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## Rudolf von Jhering's Influence on Karl Llewellyn

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# RUDOLF VON JHERING'S INFLUENCE ON KARL LLEWELLYN

Julie E. Gris ,\* Martin Gelter,\*\* & Robert Whitman\*\*\*

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Karl Llewellyn<sup>1</sup> is today considered one of the most prominent representatives of

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1. The breadth and scope of Karl Llewellyn's lifetime of experiences and work is remarkable in today's era of legal concentration and specialization. Llewellyn's contributions, whether in his academic, professional

the American Legal Realist School. Although American legal realism is no longer the predominant school of jurisprudence in the United States,<sup>2</sup> it still plays an important role in the formation of our legal traditions. Consider President Obama's recent statement concerning the candidate successfully nominated to the United States Supreme Court:

I will seek someone who understands that justice isn't about some abstract legal theory or footnote in a case book, it is also about how our laws affect the daily realities of people's lives, whether they can make a living, and care for their families, whether they feel safe in their homes, and welcome in their own nation.<sup>3</sup>

Several of Llewellyn's contemporaries in the American legal academy, including Arthur Corbin,<sup>4</sup> Jerome Frank<sup>5</sup> and Roscoe Pound<sup>6</sup> have been cited as influences on his

or personal life, are demonstrative of a unique ability to approach situations with a new and revolutionary perspective. Throughout his life, Llewellyn compiled an impressive and lengthy list of "singular" accomplishments, including but not limited to: the only American ever to have been awarded the Iron Cross; the most fertile and inventive legal scholar of his generation; legal theory's most colorful personality since Jeremy Bentham, the only common lawyer known to have collaborated successfully with an anthropologist on a major work; a rare example of a law-teacher poet; the chief architect of the most ambitious law code of recent times; the most romantic of legal realists and the most down-to-earth of legal theorists; the most ardently evangelical of legal skeptics; the most unmethodical of methodologists; the least controvertible of claims, the possessor of one of the most exotic prose styles in all legal literature. See ROBERT WHITMAN, SOIA MENTSCHIKOFF & KARL LLEWELLYN: A COMPILATION OF ARTICLES ABOUT TWO ICONIC LAW PROFESSORS (The Graduate Group 2011); Karl Llewellyn & William Twining, *Two Works of Karl Llewellyn*, 30 MOD. L. REV. 514, 514-15 (1967). See also N. E. H. HULL, ROSCOE POUND AND KARL LLEWELLYN: SEARCHING FOR AN AMERICAN JURISPRUDENCE 224 (1997). As Dean of Harvard Law School, Roscoe Pound is one of the most influential figures in the American legal realism. Roscoe Pound was both Llewellyn's critic and ally. "[H]e was also the mentor of a generation of jurists, the patron of many young scholars, and the best-placed American academic jurist of his time." *Id.*

2. See David E. Ingersoll, *Karl Llewellyn, American Legal Realism, and Contemporary Legal Behavioralism*, 76 ETHICS 253, 253 (1966). Jerome Frank was born in New York in 1889, and served as a judge of the United States Court of Appeals for the Second Circuit in 1941. Llewellyn and Frank were close friends as well as prominent figures in legal realist thought. Despite their deaths (1957 and 1962 respectively), their views continue to influence many legal theories today. *Id.* at 253-54. In describing legal realism, Ingersoll notes that the realists performed an extremely valuable and successful "ground-breaking" task in introducing social science methodology in legal scholarship. Indeed, when one compares the assumptions and the concepts of contemporary legal behavioralism with those of the realists, one is stuck by an amazing similarity. It appears as though the modern "radicals" of legal scholarship are very much the intellectual progeny of the old realists. *Id.* at 253. Legal realism is also thought of as having influenced or having the led the way for the infusion of economic analysis into contemporary legal thought. See, e.g., Kristoffel R. Grechenig & Martin Gelter, *The Transatlantic Divergence in Legal Thought: American Law and Economics vs. German Doctrinalism*, 31 HASTINGS COMP. & INT'L L. REV. 295, 316-19 (2008) (arguing that the widespread acceptance of realist ideas was a precondition for the success of economic analysis of law); Joseph William Singer, *Legal Realism Now*, 76 CALIF. L. REV. 465, 516 (1988) (reviewing LAURA KALMAN, *LEGAL REALISM AT YALE: 1927-1960* (1986)) ("[theories] associated with legal process, rights theory, and law and economics all attempt to absorb the insights of legal realism . . .").

3. Jake Tapper & Sunlen Miller, *POTUS Interrupts Press Briefing to Announce Souter's Retirement, Announce Qualifications for Next Supreme*, ABC NEWS (May 1, 2009, 3:45 PM). In his May 1 statement, President Obama also stated:

I view that quality of empathy, of understanding and identifying with people's hopes and struggles, as an essential ingredient for arriving at just decisions and outcomes. I will seek somebody who is dedicated to the rule, who honors our constitutional traditions, who respects the integrity of the judicial process and the appropriate limits of the judicial role. I will seek somebody who shares my respect for constitutional values on which this nation was founded and who brings a thoughtful understanding of how to apply them in our time.

*Id.*

4. *Early Years, 1869-1916, Arthur L. Corbin*, YALE LAW SCHOOL, <http://www.law.yale.edu/cbl/3075.htm> (last visited July 8, 2012). Even though Llewellyn referred to Corbin as "Dad" and considered him a "Realist," Corbin never formally accepted the realist label. Instead, he responded to Llewellyn: "I can join cheerfully with you and your kind of 'Realism' but I never wanted to belong to the 'Realist School' or any other School (ex-

thinking. Given his significant links with the German legal academy, it is not surprising that Llewellyn's work appears also to have benefited from his acquaintance with the work of German-speaking contemporaries and predecessors. In particular, Llewellyn's debt to the work of Rudolf von Jhering<sup>7</sup> deserves exploration.

The purpose of this Article is to shed light on the influence of Rudolf von Jhering on Karl Llewellyn. Part I offers a brief overview of Llewellyn's life, education, major work, and jurisprudential philosophy.<sup>8</sup> Part II offers the same overview for Jhering.<sup>9</sup> Part III gives a general account of the influence of German jurisprudence on American jurisprudential theory and thought.<sup>10</sup> Finally, Part IV surveys the recognized influence from German jurisprudence on Llewellyn's work and examines Jhering's influence in particular, with an emphasis on how Jhering may have affected Llewellyn's work on the Uniform Commercial Code.<sup>11</sup>

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cept, perhaps, the Yale Law School)." *Id.* It is worth noting that Corbin supported Llewellyn's scholarship as evidenced in his statement to Llewellyn, "your book will be welcomed by the judges and will sharpen their mind as to their own style and method." HULL, *supra* note 1, at 337. *See also* Friedrich Kessler, *Arthur Linton Corbin*, 78 YALE L.J. 517, 521 (1969) (describing how Arthur Corbin suggested that "the courts [should] return to and cultivate what Karl Llewellyn called the Grand Style of decision making and abandon the Formal Style, with its rigid and narrow adherence to formal logic.").

5. *See* Ingersoll, *supra* note 2, at 254.

6. Nathan Roscoe Pound was born in Lincoln, Nebraska in 1870. HULL, *supra* note 1, at 20. In 1916, he became the dean of Harvard Law School. *See id.* at 113. His experience as dean notably shaped his views and participation in the legal realist movement. *Id.* at 256–57. Not only did Pound praise Llewellyn's work, but together, Pound and Llewellyn began to question the legal system's role in society; "[t]hey began to develop a 'law in action' perspective which draws on a sociological conception of law. It draws attention to how law is embedded in political, economic, and social contexts." BETTINA LANGE, IMPLEMENTING EU POLLUTION CONTROL: LAW AND INTEGRATION 82 (2008).

7. Rudolf von Jhering contributed significantly to the American legal realism because his works were read by notable American theorists such as Oliver Wendell Holmes, Jr., Roscoe Pound, and Karl Llewellyn. ROBERT S. SUMMERS, ESSAYS IN LEGAL THEORY 21 (2000). In 1881, Jhering wrote to a friend, stating: "... my writings are widely read even in the United States, and a review of my book, *The Ends of Law*, is the most brilliant which has ever appeared about any of my works." *Id.* at 22. When Holmes stated that "the life of the law has not been logic, it has been experience," he was inspired in part by Jhering's work. ALBERT W. ALSCHULER, LAW WITHOUT VALUES: THE LIFE, WORK, AND LEGACY OF JUSTICE HOLMES 92 (2002) ("Jhering wrote that legal conceptions did not dictate life but, instead, that life shaped them. He declared that law must reflect not what logic, but what life, intercourse, the sense of right demand.").

8. *See infra* Part I. Three principal innovations marked Karl Llewellyn's jurisprudential philosophy:

[A]n expansion of the focus of casebooks, the principal teaching tools of law schools, to include material other than judicial opinions; a greater emphasis on the degree to which decisions by legal institutions, including judges, constituted exercises in social policy-making; and a transformation of the relationship between individual cases and generalized principles in legal analysis.

G. EDWARD WHITE, TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY 72 (1980).

9. *See infra* Part II.

10. *See infra* Part III.

11. *See infra* Part IV. *See generally* WILLIAM TWINING, KARL LLEWELLYN AND THE REALIST MOVEMENT 302–03 (Univ. of Okla. ed., Univ. of Okla. Press 1985) (1973); James Whitman, *Commercial Law and the American Volk: A Note on Llewellyn's German Sources for the Uniform Commercial Code*, 97 YALE L.J. 156, 156–59 (1987) (noting that the American Law Institute's *Restatements* and the Uniform Commercial Code were outgrowths of German legal science).

## PART I. AN OVERVIEW OF THE LIFE AND WORK OF KARL LLEWELLYN

A. *The Early Years of Karl Llewellyn: Life, Education, and Career*

Karl Llewellyn was born in Seattle, Washington on May 22, 1893, and spent most of his childhood and adolescence in Brooklyn, New York.<sup>12</sup> Showing immense intellectual promise, he graduated from high school at the age of sixteen. Because he was not old enough to enroll as a student at Yale College, his father decided that he would benefit from a period in Germany.<sup>13</sup> Llewellyn happily spent the next three years boarding with relatives of a family friend and attending the *Realgymnasium*<sup>14</sup> at Schwerin, in Mecklenburg, Germany.

This time spent studying in Germany played an important role in Llewellyn's life, because at a young age, he was intellectually, culturally, and socially stimulated. The "German experience" enabled him to pursue his studies further with a wider range of awareness, advancing his intellectual inquiry and creativity. This exposure proved particularly useful later in his academic career; Llewellyn was able to use this early experience and knowledge to gain popularity and respect amongst the leading German jurists of the time.

By the time Karl Llewellyn left Mecklenburg, he was completely bilingual and even fluent in the local German dialect.<sup>15</sup> Before returning to the United States and enrolling in Yale College, Llewellyn spent a brief time at the University of Lausanne in Switzerland.<sup>16</sup> Then in 1914, Llewellyn ventured to Paris to study Latin, French, and

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12. TWINING, *supra* note 11, at 87.

13. *Id.* at 89; Michael Ansaldi, *The German Llewellyn*, 58 BROOK. L. REV. 705, 708 (1992).

