The invention of economic jurisprudence. From Jhering to Posner

Stephan Vesco*

Contents

* Stephan Vesco is an independent attorney and legal researcher based in Vienna. His biography can be accessed here: https://rechtsphilosophie.univie.ac.at/team/emeriti-ehem-mitarbeiterinnen/vesco-stephan/zur-person/

University of Vienna Law Review, Vol. 5 No 1 (2021), pp. 82-101, https://doi.org/10.25365/vlr-2021-5-1-82.

I. Introduction

In the wake of American *law & economics*, some well accomplished monographs on economic jurisprudence have been written, some of which also include its historical foundations.[1] However, I am not aware of any that attempt to trace the origin of jurisprudence's economization in modern private legal thought itself and to develop it from there along its own normative claims and intrinsic tensions. This, admittedly in a very abstract way, is the claim to originality of my dissertation project "The invention of economic jurisprudence – From Jhering to Posner" of which this paper shall provide an accentuated account. This requires further substantiation and clarification of the terms and intentions that are at stake here.

By "invention" I mean a multi-stage transformation that takes private law from conceptual rationality and the postulate of freedom and equality to economic logic. Private law thereby becomes, according to my thesis, *for itself* what it has been *in itself*.[2] Accordingly, in Savigny's time, autonomous private jurisprudence inspired by Kant and Locke may still have aimed at the establishment of a state-free sphere between the free and the equal, and thus may have functioned as a fundamental rights equivalent.[3] But at the same time, it was already interwoven with economic purposes, with the fulfillment of the needs of "life" and trade, as Jhering, who at that time still thought in terms of legal concepts, put it.[4] By the "postconceptual" Jhering of the 1860s onward and later with Hayek's theory of law and *law & economics*, these objectives become clearer and finally emerge as the decisive ones. They lead private law to economic efficiency and maximization as its actual core content.

---

[1] For the German speaking world cf. for instance Horst Eidenmüller, *Effizienz als Rechtsprinzip. Möglichkeiten und Grenzen der ökonomischen Analyse des Rechts* (Tübingen: Mohr Siebeck, 1995) or Klaus Mathis, *Effizienz statt Gerechtigkeit? Auf der Suche nach den philosophischen Grundlagen der Ökonomischen Analyse des Rechts*, 3rd ed. (Berlin: Duncker & Humblot, 2009). The recourse to historical foundations is more prominent in the latter.

[2] I owe this Hegelian formulation of my project's reconstructive orientation to a remark by Prof. Alexander Somek.

[3] Cf. Dieter Grimm, *Recht und Staat der bürgerlichen Gesellschaft* (Frankfurt a.M.: Suhrkamp, 1987), p. 208.

[4] Cf. Rudolph von Jhering, *Geist des römischen Rechts auf den verschiedenen Stufen seiner Entwicklung*, vol. 2, sec. 1 (Leipzig: Breitkopf & Härtel, 1854), pp. 33, 70.

University of Vienna Law Review, Vol. 5 No 1 (2021), pp. 82-101, https://doi.org/10.25365/vlr-2021-5-1-82.

II. Reconstructive & critical claim

This change in private law is, of course, also linked to a historical process in which the *economy* intensifies its power to shape society and acquires an *undoubted leading role*. This process begins in the second half of the 19th century with an epoch of unprecedented economic growth, often referred to as the "golden era"[5] of capitalism (the "Gründerzeit" in Germany and Austria-Hungary[6], but also the so-called "gilded age" in the USA). During this period, not only the first world exhibitions, the great engineering constructions and inventions took place, but also economics began to establish itself as an independent science built around the paradigms of efficiency and maximization and formulated in technical-mathematical terms. Through the theory

[5] Hobsbawm dates the "golden era" of capital to the years 1848-1873 (cf. Eric J. Hobsbawm, *Die Blütezeit des Kapitals 1848-1875* (Das lange 19. Jahrhundert, vol. 2; Darmstadt: Theiss / WBG, 2017)). In 1848 the last general revolution occurred in the West, and from about 1850 onwards the new world of business cycles and exponential economic growth began (cf. Hobsbawm, *Die Blütezeit des Kapitals*, pp. 45 ff.). In 1873, there was the stock market crash in Vienna, which spread across the countries of the then industrializing world. The period in the years that followed was initially referred to as the "Great Depression", although this does not correspond to the facts and was subsequently withdrawn (and reserved for the period of the 1930s). After all, especially in Germany, where industrialization had just begun, the economy recovered rapidly as early as 1877 and grew even faster in the 1890s by developments in the electrical industry (see Maurice Dobb, *Entwicklung des Kapitalismus. Vom Spätfeudalismus bis zur Gegenwart*, 2nd ed. (Köln / Berlin: Kiepenheuer & Witsch, 1972), pp. 310 f.). In the U.S., the "expansion of the frontiers", which offered opportunities for investment and markets, as well as a large labor reserve due to immigration and population growth, but also railroad construction and other developments in technology and engineering, were decisive factors for sustained growth, each interrupted only briefly (cf. Dobb, *Entwicklung des Kapitalismus*, p. 311; on the "gilded age" (c. 1870 to 1900) and the then prevailing enthusiasm for the "marvels" of engineering and the idea of physical equilibrium, see also Herbert Hovenkamp, *The Opening of American Law. Neoclassical Legal Thought, 1870-1970* (Oxford: Oxford University Press, 2015), 30 f.). Accordingly, the "golden era" of capitalism in my work is understood as the entire period of the second half of the nineteenth century and the early twentieth century, which was overall characterized by high growth rates and technical developments (the difficult determination of an end point could be made with the beginning of the First World War, as a turning point that finally leads to the first real "great" depression of the 1930s; the period of the "imperial age" distinguished by Hobsbawm (cf. Eric J. Hobsbawm, *Das imperiale Zeitalter 1875-1914* (Das lange 19. Jahrhundert, vol. 3; Darmstadt: Theiss / WBG, 2017)) would thus also be included in the "golden era").

