, *Law and Economics from the Perspective of Critical Legal Studies*, 2 THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 465 (PETER NEWMAN ED.; 1998).

[53] *Ibid.*

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nonsense".[54] This dismantling would have to begin in the law school classroom and it would require curriculum reform in order for instructors to teach German law students not only a German tradition of metaphysical approaches to law but to teach them about the rational, realist, economist, critical traditions as well.[55] While this expansion of the curriculum may lead to greater complexity and analytical difficulty for both students and instructors, the upshot would probably be an improved ability on the part of everyone involved in German legal scholarship and education to *discuss* pressing legal problems better than we can today.

[54] Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUMBIA LAW REVIEW 809 (1935).

[55] For the underlying problems between enlightenment, indoctrination and academic freedom see Duncan Kennedy, *Politicizing the Classroom*, 4 U.S.C. REVIEW OF LAW AND WOMEN'S STUDIES 81 (1995).

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