14. TWINING, *supra* note 11, at 89. Around this time, Mecklenburg had six *Realgymnasien* and over a thousand students. U.S. BUREAU OF EDUC., REPORT OF THE COMMISSIONER OF EDUCATION 169 (1891) (noting that Mecklenburg had seven gymnasia in 1889). Like other (historical) types of *Gymnasium*, a *Realgymnasium* was a nine-year school that combined approximately the periods corresponding to middle school and high school in the United States and allows students to subsequently advance to university education. *Id.* See also Robert Anderson, *The Idea of the Secondary School in Nineteenth-Century Europe*, 40 PAEDAGOGICA HISTORICA 93 (2004) (discussing the German Gymnasium and the French lycée as standards of structured, advanced secondary education).

15. TWINING, *supra* note 11, at 89. Karl Llewellyn also published several law articles and a book in German. Albert Ehrenzweig was one of many distinguished jurists, who was of the opinion that he preferred "Llewellyn's German to his English prose style." *Id.* Ehrenzweig was born in 1906 in Herzogenburg, Lower Austria (a small town about 50 kilometers west of Vienna) into a family that brought forward several distinguished legal scholars. Making himself a name as a judge and scholar in Austria in the 1930s, he had to emigrate due to his Jewish ancestry in 1938. After obtaining U.S. law degrees at Columbia and the University of Chicago, he served as the member of the staff of the Law Revision Commission of New York as well as a practicing attorney at the Cravath law firm in New York. In 1948, he was appointed to the faculty of the University of California at Berkeley, where he became a leading authority on conflict of laws and tort law in the United States. Ehrenzweig died in Berkeley in 1974. See Edward C. Halbach, *Foreword*, 54 CALIF. L. REV. 1419, 1419-20 (1966); John N. Hazard, *In Memoriam*, 22 AM. J. COMP. L. 603, 603 (1974); Richard W. Jennings et al., *In Memoriam Albert A. Ehrenzweig (1906-1974)*, 62 CALIF. L. REV. 1069 (1974); Walter Perry Johnson, *Albert Armin Ehrenzweig, Law: Berkeley 1906-1974* (Univ. of Cal. Academic Senate, Berkeley, Cal.), May 1977. Regarding Llewellyn's prose, see also Manfred Rehbinder, *Einleitung des Herausgebers* [Editor's Preface], *Preface to KARL N. LLEWELLYN, RECHT, RECHTSLEBEN UND GESELLSCHAFT* 7-8 (1977) (noting that Llewellyn developed the habit of creating new words also in the German language, e.g. "Trecht" as a term for the law ("Recht") in action).

16. GEORGE W. LIEBMANN, *THE COMMON LAW TRADITION: A COLLECTIVE PORTRAIT OF FIVE LEGAL*

law, and at the Sorbonne.<sup>17</sup> While there, war broke out and Llewellyn travelled to Germany to attempt to enlist.<sup>18</sup> While accompanying the 78th Prussian Infantry on the western front, he was wounded and spent three months in a military hospital before returning to Yale.<sup>19</sup> For his efforts, he was awarded the Iron Cross Second Class.<sup>20</sup> His military service and subsequent recognition solidified his affinity with the German culture.

Upon graduation from Yale College in 1915, Llewellyn entered Yale Law School.<sup>21</sup> This was an atypical time to be a student at Yale Law due to the transitory war period; the school lost more than half of its students and faculty as a result of America's entry into the war. As a result, Llewellyn "got little competition or stimulus from his fellows."<sup>22</sup> On the other hand, Llewellyn was present at a time of much heated philosophical debate and change. He received personalized attention and instruction from the remaining faculty, particularly Arthur Corbin.<sup>23</sup>

Soon, Llewellyn became the Editor-in-Chief of the *Yale Law Journal* and, reminiscent of the intellectual promise he showed as a high school student, graduated top of his class.<sup>24</sup> Upon graduation in the spring of 1919, Llewellyn taught commercial law at Yale.<sup>25</sup> That subject "remained, with jurisprudence, his great love."<sup>26</sup>

Beginning in 1920, Llewellyn worked in the legal department of the National City Bank, and then at the law firm of Shearman and Sterling, to which the Bank eventually transferred its legal department.<sup>27</sup> Llewellyn's transfer to Shearman & Sterling turned out to be a perfect occurrence of events since it gave him the opportunity to work directly under William W. Lancaster, a leading authority on banking law of the time.<sup>28</sup> Armed

SCHOLARS 151 (2005) Llewellyn spent about six months at the University of Lausanne. *Id.*

17. *Id.*

18. TWINING, *supra* note 11, at 91.

19. *Id.*

20. LIEBMANN, *supra* note 16, at 152.

21. HULL, *supra* note 1, at 137.

22. TWINING, *supra* note 11, at 94–95.

23. HULL, *supra* note 1, at 137. Llewellyn was Editor-in-Chief of the *Yale Law Journal* for three years. *See id.* at 138. It is possible that Corbin saw great potential in Llewellyn and aspired to help him develop his legal scholarship, especially since Llewellyn was a Yale College graduate. In the 1920s, Corbin worked with Dean Swan to maintain highly promising, young Yale instructors as evidenced in the hiring of Alexander H. Frey, assistant professor of Law at Yale, who supported Yale's Realist tradition. *See* LAURA KALMAN, *LEGAL REALISM AT YALE 1927-1960* 100–01 (1986).

24. HULL, *supra* note 1, at 138.

25. *Id.*

26. *Id.*

27. Arthur L. Corbin, *A Tribute to Karl Llewellyn*, 71 *YALE L.J.* 805 (1962). Corbin noted:

Fully resolved to become a teacher and writer of the Law, he yet rejected an immediate position on the Yale faculty, saying that he must first get experience of the law in action. For two years he was a member of the then existing Legal Department of the National City Bank of New York, mastering banking custom and commercial law. Increases in salary did not deter him from joining the law faculty. The Law School was then offering a course entitled "Introduction to Law," in the Department of Anthropology and Sociology in Yale College. Karl took this on as part of his teaching, calling the course "Law in Society." Deeply attached to Yale College and the Yale Law School, he fully intended to continue here as a part of both.

*Id.*

28. TWINING, *supra* note 11, at 101. After working with William W. Lancaster, Llewellyn learned that [T]he law in the books, at least in the commercial field, was 20 years or so behind the actual work in practice, and I hooked up with the legal work of the National City Bank in the hope of finding out what the law I had been teaching was all about.

HULL, *supra* note 1, at 138.

with superior practical and theoretical legal experience, Llewellyn now possessed the necessary tools to teach commercial law.

In 1923, Llewellyn became a law professor at Yale Law School. A year later, he moved to Columbia Law School where his wife was a graduate student.<sup>29</sup> This allowed for close intellectual relationships with other Columbia faculty members, particularly with Herman Oliphant.<sup>30</sup> As a specialist in commercial law, Llewellyn was appointed as Commissioner to the National Conference of Commissioners on Uniform State Laws ("NCCUSL").<sup>31</sup> Among other important roles, he participated in drafting the Uniform Chattel Mortgage Act and the Uniform Trust Receipts Act.<sup>32</sup>

Throughout the 1920s, "formalism" ruled American jurisprudence. Llewellyn began to shift some of his focus toward jurisprudence in an effort to depart "from a tough taught tradition of doctrinal analysis."<sup>33</sup> One such example of Llewellyn's break from formalism is his casebook on sales, serving as a classic non-formalist approach toward the regulation of sales.<sup>34</sup>

### B. *The Later Years of Karl Llewellyn: Scholarship and Philosophy*

Karl Llewellyn's interest in legal jurisprudence further developed upon his return to Germany in the late 1920s.<sup>35</sup> As a visiting professor at Leipzig in the winter term of 1928-29,<sup>36</sup> Llewellyn started a series of lectures which were published five years later under the title *Präjudizienrecht und Rechtsprechung in Amerika* [*The Case Law System in America*].<sup>37</sup> This work was translated into English in 1989.<sup>38</sup> Meant as an introductory

29. HULL, *supra* note 1, at 138. Llewellyn married Elizabeth Sanford, who was then a graduate student in economics at Columbia when he visited at Columbia Law School in 1924, while maintaining informal teaching positions at Yale Law School. *Id.*

30. TWINING, *supra* note 11, at 103. Oliphant was a professor at Columbia who alongside Llewellyn served as members of most important curriculum committees: business relations and methodology. *See id.* Llewellyn mostly agreed with Oliphant in their approach in organizing courses, particularly in the area of business relations. *Id.*

31. *Id.* at 104.

32. *Id.* In addition to making significant contributions to commercial law, Karl Llewellyn also sought other challenges, and he began involving himself in three main aspects of law: (1) anthropology and sociology (1920s); (2) appellate judicial process and case law (1927); (3) concentration on the curriculum committees at Columbia (late 1920's). *Id.* at 105-06. At the outset of his career at Columbia Law in 1925, Llewellyn set out to put his theory into practice. Such examples are giving a series of lectures in Germany in 1928 as well as contributing to the Columbia Law School through his involvement in the Columbia Law Review Symposium and regular curriculum committee meetings.

33. *Id.* at 104.

34. *Id.* at 105. During this time, Llewellyn kept in close contact with Judge Cardozo and other judges. For instance, Arthur Corbin's *The Law and the Judges*, was influential for Llewellyn. He also attended Judge Cardozo's "Storrs Lectures on 'The nature of the Judicial Process.'" *Id.* at 106. Cardozo was a prominent judicial figure who played a major role in Llewellyn's interest regarding the judicial processes and interpretations. *Id.* Llewellyn held Cardozo in high regard, even praising Cardozo in his book, *The Common Law Tradition*, for Cardozo's ability to interpret documents in their commercial context to make sense of the parties' dealings. RICHARD A. POSNER, *CARDOZO: A STUDY IN REPUTATION* 16 (1990).

35. TWINING, *supra* note 11, at 106.

36. *Id.*

37. KARL. N. LLEWELLYN, *PRÄJUDIZIENRECHT UND RECHTSPRECHUNG IN AMERIKA: EINE SPRUCHAUSWAHL MIT BESPRECHUNG* (1933). *See* Karl N. Llewellyn et al., *The Case Law System in America*, 88 COLUM. L. REV. 989 (1988), for a translated and published version of the work. The University of Chicago published the English translation, *The Case Law System in America*, of this German work in 1989. Thomas Adam, *Llewellyn, Karl Nickerson, in GERMANY AND THE AMERICAS: CULTURE, POLITICS, AND HISTORY* 690, 690 (2005).

piece, it “presented an unusually bold and sophisticated account of the practical functioning of American case law”<sup>39</sup> and solidified Llewellyn’s interest in:

[T]he processes and techniques of judicial decisions, as well as in the doctrines that could be extracted from them and he began to realize how much general jurisprudential writing was based on the selective use of examples rather than on the disciplined testing of the hypotheses against the facts of daily practice.<sup>40</sup>

The book is also remarkable because it included a number of opinions by U.S. courts, which he had translated to use them in his course. Llewellyn felt that German jurists had not been given enough source materials to get a clear picture of the American variety of the common law tradition.<sup>41</sup> Unfortunately, the year when it was finally published, 1933, also marked the ascendance of the Nazis to power, which obviously cut off critical debates, thus making it harder for the book to become influential in Germany.<sup>42</sup>

The success of his first stint as visiting professor in Germany suggests that he was well-integrated into German university culture and life. Moreover, in 1931, Llewellyn was again invited to lecture as a visiting professor at Leipzig.<sup>43</sup> On the basis of his introductory lecture to legal sociology he started to work on another book, entitled *Recht, Rechtsleben und Gesellschaft* [Law, the Life of Law, and Society].<sup>44</sup> This piece was written in the tradition of Ehrlich, whom he had the opportunity to thoroughly read during his first visit to Germany, and “represents Llewellyn’s first sustained attempt to develop a sociological theory of law.”<sup>45</sup> It was not published until 1977, since the Great Depression put the prospective publisher into dire financial circumstances and the manuscript was only rediscovered and published by the Swiss legal sociologist Manfred Rehbinder decades later.<sup>46</sup>

Llewellyn’s return to Germany to advance his academic career undoubtedly had a profound impact on his scholarship and jurisprudential philosophy. While in Leipzig, “Llewellyn had close contact with a number of distinguished German scholars,”<sup>47</sup> including Hermann Kantorowicz,<sup>48</sup> who had lectured at Columbia in 1927 and most likely

38. Adam, *supra* note 37, at 690.

39. TWINING, *supra* note 11, at 106.

40. *Id.* at 106–07.