[6] On the "pulsating" character of Vienna during Jhering's stay between 1868 and 1872, see Michael Kunze, 'Rudolf von Jhering – ein Lebensbild', in Okko Behrends (ed.), Rudolf von Jhering. Beiträge und Zeugnisse aus Anlaß der einhundertsten Wiederkehr seines Todestages am 17.9.1992, 2nd ed. (Göttingen: Wallstein, 1993), 11-28, pp. 18.

University of Vienna Law Review, Vol. 5 No 1 (2021), pp. 82-101, https://doi.org/10.25365/vlr-2021-5-1-82.

of marginalism[7] it experienced decisive imprints.[8] It is precisely *the impact of this process*[9] *in the theoretical conceptualization of private law* that is the essential content of the reconstructive claim of my project.

Connected to this, however, is a critical claim. Each stage characterized in my work postulates that the ideals of freedom and equality cannot only be reconciled with the economic imperative but indeed are best served by it. The irredeemability of this postulate will have to be demonstrated again and again by highlighting its tensions and contradictions. Connected with this critique the political nature of private law shall be carved out, normatively shaping society towards certain goals. This will also be shown by the fact that normative goals change within economic legal thinking according to different definitions of efficiency.

---

[7] Which was founded and developed by Jevons (see William Stanley Jevons, *The Theory of Political Economy*, 3rd ed. (London: Macmillan, 1888), see there esp. the 2nd chapter, Theory of Pleasure and Pain, pp. 28 ff. and the 3rd chapter, Theory of Utility, pp. 37 ff.), Menger (see Carl Menger, *Grundsätze der Volkswirtschaftslehre* (Wien: Braumüller, 1871), see there esp. the 3rd chapter, Die Lehre vom Werthe, pp. 77 ff.), Walras (see Léon Walras, *Elements of Pure Economics or The Theory of Social Wealth* (London: Routledge, 2003), see there esp. the 8th chapter, Utility Curves or Want Curves. The Theorem of Maximum Utility of Commodities, pp. 115 ff., and the 36th chapter, The Marginal Productivity Theorem. Expanding Output. The Law of General Movements in a Progressive Economy, pp. 382 ff., as well as the subsequent chapters) and others.

[8] Cf. Hovenkamp, *The Opening of American Law*, pp. 34 f, 77 f.

[9] Cf. also Luhmann's thesis of a change of "societal leadership" from politics to the economy which is characterized as "revolution of the modern era" (cf. Niklas Luhmann, *Ausdifferenzierung des Rechts. Beiträge zur Rechtssoziologie und Rechtstheorie* (Frankfurt a.M.: Suhrkamp, 1999), p. 32. This change would make possible the democratization of politics and the full positivization of law by generating structuring problem specifications from outside of the political system (cf. Luhmann, *Ausdifferenzierung des Rechts*, pp. 32, 150). The market and money mechanism, Luhmann argues, is now assigned the leading role because it is most capable of maintaining very high complexity (cf. Luhmann, *Ausdifferenzierung des Rechts*, pp. 149 f., fn 78). Elsewhere, he even speaks of a "usurpation" of society by a subsystem as a necessary precondition for the process of social evolution (cf. Niklas Luhmann, *Rechtssoziologie*, vol. 1/2, 3rd ed. (Opladen: Westdeutscher Verlag, 1987), p. 244). In fact, it is only the "late" Luhmann who, by completing the paradigm shift from the concept of environmental openness to the concept of self-reference (cf. Luhmann, *Rechtssoziologie*, preface to the 2nd edition), designs a radicalized conception of autonomy of systems of equal rank and thus bids farewell to the primacy of the economy (cf. Luhmann, *Ausdifferenzierung des Rechts*, p. 150) initially advocated (for the new understanding of the econonmy as one subsystem amongst others cf. Niklas Luhmann, *Die Wirtschaft der Gesellschaft* (Frankfurt a.M.: Suhrkamp, 1996), see for instance pp. 9, 11). Of course, it is interesting to note and taken up in my work that Luhmann's development of thought is precisely in opposition to the strengthening of the economy's leadership and the increase of the heterenomy or allopoiesis of the law observed in Jhering and through this study.