41. Ansaldi, *supra* note 13, at 713. See *id.* at 720–45, for a detailed summary of the book.

42. Christian Joerges, David M. Trubek & Peer Zumbansen, *German Perspectives and Fantasies*, 12 GERMAN L.J. 10, 20–21 (2011).

43. TWINING, *supra* note 11, at 106–07.

44. LLEWELLYN, *supra* note 15, at 8–9. On the significance of Eugen Ehrlich see *infra* Part III.B.

45. TWINING, *supra* note 11, at 107. Unfortunately, this book has not yet been translated into English. Ansaldi, *supra* note 13, at 720.

46. Rehbinder, *supra* note 15, at 8–9 (describing the book’s history); See also Ansaldi, *supra* note 13, at 720. See *id.* at 745–70, for a summary of the content of the book.

47. TWINING, *supra* note 11, at 107.

48. *Id.* Llewellyn described Kantorowicz as follows:

And then there was Kantorowicz. As a legal historian, he rates at least with Holmes. As a logistician and technician, he rates only one notch under Jerome Michael [professor at Columbia Law School] himself. As an embodiment of vanity, he rates above any but one I have known. But Kantorowicz said to me with fervor, and at the height of his career: “I would give everything I have done, and more, to have written Géný’s *Méthode*.” And Kantorowicz was *not* a Natural Law man.

KARL N. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 422 n.46 (1960) (emphasis in the original). Llewellyn especially admired Kantorowicz’s Geny’s Method, written in 1899, because of its emphasis on the importance of common law on French legal tradition. See ROBERTA KEVELSON, CHARLES S.



organized Llewellyn's visit to Leipzig.<sup>49</sup> He also gave lectures at a number of German universities, all the while developing and maintaining an "excellent reputation among German scholars."<sup>50</sup>

Upon Llewellyn's return to Columbia, he had all but abandoned the formalist approach to jurisprudence. He and Jerome Frank advocated a sociological approach to jurisprudence.<sup>51</sup> There was a notable effort urging a more sophisticated articulation of the realist philosophy, evidenced in his major works published in 1929: *The Bramble Bush*,<sup>52</sup> *Cases and Materials on the Law of Sales*,<sup>53</sup> and several articles on ism.<sup>54</sup> This shift in perspective coupled with the published literature solidified Llewellyn as a co-leader in the American realist movement and as a key protagonist in the realist controversy that broke out in the academic legal world.<sup>55</sup>

Stimulated by this intellectual revolution, Llewellyn published a prodigious

PIERCE'S METHOD OF METHODS 72 (1987). On Kantorowicz' significance, see *infra* Part III.B.

49. Ansaldi, *supra* note 13, at 711.

50. TWINING, *supra* note 11, at 108.

51. DRAGAN MILOVANOVIC, AN INTRODUCTION TO THE SOCIOLOGY OF LAW 110 (3d ed. 2003). American Realism is best represented by Karl Llewellyn and Jerome Frank. As Dragan Milovanovic expounds in his book:

They [Jerome Frank and Karl Llewellyn] viewed law more as a social science. Sociology, economics, psychology, and philosophy would be their guide. Their laboratory was the real world. Pragmatism was their philosophy. Their focus was on judicial decision making and its non-formal (extra-legal) aspects. The law, for them, had become stagnant. It had ossified into formal procedures that did not allow equitable justice. They challenged the stated ideal of certainty and predictability in decision making (assumedly assured by abiding by the letter of the law), the strict emphasis on precedents (*stare decisis*), and the reliance on abstract and syllogistic reasoning. Their method was a socio-legal critique. They were to apply various sociological findings to the sphere of jurisprudence.

*Id.*

52. See generally KARL N. LLEWELLYN, *THE BRAMBLE BUSH: THE CLASSIC LECTURES ON THE LAW AND LAW SCHOOL* 20 (Oxford Univ. Press 2008) *Bramble Bush* is one of the most popular books serving as an introduction for law students relating to what the law is, how to read cases, how to prepare for class, and how justice in the real world relates to the law.

53. See generally KARL N. LLEWELLYN, *CASES AND MATERIALS ON THE LAW OF SALES* ix–xii (1930) In this book, Llewellyn explains his views on teaching law, teaching the law of sales, sales as a case-method course in the second year, and the net purpose of annotations. He expands on the importance of reading cases in depth to fully understand them and to appreciate the law of sales in judicial action.

54. Some examples of his work include: Karl N. Llewellyn, *Some Realism about Realism - Responding to Dean Pound*, 44 HARV. L. REV. 1222 (1931) (responding to Roscoe Pound's attack on the Realists); Karl N. Llewellyn, *A Realistic Jurisprudence -- The Next Step*, 30 COLUM. L. REV. 431 (1930) (exploring the different concepts of law and, in particular, addressing the difficulty in framing any one concept of law because there are many to include). Llewellyn and Pound had differing views regarding the significance of Legal Realism. Llewellyn strongly believed, "What realism was, and is, is a method, nothing more, and the only tenet involved is that the method is a good one." Brian Z. Tamanaha, *Understanding Legal Realism*, 87 TEX. L. REV. 731, 737–38 (2009). On the other hand, Pound wanted to explore Realism more as a full-blown jurisprudential theory. Most historians view this separation of ideas as "less a battle over substance than an unintended collusion that followed from a clash of egos." *Id.* at 738.

55. See TWINING, *supra* note 11 at 108–09. Though the majority of Llewellyn's references were to American works:

[I]t was the stimulus of having to interpret American law to foreign audiences that led him to take a sustained look at the system as a whole from the outside and prompted his first two substantial works of general theory. These works, written in German, while he was in close contact with German scholars and German literature, mark the start of his original contributions to jurisprudence. From now on he was no longer merely an acolyte of Corbin, Hohfeld, Cook, and Moore, but a fully fledged jurist in his own right.

*Id.*

amount of work in the 1930s.<sup>56</sup> He once again had the opportunity to return to Leipzig in 1931 through 1932 and took this opportunity to extensively travel throughout Germany, no doubt exposing himself to the latest intellectual debate and juristic evolutions of the time.<sup>57</sup>

During the 1930s, the scope of his intellectual capacity truly began to shine. First, Llewellyn reached new audiences when he published a book of poems<sup>58</sup> and a pamphlet of lyrics.<sup>59</sup> Second, in 1933, Llewellyn collaborated with Edward Adamson Hoebel and William T. Ross on a number of studies of American Indian Law. This practical experience eventually led to the publication of *The Cheyenne Way*, “a major contribution to the anthropological study of primitive law.”<sup>60</sup> Third, his involvement in the *Sacco-Vanzetti*

56. Along with major books as *The Bramble Bush* and *Cases and Materials on the Law of Sales*, Llewellyn published over twenty articles and related pieces. “The great majority of published and unpublished works were concerned with the sociology of law, contracts, and commercial law.” TWINING, *supra* note 11, at 109.

57. *See id.* at 110.

58. Llewellyn “continued to write poetry throughout his life and used poetry as one of his many tools in his exploration of human interaction in law, custom, and social convention.” Robert Whitman, Peter Dinunzio & Elinor Kim, *Karl N. Llewellyn: How Icelandic Saga Literature Influenced the Scholarship and Life of an American Legal Realist*, 39 CONN. L. REV. 1923, 1958 (2007). Many of Llewellyn’s ideas were influenced by medieval Icelandic literature, and “[i]n modern America, like in Iceland, Llewellyn saw dangers in separating citizens from their law.” *Id.* Similarly, his other poems: “Come queen be kind,” “Let law be alive!” and “Peace for the people,” illustrate his beliefs of the American legal system, which are derived from the Njal’s Saga. *See id.* Furthermore, Llewellyn privately published a book of poems named *Put in His Thumb*. KARL N. LLEWELLYN, *PUT IN HIS THUMB* (1931). In this book, Llewellyn notes that “[t]here is some virtue in dilettantism in the arts; when art-for-fun moves from dabbling into sustained and honest effort, it has the same chance for contribution that fresh infusion brings to any line of work.” *Id.* at v; *see also* Robert W. Whitman, Henry F. Murray & Peggy M. Pschirrer, *The Poetic Imagination of Karl Llewellyn*, 29 U. TOL. L. REV. 27, 33 (1997). Hull describes Llewellyn as “an authentic anomaly among his generation—a romantic Realist.” N. E. H. Hull, *The Romantic Realist: Art, Literature and the Enduring Legacy of Karl Llewellyn’s ‘Jurisprudence,’* 40 AM. J. LEGAL HIST. 115, 116–17 (1996) (emphasis in the original). Llewellyn immersed himself in words of a broad range of poets and novelists. He surveyed the works of “Rudyard Kipling, Bret Harte, Joel Chandler Harris’s ‘Uncle Remus’ stories, William Makepeace Thackeray, the Arabian Nights . . . and O. Henry.” *Id.* at 118. Also, for his unpublished and undated student paper named “The Best Short Story Poem,” he received a grade of “Very Good + +” from his instructor. *Id.* at 118 nn.12–13. His poetic style can be seen in his legal writings, which has been attractive for legal scholars.

59. KARL N. LLEWELLYN, *BEACH PLUMS* (1931). *Beach Plums* is an eight page published work composed of poems and ballads written by Llewellyn. Takeo Hayakawa, an accredited expert in Llewellyn’s poetry, opined that Llewellyn took himself very seriously as a poet. Hayakawa noted, “[w]hile certainly some of Llewellyn’s product was intentionally ‘art for fun,’ other of his output was heartfelt and intended to be taken seriously, particularly by the middle to late 1930s.” HULL, *supra* note 1, at 220. Even Llewellyn’s widow, Soia Mentschikoff stated that Llewellyn “took more pride in poetry than anything else—even jurisprudence.” *Id.* Further evidence that Llewellyn considered himself a serious poet was that he “took the trouble to have two volumes of his poetry privately published, personally promoted their sale among colleagues and friends, submitted his verse (though unsuccessfully) to prestigious magazines, and included his poems in so many of his other writings[.]” *Id.*

60. TWINING, *supra* note 11, at 111. An excerpt from *The Cheyenne Way* reads as follows:

Take American legal institutions and more particularly our ways of legal work and thinking, as contrasted with the German ways during two decades on either side of completion in 1897 of their Civil Code. In the forefront of American legal thinking is the judge . . . [w]hile advocates and counselors sink slowly into anonymity, and legislators tend to; not so that judge whose mark is stamped upon the law. . . Now in contrast to this, the German attitude strained constantly and consciously toward rigorous articulation and intellectualization of juristic thought. . . . The center of German juristic method was for decades not the judge, but the systemic scholar, and after him the “the legislator,” who had cast authoritative law into words of rigid command and limitation—both abstract thinkers of abstract thought.

KARL N. LLEWELLYN ET AL., *THE CHEYENNE WAY* 310–11 (1941).

What concerns us is that when, with these other legal systems in mind, we turn to the Cheyenne materials, we meet a curious phenomenon. It is not merely that we find neat juristic work. It is that

case<sup>61</sup> allowed him to provide great assistance to the National Association for the Advancement of Colored People ("NAACP") as well as the American Civil Liberties Union ("ACLU").<sup>62</sup> This enlivening experience even prompted Llewellyn to run for office.<sup>63</sup> These experiences influenced his efforts toward making legal services more accessible to the poor and to the lower middle class.<sup>64</sup> Lastly, Llewellyn "published a notable series of articles on the law of sales"<sup>65</sup> and lectured on American state appellate courts during the 1930s as well.<sup>66</sup>

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the generality of the Cheyennes, not alone the "lawyers" or the "great lawyers" among them. . . . worked out their nice cases with an intuitive juristic precision which among us marks a judge as good; that the generality among them produced indeed a large percentage of work on a level of which our rarer and greater jurists could be proud.

*Id.* at 312–13.

61. On April 15, 1920, a robbery of a shoe factory in South Braintree, Massachusetts, ended with the shooting of a paymaster and his guard. PAUL AVRICH, SACCO AND VANZETTI: THE ANARCHIST BACKGROUND 3 (1991). Nicola Sacco was a shoe maker and Bartolomeo Vanzetti was a fish peddler. *Id.* Being Italian immigrants and anarchists, they were both brought to trial during the height of the Red Scare. *Id.* It was an atmosphere of great hostility and the judge in the case, Webster Thayer, echoed the country's acrimony toward foreigners: "Outside the courtroom, during the trial and appeals which followed, he made remarks that bristled with animosity towards the defendants ('Did you see what I did with those anarchistic bastards the other day? I guess that will hold them for a while.')" *Id.* at 3–4. The persecution of radicals and immigrants sparked Llewellyn's interest. Both Llewellyn and future Supreme Court Justice Felix Frankfurter, then a law professor at Harvard, were involved in this case. Llewellyn soon began working on reforms indicated by the case and to establish the innocence of Sacco and Vanzetti while Frankfurter rallied "respectable" opinion behind Sacco and Vanzetti. Three days before their execution, Llewellyn:

[D]elivered a radio address seeking commutation of sentence on broader grounds: 'Daily in every city you are permitting lawyers to win—or lose—cases by playing on the passions of the jury—murder cases, accident cases, every jury case . . . You sit and let it happen; the open invitation to an unfair trial . . . we must awake to our responsibilities . . . if a hundred and a thousand of such cases are not to go on occurring without notice.'

LIEBMANN, *supra* note 16, at 174. After the execution, Llewellyn joined the council of the Sacco-Vanzetti National League and planned to write a book about the case, but the final section was never completed after the league was dissolved. TWINING, *supra* note 11, at 346. The main argument of the book was:

[T]hat all the public can do about it is to kick the civil bar; that the problem of improvement is a technical one, and that only technicians are equipped to handle it. And finally, that until the civil bar gets kicked into a sense of its duty as a public watchdog over criminal procedure, we get no reforms on the legal side, as distinguished from the administrative side.

*Id.* at 347.

62. The writing of *The Cheyenne Way* motivated Llewellyn to get involved with other "liberal" causes such as the National Association for the Advancement of Colored People ("NAACP") and the American Civil Liberties Union, with particular interest in laws to liberalize the sedition acts. TWINING, *supra* note 11, at 110.

63. In 1934, Llewellyn was a candidate backed by 'the Knickerbocker Democrats' for membership of the Democratic State Committee (11th District). *Id.* He vowed to "'clean up Tammany Hall'" and by this time, he was somewhat of a public figure. *Id.* However, he decided to resign one day before polling day to allow a candidate sharing the same platform to take his place. *Id.* He was knocked out because of his fighting for the Germans in World War I.

64. *Id.*

65. *Id.* at 111.

66. LLEWELLYN, *supra* note 48, at 5 (discussing the various actions in American appellate courts). In 1941, Llewellyn gave two lectures on American state appellate courts at the University of Chicago entitled "The Good, the True, and the Beautiful in Law" and at Yale on "The Common Law Tradition." See Karl N. Llewellyn, *On The Good, The True, The Beautiful, In Law*, 9 U. CHI. L. REV. 224 (1942). In an excerpt from Llewellyn's book, *The Common Law Tradition: Deciding Appeals*, he eloquently presents the problem:

You cannot listen to the dirges of lawyers about the death of *stare decisis* (of the nature of which lovely institution the dirge-chanters have little inkling) without realizing that one great group at the bar are close to losing their faith. You cannot listen to the cynicism about the appellate courts that is stock conversation of the semi- or moderately successful lawyer in his middle years without realizing that his success transmutes into gall even as it comes to him.

LLEWELLYN, *supra* note 48, at 4.

Given his well-rounded experience and the need for written uniformity regarding the law of sales, it is no surprise that by the 1940s Llewellyn's work primarily revolved around the Uniform Commercial Code.<sup>67</sup> As the chief reporter for the UCC, this enormous undertaking became his monumental task.<sup>68</sup> Still, he also managed to publish "articles on jurisprudence, legal education,<sup>69</sup> the legal profession, and commercial law"<sup>70</sup> during this time. He also continued his study of American Indians.<sup>71</sup>

As a leading member of the American realist movement, it is worth noting that Llewellyn remained a skeptic of the adjudicatory process because he disagreed with the view of law as a system of rules. During his prime years as a realist philosopher, Llewellyn rejected the theory that rules decide cases. However, later in his academic career, Llewellyn became less extreme in his beliefs and put forth that the rule of law plays a significant role in the legal institution.<sup>72</sup>

One can speculate that such academic success placed a tremendous toll on his personal life; in 1946, Llewellyn divorced his second wife, Emma Costvet, in order to marry Soia Mentschikoff.<sup>73</sup> Soon thereafter, he left Columbia Law School for a joint appoint-

67. Robert Whitman, Dom Calabrese, & Peggy Pschirrer, *Karl Llewellyn's Letters to Emma Cortsvet Llewellyn From the Fall 1941 Meeting of the National Conference of Commissioners on Uniform State Laws* 27 CONN. L. REV. 523, 524 (1995). While a professor of law at Columbia University, Karl N. Llewellyn was named by the National Conference of Commissioners on Uniform State Laws ("NCCUSL") as Chief Reporter for the UCC project. *Id.* His third wife, Soia Mentschikoff, was Associate Chief Reporter. *Id.* The project was designed for the Uniform Commercial Code "to improve the law of sales, to integrate it with contract law so that it could take effective account of promises, and to make it uniform across the states." W. DAVID SLAWSON, *BINDING PROMISES: THE LATE 20<sup>TH</sup>-CENTURY REFORMATION OF CONTRACT LAW* 133 (1996).

68. See Shael Herman, *The Fate and the Future of Codification in America*, 40 AM. J. LEGAL. HIST. 407, 429 (1996). Llewellyn knew that American lawyers thought codification of commercial law was nearly impossible. Therefore, his role for drafting a successful code or "one that would not gather dust on a shelf" meant that "a drafter had to figure out its role in a lawmaking apparatus and the appropriate balance between judicial and legislative lawmaking." *Id.* In other words, a successful code requires what he called a "'loose precedent,'" which was "located somewhere between *jurisprudence constante* and strict *stare decisis*, assured that American courts, instead of ignoring the code, would adhere to the code and view new cases through the prism of the code's verbal symbols." *Id.* at 432.

69. In 1944, he was chairman of an Association of American Law Schools ("AALS") committee on curriculum "which produced a notable report on the place of skills in legal education." TWINING, *supra* note 11, at 111. Llewellyn's report of the AALS Committee on Curriculum is even noted by some scholars as the start of the modern skills movement, or basically the skills and competency associated with the legal education. WILLIAM TWINING, *LAW IN CONTEXT: ENLARGING A DISCIPLINE* 192 (1997).

70. TWINING, *supra* note 11, at 111.

71. Working with Hoebel again, Llewellyn began another study of American Indians: the Pueblos of New Mexico. TWINING, *supra* note 11, at 111. In 1956, Llewellyn dove into the political life of the Pueblos:

During his visits to New Mexico, he became actively involved in Pueblo affairs; he drafted codes for some of the Pueblo councils, he acted in a number of cases, and ultimately his interest in Indians affairs led to his appointment to the Commission on the Rights, Liberties, and Responsibilities of the American Indian.

*Id.* at 111-12.

72. See generally LLEWELLYN, *supra* note 52.

73. Soia Mentschikoff was once Llewellyn's "student, research assistant, and Associate Chief Reporter on the Code." TWINING, *supra* note 11, at 112. From 1941 to 1948, she created quite a reputation for herself as "an outstanding commercial lawyer in her own right" and became "the first woman to teach at Harvard Law School." *Id.* Llewellyn met Soia when she entered Columbia Law School in 1931. During her stay at Columbia, Soia worked as an assistant for Karl and had her own desk in his office at the law school. A friendship soon developed; in fact, when the tragic news of Soia's lover's death arrived, it was Karl who chose to deliver the War Department's grim telegram. At some point, while Karl was still married to Emma Corstvet, a love relationship developed between Soia and Karl; neither Soia nor Karl ever openly spoke about the subject of their relationship before their marriage. Robert Whitman, *Soia Mentschikoff and Karl Llewellyn: Moving Together to the University of Chicago Law School*, 24 CONN. L. REV. 1119, 1128 (1992).

ment with Soia at the University of Chicago Law School.<sup>74</sup> From 1951 to 1962, he served as a professor at the University of Chicago Law School until his untimely death on February 13, 1962.<sup>75</sup> Dean Levi of the University commented on some of Llewellyn's academic and personal strengths:

Karl's many-sidedness was reflected in the radius of his influence at Chicago. . . . His influence was strong for instruction in draftsmanship. His concern for instruction in the skills of the craft produced the course in advocacy, which he taught, and gave impetus to student work in moot court and legal aid. . . . His last year of law teaching was perhaps his best. The barrier between teacher and student was low; the creative power of the teaching was strong. He did not regard his work as finished. He still had before him a work on law in society.<sup>76</sup>

Before he died,<sup>77</sup> Llewellyn published his last great work, *The Common Law Tradition: Deciding Appeals*.<sup>78</sup> Unfortunately, Llewellyn was unable to make another scheduled trip back to Germany.<sup>79</sup>

## PART II.

### A. German Jurisprudence in the 19<sup>th</sup> Century

Rudolf von Jhering is known to have "led the revolt against philosophical abstraction and conceptualism in German jurisprudence and the glorification of logic as a juristic method."<sup>80</sup> This established Jhering as the "pioneer of the basic modern trends in jurisprudence."<sup>81</sup> During much of the nineteenth century, German legal thought was dominated by the historical school founded by Friedrich Carl von Savigny, who proposed a "science of law" as an independent discipline.<sup>82</sup> In one of his most famous es-

74. Whitman, *supra* note 73, at 1124, 1130.

75. *See id.* at 1130, n.24.

76. TWINING, *supra* note 11, at 113.

77. Llewellyn is said to have died of a heart attack. *Id.* at 112. Because he suffered from depression and alcoholism, suicide was also a possible cause of death. *Id.* at 109.

78. The central theme of *The Common Law Tradition: Deciding Appeals* is eloquently stated here:

No rational observer of the American legal system suggests that the process of deciding appellate cases is simply a matter of searching out the single right answer. Yet, this very awareness that the judicial process often involves the necessity of choice between two or more possible results occasions further uneasy inquiry. If there is sometimes no single right answer, and if we must therefore accept judicial creativity, what then of the lawyer's once immutable canon of truth, *stare decisis*? What then can the lawyer more than any layman offer in the way of predictability?

Robert B. McKay, *Review of The Common Law Tradition*, 49 CALIF. L. REV. 778, 778 (1961) (book review).

79. In 1962, Llewellyn was invited to give a lecture in Germany, and this was to be his last statement on his juristic views. TWINING, *supra* note 11, at 113.

80. William Seagle, *Rudolf Von Jhering: Or Law as a Means to an End*, 13 U. CHI. L. REV. 71, 71 (1945-1946) (Rudolf von Jhering might appropriately be called the "Mark Twain of German jurisprudence."). Rudolf von Jhering was a German jurist, born August 22, 1818 in East Friesland, where his father practiced as a lawyer. *Id.* at 76. After receiving his law degree, he soon established himself as a professor teaching Roman law at Berlin in 1844, at University of Basel in 1845, at University of Rostock in 1846, at University of Kiel in 1849, and at University of Gießen in 1851. In 1867, he became a professor at the University of Vienna, and in 1972 he moved to Göttingen. *Id.* He was often called the father of sociological jurisprudence and his ideas were significant in developing "jurisprudence of interests" in Germany. *Id.* at 86. He continued to work in Göttingen until he died on September 17, 1892. *Id.* at 76.

81. *Id.* at 71.

82. Mathias Reimann, *Nineteenth Century German Legal Science*, 31 B.C. L. REV. 837, 839-40 (1990). Friedrich Karl von Savigny was born in 1779 in Frankfurt and died in 1861 in Berlin. For a brief overview of

says, *Vom Beruf unserer Zeit für Gesetzgebung und Rechtswissenschaft* of 1814, he argued that the law developed from the *Volksgeist* [spirit of the people] that could be found in the Roman law and not in codifications, which he famously opposed.<sup>83</sup> A detractor of enlightenment natural law theories, he believed that the optimal law could be derived deductively in a rational manner.<sup>84</sup> In his view, lawyers were in the best position to further its organic development in an evolutionary process.<sup>85</sup> Savigny, the founding father of the German idea of *Rechtswissenschaft* [legal science]<sup>86</sup> was an influence on opponents of the codification movement in the United States<sup>87</sup> and adherents of American classical legal thought, who considered German scholarship as a model and a reference point.<sup>88</sup> American legal thought in this period is usually seen as representing an understanding of the law as a coherent, logical, and value-neutral system. The legal realists of the 1920s and 1930s later rebelled against these views.<sup>89</sup>

Most famous for his eight-volume *System des heutigen römischen Rechts* [*System of Contemporary Roman Law*],<sup>90</sup> Savigny inspired generations of German scholars and founded the “Historical School” of legal science; his students went on to systematically expose the law and to explore its history. Scholars grouped into the “Germanist” and “Romanist” camps, depending on whether they studied the Teutonic and medieval or Roman sources of the legal system.<sup>91</sup> This school of thought, which focused on the logical and systematic basis of the law and dominated throughout much of the Nineteenth Century was later often described as *Begriffsjurisprudenz* [conceptual jurisprudence], a somewhat derogatory term initially coined by Jhering.<sup>92</sup> The adherents of both of its branches, including Georg Friedrich Puchta, Bernhard Windscheid and Carl Gerber<sup>93</sup> continued to view the law as a coherent and logical system that needed to be viewed as clearly separate from the social circumstances in which it operated.<sup>94</sup> “The

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his work and legacy see Stefan Riesenfeld, *The Influence of German Legal Theory on American Law: The Heritage of Savigny and His Disciplines*, 37 AM. J. COMP. L. 1 (1989).

83. FRIEDRICH CARL VON SAVIGNY, *VOM BERUF UNSERER ZEIT FÜR GESETZGEBUNG UND RECHTSWISSENSCHAFT* (1814). For a brief overview of the debate between Thibaut and Savigny, see Mathias Reimann, *The Historical School Against Codification: Savigny, Carter, and the Defeat of the New York Civil Code*, 37 AM. J. COMP. L. 95, 97–98 (1989).

84. See RICHARD A. POSNER, *FRONTIERS OF LEGAL THEORY* 195 (2001).

85. See Reimann, *supra* note 83, at 110–11 (quoting a passage from Savigny’s *Beruf* that explains how the spirit of the law is channeled through the jurists).

86. Reimann, *supra* note 82, at 852.

87. Reimann, *supra* note 83, at 103–07.

88. Reimann, *supra* note 82, at 838.

89. Singer, *supra* note 2, at 499. But note that Holmes was the first to critically engage with Savigny’s theories in the United States. See OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 207, 211, 218–19 (1881). See POSNER, *supra* note 84, at 198 (“America’s rejection of Savigny was announced in 1881 by Oliver Wendell Holmes, Jr.”).

90. 1–8 FRIEDRICH CARL VON SAVIGNY, *SYSTEM DES HEUTIGEN RÖMISCHEN RECHTS* 1840–1849. This famous work was translated into English in 1880. See Riesenfeld, *supra* note 82, at 2–3.

91. Reimann, *supra* note 82, at 858.

92. RUDOLF VON JHERING, *SCHERZ UND ERNST IN DER JURISPRUDENZ* 337 (9th ed., Lind Int’l 2009) (1884).

93. Grechenig & Gelter, *supra* note 2, at 345. Bernhard Windscheid was born in 1817 in Dusseldorf and died in 1892. He was famous for influencing the formation of German Civil Code and for his study in Roman law. He also served as a professor at Basel, Greifswald, Heidelberg, and Leipzig. Bernhard Großfeld, *Comparatists and Languages in COMPARATIVE LEGAL STUDIES: TRADITIONS AND TRANSITIONS* 154, 171 (Pierre Legrand & Roderick Munday ed., 2003).

94. See Vivian Grosswald Curran, *Fear of Formalism: Indications of the Fascist Period in France and*

'*Begriffsjurisprudenz*' . . . reduced law to a game of induction and deduction."<sup>95</sup>

While in his early career Rudolf von Jhering was a leading proponent of conceptual jurisprudence, his scholarship underwent a remarkable shift around 1860. By advocating social utilitarianism and focusing on function rather than formal definition, Jhering set himself apart from most other scholars of the time, who were "interested only in legal history or the philosophy of law."<sup>96</sup> At a time when German jurisprudence was very inward looking, Jhering took a broader view and strove for the high aim of a "'general jurisprudence' intended to embrace the legal phenomena of all peoples of all times in one great view, of a 'universal legal history' as part of an idealistic history of mankind, imbued with the ideal of progress."<sup>97</sup>

#### B. *The Early Years of Rudolf von Jhering: Life and Education*

On August 22 of 1818 in East Frisia, Germany, Rudolf von Jhering was born to a family of jurists and civil servants; among the most notable members was his great-great-grandfather, Hermann Conring,<sup>98</sup> a pioneering German legal historian of the seventeenth century.<sup>99</sup> After leaving the gymnasium at the age of eighteen, Jhering studied law at Heidelberg, Munich, Göttingen, and Berlin, where he became a student of Friedrich Karl von Savigny.<sup>100</sup> At the conclusion of his studies, he began teaching Roman law at Basel, Rostock, and Kiel.<sup>101</sup> In 1852, he went to Giessen to teach and write, gaining substantial recognition with the publishing of *Geist des Römischen Rechts auf den verschiedenen Stufen seiner Entwicklung* [*The Spirit of the Roman Law in the Various Stages of Its Development*, published in three volumes from 1852-1865].<sup>102</sup> He continued onto the University of Vienna in 1867, where he was ennobled by the Emperor, and returned to Göttingen, as a professor, in 1872.<sup>103</sup>

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*Germany of Judicial Methodology's Impact on Substantive Law*, 35 CORNELL INT'L L.J. 101, 155 (2002); Grechenig & Gelter, *supra* note 2, at 345.

95. Reimann, *supra* note 82, at 864.

96. Seagle, *supra* note 80, at 73. ("[These jurists] paid little or no attention to the needs of practical jurisprudence, which they left entirely in the not too capable hands of the practitioners. Since political unification is the first prerequisite of any effectively functioning legal system, the task of the jurists would perhaps have been hopeless.").

97. Max Rheinstein, *Comparative Law and Conflict of Laws in Germany*, 2 U. CHI. L. REV. 232, 233-34 (1935).

98. Seagle, *supra* note 80, at 76. Herman Conring was a German intellectual who focused on economics, politics, and law. Born in 1606, he was no stranger to political controversies as he opposed the Holy Roman Empire. *Id.*

99. Constantin Fasolt, *Hermann Conring and the European History of Law*, in *POLITICS AND REFORMATIONS: HISTORIES AND REFORMATIONS, ESSAYS IN HONOR OF THOMAS A. BRADY, JR.* 113, 127 (Christopher Ocker, Michael Printy, Peter Starenko & Peter Wallace eds., 2007) ("[Herrmann Conring] has therefore been called 'the founder of German legal history.'"); Reinhard Zimmermann, *Codification: History and Present Significance of an Idea*, 3 EUR. REV. PRIVATE L. 95, 99 (1995) ("In the middle of the 17<sup>th</sup> century, Hermann Conring shattered the Lotharian legend, according to which Roman Law had been introduced in Europe by way of a formal imperial enactment.").

100. Seagle, *supra* note 80, at 76.

101. *Id.*

102. *Id.*

103. Hasso Hofmann, *From Jhering to Radbruch: On the Logic of Traditional Legal Concepts to the Social Theories of the Law to the Renewal of Legal Idealism*, in 9 *A TREATISE OF LEGAL PHILOSOPHY AND GENERAL JURISPRUDENCE: A History of the Philosophy of Law in the Civil Law World, 1600-1900* 301, 302 (Damiano Canale, Paolo Grossi & Hasso Hofmann eds., 2010); Seagle, *supra* note 80, at 76.

In his early years as a jurist, Jhering's jurisprudential philosophy remained a product of his education. As a student of Karl von Savigny, he initially remained a supporter of the historical school, and as a historian of Roman law, "he was really bent on a search for its permanent usable elements."<sup>104</sup> Nevertheless, while still firmly grounded within conceptual jurisprudence during that period, he went beyond the work of other Romanists by emphasizing that ancient Roman law and the works of the classical jurists could not continue to apply unmodified many centuries later, but that the spirit of Roman law could be preserved to apply under changed circumstances.<sup>105</sup> Even then, he apparently "began to have doubts in mid-career about the accepted view of law as an organic body of rules and concepts."<sup>106</sup> Given Jhering's almost Pauline conversion, the *Geist des Römischen Rechts* remained unfinished, while its earlier volumes continue to be reprinted.<sup>107</sup>

### C. *The Later Years of Rudolf von Jhering: Scholarship and Philosophy*

In 1860, Jhering's jurisprudential philosophy began to surface.<sup>108</sup> Between 1860 and 1866, he anonymously published a series of six *Confidential Letters* that questioned the prevailing jurisprudence of the time and criticized the divorce between theory and practice.<sup>109</sup> In 1872, Jhering published *Der Kampf ums Recht*, based on a series of lectures he had held during his time at the University of Vienna, in which he decidedly distanced himself from his earlier writing.<sup>110</sup> *Der Kampf* [*The Struggle for Law*] stirred much discussion because of the controversial content. It was taken as an "attack on the historical school" because Jhering's theory was premised on the idea that "the law was not a system of abstract rights but a method of reconciling conflicting interests."<sup>111</sup> In contrast to the prevailing view, Jhering argued that legal cases could not be solved alone on the basis of the body of enacted law, and that judges were not able to simply arrive at their judgment through a process of logical deduction, but that social and situational factors had to be taken into account.<sup>112</sup> Moreover, he emphasized that "the origin of law is

104. Seagle, *supra* note 80, at 77.

105. Reimann, *supra* note 82, at 862; *see also* Hofmann, *supra* note 103, at 303–05; Joerges et al., *supra* note 42, at 14–15 (describing Jhering's development as a scholar).

106. James E. Herget & Stephen Wallace, *The German Free Law Movement as the Source of American Legal Realism*, 73 VA. L. REV. 399, 407 (1987).

107. Hofmann, *supra* note 103, at 306.

108. Neil Duxbury, *Jhering's Philosophy of Authority*, 27 OXFORD J. LEGAL STUD. 23, 24 (2007). As articulated by Duxbury, Jhering's philosophy can be regarded as a "detailed attempt to answer this question":

[W]e carry our own ethical view into the past,' he maintained, for we tend to deny that law originates with 'naked egoism' and prefer instead to explain legal origins by reference to the idea of a social contract- even though this idea 'is a pure construction without regard to actual history.' The truth is more straightforward: through force an original 'norm' or constitution is established, and with this norm 'the force of the stronger has laid down the law for the weaker.' The stronger may well intend to bind themselves as well - though whether or not they do 'is immaterial for the significance of the process which has thus been accomplished'; what matters is that 'law has been placed in the world once and for all, and this fact can never be undone again.'

*Id.* at 25.

109. Seagle, *supra* note 80, at 79.

110. Hofmann, *supra* note 103, at 307.

111. Seagle, *supra* note 80, at 81. In this work, Jhering argued that law results from a conflict between real interests, which was a radical and extremely influential idea.

112. Curran, *supra* note 94, at 155–56. Compare Oliver Wendell Holmes famous quotation, paralleling



to be found in social struggles” and “urges every individual to the struggle for law” because according to him, “the life of law is a struggle, it can endure only if the individual is ever ready and vigilant to defend his rights.”<sup>113</sup>

Jhering’s final work on the philosophy of law was set forth in *Der Zweck im Recht* [*Law as a Means to an End*, two volumes, 1877 and 1883]<sup>114</sup> in which he developed his critique into a fully developed new system that has been described as marking “an epochal turning-point in jurisprudence.”<sup>115</sup> It can best be summarized in the following statement: “Law is not the highest thing in the world, not an end in itself, but it is merely a means to an end, the final end being the existence of society.”<sup>116</sup> Hence, “[c]onstructive jurisprudence was barren and bankrupt, and must be replaced by a system of social mechanics.”<sup>117</sup> Instead, law should be a “system of reconciling conflicting interests” not based on the “analysis and combination of legal principles, which jurisprudence had borrowed from mathematics” because “[l]egal principles cannot be extended merely by a process of analogy; they [do] not contain in themselves the correct solutions for every legal controversy.”<sup>118</sup> Jhering’s view, unorthodox for its time, seems remarkably like the catchword of at least some American Legal Realists — that legal interpretation can legitimately be “purposive.”<sup>119</sup>

Jhering believed that the law should be studied not merely as a theory but in its practical application.<sup>120</sup> Jhering emphasized that “[t]he judge was not an automaton who pronounced his judgments merely on the basis of pre-established legal principles.”<sup>121</sup> Jhering’s main critique of law was that:

Our theory of law, it is only too easy to perceive, is busied much more with the scales than with the sword of Justice. The one-sidedness of the purely scientific standpoint from which it considers the law, looking at it not so much as it really is, as an idea of force, but as it is logically, a system of abstract legal principles, has, in my opinion, impressed on its whole way of viewing the law, a character not in harmony with the bitter reality. This I intend to prove.<sup>122</sup>

Jhering’s perspective of law encourages people to take a more active role in defending their legal rights even if it requires taking an aggressive approach because “the

Jhering’s view: “The life of the law has not been logic; it has been experience.” HOLMES, *supra* note 89, at 1.

113. Seagle *supra* note 80, at 81.

114. DONALD L. SMITH, ZECHARIAH CHAFEE, JR: DEFENDER OF LIBERTY AND LAW 85 (1986) (Jhering characterized the legal system into three categories involving rights that concerned the individual, state, and society). In this work, Jhering studied law as the end product of a process of adjusting and resolving conflicting interests. *Id.*

115. Hofmann, *supra* note 103, at 308.

116. SMITH, *supra* note 114, at 85 (quoting a letter Chafee sent to Ernest Angell). Jhering characterized the legal system into three categories involving rights that concerned the individual, state, and society. In this work, Jhering studied law as the end product of a process of adjusting and resolving conflicting interests. *Id.*

117. Seagle, *supra* note 80, at 84.

118. *Id.* at 83.

119. Julian B. McDonnell, *Purposive Interpretation of the Uniform Commercial Code: Some Implications for Jurisprudence*, 126 U. PA. L. REV. 795 797–98 (1978).

120. Seagle, *supra* note 80, at 80.

121. *Id.* at 83.

122. RUDOLPH VON JHERING, *THE STRUGGLE FOR LAW* 5 (John J. Lalor trans., 2nd ed. 1915).

life of the law is a struggle, — a struggle of nations, of the state power, of classes, of individuals.”<sup>123</sup>

### PART III. THE INFLUENCE OF GERMAN JURISPRUDENCE ON AMERICAN JURISPRUDENTIAL THEORY AND THOUGHT

#### A. *The Foundations in America for the Reception of German Jurisprudence*

German jurists, including Jhering, and the early twentieth century thinkers involved in the free law movement had a significant impact on American jurisprudence and eventually on the realist school. This comes as no surprise, if one accepts that most juristic discoveries of the nineteenth century seem to have been made in Germany and that German jurists enjoyed the highest reputation in Europe.<sup>124</sup>

During the time that Jhering was developing his jurisprudential philosophy, the legal conditions in both America and Germany had “strong similarities,” thus making the reception in America of German jurisprudence particularly easy.<sup>125</sup> First, Germany was struggling to adapt Roman law to the newly unified state while the United States was figuring out how to adapt “English common law to the needs of a democratic and increasingly industrialized nation.”<sup>126</sup> Second, German jurisprudence had been dominated by the historical school, whereas American jurisprudence was characterized by the “seventeenth and eighteenth century philosophy of natural rights thinly disguised as constitutionalism.”<sup>127</sup> Finally, America was also struggling with the “tyranny of legal concepts” and focused on solving problems involving vast social, political, and economic interests by ignoring realities and applying “abstract conceptual concepts . . . by a process of pseudological analysis.”<sup>128</sup> This was most evident in treatises and Restatements, which, in functioning much like the BGB, “represented the practical implementation of the positivist legal philosophy in an extreme form.”<sup>129</sup> This period in U.S. jurisprudence later came to be called “classical legal thought,” and is often associated with the name of Christopher Columbus Langdell.<sup>130</sup> Like its German counterpart, Langdellian legal thought adopted an understanding of law as a science,<sup>131</sup> where individual cases could be explained within a coherent system, from which it would also be possible to deduce the outcome of future cases.<sup>132</sup> Classical legal thought in the United States not only par-

123. *Id.* at 1.

124. Herget & Wallace, *supra* note 106, at 402.

125. Seagle, *supra* note 80, at 87.

126. *Id.*

127. *Id.*

128. *Id.*

129. Herget & Wallace, *supra* note 106, at 430. BGB, the civil code of Germany, became effective on January 1, 1900 and served as a guide for other civil law jurisdictions such as China, Japan, Greece, and Taiwan. *See id.* at 406–07.

130. E.g., MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LEGAL THOUGHT 1870-1960*, 129 (1992); DUNCAN KENNEDY, *THE RISE AND FALL OF CLASSICAL LEGAL THOUGHT* (Cambridge ed. 1998); Gary Minda, *One Hundred Years of Modern Legal Thought: From Langdell and Holmes to Posner and Schlag*, 28 IND. L. REV. 353, 357–58 (1995).

131. Laura I. Appleman, *The Rise of the Modern American Law School: How Professionalization, German Scholarship, and Legal Reform Shaped Our System of Legal Education*, 39 NEW ENG. L. REV. 251, 286 (2005).

132. E.g., Brian Leiter, *Legal Realism*, in *A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY* 262–263 (2d ed., Wiley-Blackwell 2010); BERNARD SCHWARTZ, *MAIN CURRENTS IN AMERICAN LEGAL THOUGHT*

alleled developments in Germany, but had apparently also been influenced by the German historical school.<sup>133</sup>

Such similar legal and juristic conditions made American jurists eager recipients and promoters of the revolutionary concepts articulated by the German jurists. Much of the revolt against the system of jurisprudence in place was influenced by Jhering. The impact spread among many prominent figures such as Justice Holmes,<sup>134</sup> Roscoe Pound, and their successors during the 1920s and 1930s, who are usually viewed as belonging to the realist school.<sup>135</sup> Such events suggest that Karl Llewellyn was greatly influenced by Jhering and German jurisprudence.

#### B. *The German Free Law Movement*

Jhering died in 1892, but he left a lasting imprint on German legal thought. One current in legal thought that took his views to more radical conclusions was the free law movement of the late nineteenth and early twentieth century, which reached its peak just before World War I. It is crucial to understand the concepts behind the free law movement in order to recognize its influences on the American realist movement. The free law movement developed largely as a response to the inability of the leading jurisprudential schools and the BGB to adequately address the issue of where a judge can go for guidance, especially “when positive law is unclear or does not appear to address a question presented by a case;”<sup>136</sup> in other words, the objective was to address the case of a lacuna or gap in the legal code. At the time of codification, leading jurists from the prevailing schools were satisfied that “[e]verything a judge needed to know about the civil law was contained in the BGB or could be deduced from it directly or from the concepts that its

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346 (1993); Singer, *supra* note 2, at 496–97.

133. Appelman, *supra* note 131, at 274–97; Michael H. Hoeflich, *Savigny and his Anglo-American Disciples*, 37 AM. J. COMP. L. 17 (1989); Duncan Kennedy, *Two Globalizations of Law & Legal Thought: 1850–1968*, 35 SUFFOLK U. L. REV. 631, 637–48 (2003) (identifying a globalization of classical legal thought originating in Germany); Reimann, *supra* note 83; Stefan Riesenfeld, *The Influence of German Legal Theory on American Law: The Heritage of Savigny and His Disciples*, 37 AM. J. COMP. L. 1 (1989). See JOHN DAWSON, *THE ORACLES OF THE LAW* 451 (1968). For a contemporary view, see Joseph H. Beale, *The Development of Jurisprudence During the Past Century*, 18 HARV. L. REV. 271, 283 (1905) (suggesting that the historical school “obtained a powerful hold” in the United States).

134. Oliver Wendell Holmes shared common views with Jhering; the two most prominent similarities were: “their views of law as a result of constant struggle in society,” and their sociological observations on legal theories matched one another. Mathias W. Reimann, *Holmes’s Common Law and German Legal Science*, in *THE LEGACY OF OLIVER WENDELL HOLMES, JR.* 102 (Robert W. Gordon ed. 1992). See also, *infra* text at n.142. Pound presented the heart of his sociological jurisprudence, a theory of interests, in 1963 in his work titled *The Spirit of the Common Law*, which pays homage to Jhering. ROSCOE POUND, *THE SPIRIT OF THE COMMON LAW* (Marshall Jones Co. ed. 1921).

135. Karl Llewellyn was instrumental in giving its name to legal realism in exchange with Dean Roscoe Pound, who, in spite of sharing some views with the realists, criticized Llewellyn, and from whom Llewellyn sought to set himself apart. See Karl N. Llewellyn, *A Realistic Jurisprudence – The Next Step*, 30 COLUM. L. REV. 431 (1930); Roscoe Pound, *The Call for a Realistic Jurisprudence*, 44 HARV. L. REV. 697 (1931). In his response to Pound, Llewellyn compiled his famous list of legal realists that subsequently shaped the perception of the movement. Karl N. Llewellyn, *Some Realism about Realism – Responding to Dean Pound*, 44 HARV. L. REV. 1222, 1226 n.18 (1931) (establishing the criteria of realists). This has sparked some controversy, as it has been argued legal realism should be seen as part of a broader current that includes thinkers such as Holmes and Pound. Robert S. Summers, *Pragmatic Instrumentalism in Twentieth Century American Legal Thought – A Synthesis and Critique of Our Dominant General Theory About Law and its Use*, 66 CORNELL L. REV. 861, 864–65 (1981) (grouping all legal realist thinkers together as “pragmatic instrumentalists”). HORWITZ, *supra* note 130, at 171 (suggesting that Llewellyn’s list provides a distorted picture of the realist movement).

136. Herget & Wallace, *supra* note 106, at 403.

terms implied.”<sup>137</sup> Jhering was among the first jurists to voice his skepticism that the law, “through its organic unity, provided the answer to every possible case that could come before a judge.”<sup>138</sup>

Francois GénY, an influential French legal philosopher, expounded upon Jhering's skepticism and concluded that “it is difficult to assess the practical influence”<sup>139</sup> of German theories in France. Rather, it is drawn from the “objective sociological data-social realities, needs, values, and nature of things.” He also “recognized that this method of decisionmaking was nothing new; courts had been doing it all along. It was simply time for jurisprudence to recognize the creative aspects of judging.”<sup>140</sup>

The Free Law movement as such is most often associated with the names of Hermann Kantorowicz and Eugen Ehrlich. Going further in their critique than Jhering, they denied the significance of formal legal arguments (such as those based on the accepted methods of interpreting the Civil Code), considering them a linguistic convention behind which judges felt compelled to hide their actual motivations in deciding a specific case.<sup>141</sup> Possibly the most prominent work representing this radical iconoclastic view is Kantorowicz' *Der Kampf um die Rechtswissenschaft* [*The Struggle for Legal Science*],<sup>142</sup> published under the pseudonym *Gnaeus Flavius*. Kantorowicz “assail[ed] the prevailing notions of proper juristic thinking and call[ed] for a new movement to tear down the old scholastic type of analysis and build a new radical science to serve justice.”<sup>143</sup> This work addressed many of the themes of the free law movement and even gave the movement its name.<sup>144</sup> According to Kantorowicz, the main tenets of the free law movement require:

The legal system does not need architects of logical construction but judges who are trained to recognize psychological and sociological factors and who share the legal consciousness of the people. The Administration of the law must be placed in the hands of judges who are willing to invoke free law and whose education fits them for the task. Such education would include the study of political science,

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137. *Id.* at 407.

138. *Id.*

139. RENÉ DAVID & JOHN E. C. BRIERLEY, MAJOR LEGAL SYSTEMS IN THE WORLD TODAY 107 (1978). Francois GénY was born in Baccarat, France in 1861 and died in 1959. He studied law at the University of Nancy. His legal theories addressed problems of legal methodology and influenced the development of statutory law throughout Europe. *See id.* (noting GénY's influence on legislation through scientific research in France).

140. Herget & Wallace, *supra* note 106, at 411.

141. *E.g.*, Grechenig & Gelter, *supra* note 2, at 349–50.

142. MARGARET BARBER CROSBY, THE MAKING OF A GERMAN CONSTITUTION 59 (2008). Hermann Kantorowicz's essay, *Der Kampf um die Rechtswissenschaft* [*The Struggle for Legal Science*], whose title is an obvious allusion to Jhering's *Der Kampf ums Recht*, was a radical writing that urged “an idealized appreciation of the ability of English courts to consider social conditions in the administration of justice.” *Id.* It was meant to encourage judicial activism because “the judge was entitled, indeed bound, to disapply a statute in any case where to apply it seemed to him unjust or inappropriate.” *Id.* (citation omitted).

143. Herget & Wallace, *supra* note 106, at 412.

144. *Der Kampf um die Rechtswissenschaft* “had an immediate impact, arousing heated debate and bitter controversy, as had been the intention.” Frank Kantorowicz Carter, *Gustav Radbruch and Hermann Kantorowicz: Two Friends and a Book - Reflections on Gnaeus Flavius's Der Kampf um die Rechtswissenschaft (1906)*, 7 GER. L.J. 657, 658 (2006). This manifesto termed the free law movement as *Freirechtsschule* and according to Arthur Goodhart in 1958, “it has probably been cited more frequently than any other legal essay published during the present century.” *Id.* (citation omitted).

economics, applied psychology, philosophy, and criminology.<sup>145</sup>

Thus, Kantorowicz called for judges to use discretion to make greater use of social science, thus considering the consequences of their decisions. However, the Free Law School stopped short of suggesting that judges should not be bound by statutes.<sup>146</sup>

Another important example emphasizing social factors in law is *Freie Rechtsfindung und freie Rechtswissenschaft* [*Free Finding of Law and Free Legal Science*],<sup>147</sup> by Eugen Ehrlich,<sup>148</sup> which lent its title to the movement. Ehrlich, one of the founding fathers of legal sociology, in his writing “attacked the broad codification that had taken place and assailed lawyers’ technicalism” and “proposed that legal science turn its attention away from conceptual gymnastics and toward the study of the operation of law within its full social setting.”<sup>149</sup> Both Ehrlich and Kantorowicz believed that it was not the enacted law that provided the best guarantee for justice, but, rather, it was the personality and qualification of judges.<sup>150</sup>

While the radical free law movement was somewhat influential in early twentieth century Germany, it was virtually over by the time of World War II and failed to exert a transformative influence on German legal thought, unlike its American counterpart, legal realism. Specifically for Kantorowicz, it was difficult to secure a permanent teaching position because of his political leanings, and he was not appointed as a professor in Kiel until 1928 at age fifty-one.<sup>151</sup> Of Jewish ancestry, he was removed from his position by the Nazis in 1933, which led him eventually to take refuge in the United States,<sup>152</sup> where he also took the opportunity to engage with and criticize American legal realism.<sup>153</sup> The fates of other critical scholars were similar.<sup>154</sup> Radbruch, another prominent member of the free law school who remained in Germany during his last years, is often remembered for expounding the view (now often considered a myth) in 1946 that legal positivism

145. Herget & Wallace, *supra* note 106, at 414.

146. Curran, *supra* note 94, at 162.

147. EUGEN EHRLICH, *FREIE RECHTSFINDUNG UND FREIE RECHTSWISSENSCHAFT* (Aalen Scientia 1987). In this book, Eugen Ehrlich elaborates on the “juristic science in England” where he concludes that “English method of applying law is practically a free finding of law.” Walter L. Moll, *Translator’s Preface* of EUGEN EHRLICH ET AL., *FUNDAMENTAL PRINCIPLES OF THE SOCIOLOGY OF LAW* II, IV (Walter L. Moll trans., Transaction Publishers rev. ed. 2002). By this, he means that when a new matter is brought to the courts, the facts of the case may influence judicial decisions on its own, “independent” of legal materials. EUGEN EHRLICH ET AL., *FUNDAMENTAL PRINCIPLES OF THE SOCIOLOGY OF LAW* 5 (Walter L. Moll trans., Transaction Publishers rev. ed. 2002).

148. Eugen Ehrlich was born on September 14, 1862, in Czernowitz, Bukowina, Austrian Empire (now Chernovtsy, Ukraine). Sidney Post Simpson, *Fundamental Principles of the Sociology of Law*, 51 HARV. L. REV. 190, 190 (1937) (book review). After studying, practicing, and teaching law in Vienna, he became a full-time professor at the Franz-Joseph University of Czernowitz in 1897. *Id.* Observing significant differences between the Austrian law “on the books” and its implementation in practice in his remote and multiethnic region of origin, he became one of the founding fathers of the sociology of law, and he was one of the first proponents of the free law movement. Given that Czernowitz became part of Romania after World War I, Ehrlich would have been required to teach in Romanian. Afflicted by health problems, he retired to Vienna, where he died in 1922. *Id.*

149. Herget & Wallace, *supra* note 106 at 411–12.

150. Curran, *supra* note 94, at 158.

151. Vivian Grosswald Curran, *Rethinking Hermann Kantorowicz: Free Law, American Legal Realism and the Legacy of Anti-Formalism*, in *RETHINKING THE MASTERS OF COMPARATIVE LAW* 66, 67 (Annelise Riles ed. 2001).

152. *Id.*

153. Hermann Kantorowicz, *Some Rationalism About Realism*, 43 YALE L.J. 1240 (1934).

154. Grechenig & Gelter, *supra* note 2, at 352–53.

made the law a malleable instrument in the hands of the Nazis, and that judges should refuse to enforce laws that reach an excessive level of injustice.<sup>155</sup>

Mainstream German private law jurisprudence turned to another legacy of Jhering's, namely *Interessenjurisprudenz* [*jurisprudence of interests*], which was developed by Philipp Heck in the 1920s (building on Jhering's work), and the younger, similar school of *Wertungsjurisprudenz* [*jurisprudence of value judgments*] that dominates to-day.<sup>156</sup> While these schools recognized the significance of social factors to the juridical process, which was emphasized by Jhering, they are based on a greater confidence in statutory law.<sup>157</sup> Social factors are relevant to the required purposive (or "teleological") interpretation of the law, namely insofar as they influenced the conflicting interests that led to the enactment of the respective statute (according to *Interessenjurisprudenz*) or the value judgment embodied in the legislative enactment (according to *Wertungsjurisprudenz*).<sup>158</sup>

### C. Reception of the Free Law Movement in the United States

Turning to the influence on American realism, Roscoe Pound was vital in bringing the free law movement ideas into American jurisprudence.<sup>159</sup> Pound read the free law literature and he expanded on the concept of "living law," by distinguishing between the "law in the books" and "law in action."<sup>160</sup> There is some evidence of Jhering's direct influence on Pound where Pound draws upon Jhering's notion of law as a means to an end, infusing the debate over whether law is made or found.<sup>161</sup>

There were other American jurists who promoted the free law movement ideas. First, Albert Kocourek<sup>162</sup> drew upon Gény, Ehrlich, and Kantorowicz to summarize the "free law position."<sup>163</sup> Second, John Chipman Gray<sup>164</sup> cited Jhering and Savigny twen-

155. Gustav Radbruch, *Gesetzliches Unrecht und übergesetzliches Recht*, 1 SÜDDEUTSCHE JURISTEN-ZEITUNG 105 (1946). See, Curran, *supra* note 94, at 151–53 (describing the debate about formalism and anti-formalism in post-war Germany); Hubert Rottleuthner, *Legal Positivism and National Socialism: A Contribution to a Theory of Legal Development*, 12 GER. L.J. 100 (2011) (discussing various historical legal developments, including the influence of legal positivism on German jurist).

156. Grechenig & Gelter, *supra* note 2, at 352–53 (describing the development in Germany); Hofmann, *supra* note 103, at 317–19 (pointing out similarities between Heck's *Interessenjurisprudenz* and Roscoe Pound's "sociological jurisprudence").

157. *Id.* at 354.

158. *Id.* at 354–55.

159. See generally HULL, *supra* note 1.

160. Klaus A. Ziegert, *Introduction to the Transaction Edition* of EUGEN EHRLICH ET AL., FUNDAMENTAL PRINCIPLES OF THE SOCIOLOGY OF LAW xxxix (Walter L. Moll trans., Transaction Publishers rev. ed. 2002).

161. See generally RUDOLF VON JHERING, LAW AS A MEANS TO AN END (Isaac Husik trans., Bos. Book Co. 1913).

162. Herget & Wallace, *supra* note 106, at 426. Albert Kocourek was the Professor Emeritus of Law in the Northwestern University School of Law. He was also an Editor-in-Chief of the Illinois Law Review, and he "advocated both for local law journals and for a move to cooperative or regional publication for the general law reviews." Dawn Clark Netsch & Harold D. Shapiro, *Histories: 100 Years and Counting*, 100 NW. U. L. REV. 1, 14 n.54 (2006). See also Editorial Notes, 19 ILL. L. REV. 161 (1924). Some of his famous works include: *Evolution of law*, *Philosophy of Law*, and *Primitive and Ancient Legal Institutions*.

163. Herget & Wallace, *supra* note 106, at 426.

164. See JOHN CHIPMAN GRAY, THE NATURE AND SOURCES OF THE LAW 62 (Aldershot, 2nd ed. 1997) John Chipman Gray was a scholar of property law and a Professor at Harvard Law School. Stephen A. Siegel, *John Chipman Gray and the Moral Basis of Classic Legal Thought*, 86 IOWA L. REV. 1513, 1528 (2001). He was also the co-founder of the well-known law firm of Ropes & Gray. *Id.* at 1527. Gray is known for: *Restraints on*

ty-four times in his book, *The Nature and Sources of Law*.<sup>165</sup> Third, Benjamin Cardozo<sup>166</sup> cited Pound, Géný, Ehrlich, Kantorowicz, Gray and Jhering in his famous book, *The Nature of the Judicial Process*.<sup>167</sup>

The inception of the realist movement in the United States is thought to have started with a “speech given by Professor Herman Oliphant to the annual meeting of the Association of American Law Schools in 1927.”<sup>168</sup> This speech was a “call to action by legal academics to storm the barricades of formalism and to breathe new life and realism into their scholarship.”<sup>169</sup>

However, Oliphant’s speech only cited a select group of other realists, if at all. The speech barely referenced Pound and it failed to mention German juristic influence. Why was German jurisprudence downplayed? There are several reasons for this. First, German scholarship was unpopular due to the anti-German sentiment surrounding World War I. The social and political atmosphere of the time, namely the growing threat of World War II, made the belief in the legal institution popular. After all, Hitler’s idea of the “State” above all incited fear that legal realism could threaten the legal system in the United States. Second, many legal scholars were not proficient in the German language. Third, citing to German scholarship was avoided because those ideas had already been absorbed into the works of Pound and Llewellyn.<sup>170</sup> Furthermore, around this time, Pound was often not cited because of a scholarly debate with Llewellyn that had the immediate effect of casting Pound “in the role of an anti-realist in the eyes of contemporaries,” and “by the time the movement caught on in the United States, Pound’s own thinking had moved beyond realism.”<sup>171</sup>

#### PART IV. RUDOLF VON JHERING’S INFLUENCE ON THE LIFE AND WORK OF KARL LLEWELLYN

##### A. *Dismissal of German Jurisprudence*

Commentary on American realism mainly attributed realist theories to other American realists.<sup>172</sup> This could be a reflection of the anti-German sentiment of the time, an

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*the Alienation of Property, The Nature and Sources of the Law, and The Rule Against Perpetuities. Id.* at 1528–29.

165. *See id.* Gray’s book dealt with the theory of law, in so far that it defined the “nature of the law in terms of its analytical scope, expanding the number of sources and narrowing the concept of law.” THE PHILOSOPHY OF LAW: AN ENCYCLOPEDIA 33 (Christopher B. Gray ed., 1999). Gray’s analysis includes Friedrich von Savigny’s version of historical jurisprudence based on judicial discretion. *See id.*

166. Benjamin Cardozo studied law at Columbia Law School for two years and after a successful career as an attorney, he was elected to a fourteen-year term on the New York Supreme Court in 1913. RICHARD POLENBERG, THE WORLD OF BENJAMIN CARDOZO: PERSONAL VALUES AND THE JUDICIAL PROCESS I (Harvard Univ. Press ed. 1997). Later, he served on the Supreme Court from 1932 until his death six years later in 1938. *Id.* at 3.

167. *See id.* at 2. In his renowned work, Cardozo immediately posed the question: “What is it that I do when I decide a case?” *Id.* The answer really depends on a multitude of factors: whether precedent is applicable, what sources of information are available, consideration of the social welfare, and opinions of justice and morals to name a few.

168. Herget & Wallace, *supra* note 106, at 431.

169. *Id.*

170. *See generally* HULL, *supra* note 1.

171. Herget & Wallace, *supra* note 106, at 433.

172. *See, e.g.,* ERWIN HEXNER, STUDIES IN LEGAL TERMINOLOGY (Chapel Hill ed., Univ. of N. C. 1941).

ignorance of German language, or the reception of these ideas into the scholarship of the first American realists.

Llewellyn's later works express no homage to Jhering, and indeed Llewellyn's "autobiographical accounts of his intellectual development place relatively little stress on his connections with Germany."<sup>173</sup> One can argue that Llewellyn's German acculturation and early interpretations of the works of German jurists make it obvious that Llewellyn was, to some extent, under German influence. Llewellyn's years in Mecklenburg were full, vibrant and must have helped him to build a basis to expand his thinking about jurisprudence later on, enabling him to make full use of developments in German jurisprudence, which had reached an early peak during that period, for his own work. At the time of Llewellyn's visits, German private law theory had been profoundly influenced by Jhering's legacy, and this influence was also apparent in the German scholars with whom Llewellyn interacted. To suggest that Llewellyn's early years as a jurist were not influenced by von Jhering does not diminish the great contributions made by Karl Llewellyn. Perhaps Llewellyn subconsciously denied his German influences because he was unaware of how much German jurisprudence was integrated into his life. Or, perhaps Karl Llewellyn consciously rejected German influence for fear that this would have a negative effect on his career.

Furthermore, there is little room to argue that Llewellyn was insulated from the major German affairs of the time, particularly involving the legal theory of Jhering. First, Llewellyn was influenced by Jhering's crusade against conceptual jurisprudence: "Llewellyn's antipathy to conceptual jurisprudence is legendary," and "[h]is campaign against the use of 'heavenly concepts' to solve real problems is reminiscent of the struggle . . . of Rudolf von Jhering."<sup>174</sup> Jhering viewed his juristic works as "akin to the work of alchemists . . . driven by purpose, not invisible concepts;" therefore, Jhering pointed out that "the life of the law was experience, not logic," and "maintained that "law had to be functional."<sup>175</sup>

Second, Llewellyn expanded on ideas similar to those of Jhering, one being the promotion of purposive interpretation. Llewellyn learned of purposive interpretation through his study of Jhering, who was one of its greatest exponents.<sup>176</sup> As a result, Llewellyn believed that "[t]he language of a statute was relative, not absolute" and that it "had to be understood in terms of its context."<sup>177</sup> Both jurists espoused that "law was a means to preselected social ends, and that statutes could not be adequately understood by references only to plain meaning and usage."<sup>178</sup>

Third, Llewellyn's views on the judicial function echoed Jhering's philosophy. Llewellyn's work emphasized that law is merely a prediction of what the courts will ac-

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Before 1933, Professor Hexner referenced works to German sources, and during 1933 to 1935, his main sources were English publications. Many see this shift as Hexner's allegiance to American public opinion and the political turmoil in Nazi Germany.

173. TWINING, *supra* note 11, at 108.

174. Shael Herman, *Llewellyn the Civilian: Speculations on the Contribution of Continental Experience to the Uniform Commercial Code*, 56 TUL. L. REV., 1125, 1162 (1982).

175. *Id.* at 1162–63.

176. *Id.* at 1135–36.

177. *Id.* at 1136.

178. *Id.* at 1135–36.



tually do. Instead, the legal actors should apply rules more scientifically and the judicial law-creating process should be investigated by jurists. In order to derive these conclusions, Llewellyn drew from “Jhering’s discoveries in the area of latent legal rules and legal fictions.”<sup>179</sup>

Finally, Jhering’s inspiration is most recognizable in the Uniform Commercial Code, though the features may only be cognizable to lawyers trained in the civil law.<sup>180</sup> Additionally, “[t]he whole modern American growth of administrative agencies, such as boards and commissions, from the Interstate Commerce Commission to the National Labor Relations Board, owes much to Jhering’s gospel of purpose and interest.”<sup>181</sup> These agencies used the UCC to “accomplish some particular social purpose or correct some particular social abuse, but they [were] designed to fulfill their tasks without observing all the techniques and procedures of the conventional legal system.”<sup>182</sup>

For instance, Section 2-615 of the UCC, “The Doctrine of the Failure of Presupposed Conditions” is based on a situation posed by Jhering that was later resurrected by Bernhard Windscheid, and later by Paul Oertmann, as *Geschäftsgrundlage* [basic assumption of the parties].<sup>183</sup> While drafting the UCC, it is fair to conclude that Llewellyn knew of *Geschäftsgrundlage* because he was a visiting professor in Germany at the time when the doctrine was still much discussed.<sup>184</sup>

#### PART V. CONCLUSION

Rudolf von Jhering’s influence on Karl Llewellyn and the American realist movement was substantial and meaningful. Jhering was the first jurist in Germany to set the free law movement in motion, which largely and directly influenced the American realist movement. As a leader of this realist movement, Llewellyn played a major role in redefining how there is room to interpret the law. The German jurists, and particularly Jhering, strongly influenced Llewellyn because Llewellyn held close, personal ties to Germany and its culture. His legal works and constant interactions encouraged his acceptance into the German legal community. The American and German Realism movement shared similarities despite the development of American anti-German sentiment upon the rise of Adolf Hitler, and Nazism. While this development caused the link between German jurisprudence and realism in America to be purposely broken, Rudolf Von Jhering, and other German jurists, undoubtedly helped to shape and motivate what is known today as American Legal Realism.

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179. Konrad Zweigert & Kurt Siehr, *Jhering’s Influence on the Development of Comparative Legal Method*, 19 AM. J. COMP. L. 215, 228 (1971).

180. See Seagle, *supra* note 80, at 88 (discussing Jhering’s influence on American realists); see also Whiteman, *supra* note 11.

181. Seagle, *supra* note 80, at 88.

182. *Id.*

183. Riesenfeld, *supra* note 82, at 5.

184. *Id.* at 6.