University of Vienna Law Review, Vol. 5 No 1 (2021), pp. 82-101, https://doi.org/10.25365/vlr-2021-5-1-82.

III. Reasons for the selection of the characterized stages

As far as the selection of the stages characterized here is concerned, it is related, on the one hand, to explicit references between the authors in their texts.[10] Above all, however, it is determined by the fact that they each mark positions in the dialectical process of economizing jurisprudence. In this process, economic efficiency of law is first brought in indeterminately from outside (Jhering), then again conceived as inherent in common law and its concepts (Hayek), and finally transposed into private law as its new but true dogmatics (Posner as a representative of *law & economics*). Admittedly, this study cannot claim to present a globally uniform development, which as such an endeavour would be doomed to failure because of the differences between the Anglo-Saxon and continental European traditions. In fact, however, this study's course from Germany (and Austria) to the United States is not random at all but follows the shift of academic centers of knowledge production. Just as Jhering had a significant influence on American jurisprudence[11], *law & economics* is now having an impact on European jurisprudence[12], although in these parts, especially in Austria, a replacement of the old legal dogmatics is not yet foreseeable.

IV. From Formalism to Finalism; or rather the interplay of self-determination and teleology

If, in order to describe the thematic change in private law thought, one looks for criteria inherent in it, then, following Kantorowicz, the opposites of *formalism* and *finalism*, which he considered decisive for the history of jurisprudence in general[13], seem the appropriate choice. According to Kantorowicz, the pendulum of jurisprudence would swing back and forth between these poles in historical periods

[10] Cf. below (see fn 22 and 27).

[11] Cf. in exemplary fashion, the authoritative reference of Cohen's Realist classic "Transcendental Nonsense" to Jhering's "coming to terms" with conceptual legal thought in his "Scherz und Ernst" (see Felix S. Cohen, 'Transcendental Nonsense and the Functional Approach' (1935) 35/6 Columbia Law Review 809-849, see there esp. right at the beginning, p. 809; cf. Rudolph von Jhering, *Scherz und Ernst in der Jurisprudenz. Eine Weihnachtsgabe für das juristische Publikum*, reprint of the 13th ed. (Darmstadt: Wissenschaftliche Buchgesellschaft, 1992), see there the 3rd Section, Im juristischen Begriffshimmel. Ein Phantasiebild, pp. 245-333.

[12] Cf. Klaus Mathis, *Law and Economics in Europe. Foundations and Applications* (New York / Wien: Springer, 2014).

[13] Cf. Hermann Kantorowicz, 'Die Epochen der Rechtswissenschaft', in Kantorowicz, *Rechtshistorische Schriften* (ed. by Helmut Coing and Gerhard Immel; Karlsruhe: Verlag C.F. Müller, 1970), p. 1-14.

University of Vienna Law Review, Vol. 5 No 1 (2021), pp. 82-101, https://doi.org/10.25365/vlr-2021-5-1-82.

since ancient Rome.[14] After great epochs of finalism in scholasticism and rationalism, the third and newest form of finalism is attributed to none other than Jhering, after his abandonment of the formalism he first advocated.[15]

Picking up on this, the economization of private law thinking, which is the subject of my work, can be described as the interplay of two elements. However, the characteristic of the formal element is seen here, on the one hand, in the autonomy or *self-determination* of law, which can be negated in various ways or also transferred to other instances. On the other hand, the final element (here essentially synonymously referred to as *teleology*) is understood in such a way that it can itself likewise assume a formal or dogmatic character. Thus, the contrast reconstructed does not only accentuate itself between (legal) formalism and (economic) finalism, but also between legal and economic formalism.

The course of the reconstruction carried out according to these characteristics can be sketched out in the following lines.

V. From Jhering to Posner

A. Jhering

In his "first phase", it is Jhering himself who ascribes *self-determination* and *teleology* as essential qualities to law. Self-determination here refers to the *autonomy* of law and its concepts, by which the liberal conception of a society of autonomous spheres is anticipated. The autonomous motion of law is further conceived *teleologically*, both in terms of law itself, insofar as every newly developed concept is understood as an actualization of a potential inherent in law, and in terms of external effects, insofar as the development of law is conceived as having a kind of intentionality for the best possible realization of individual and societal needs – essentially freedom of choice and economic prosperity.[16] The normative claim of this legal model lies exclusively in the development of the legal concepts themselves and the purpose contents allegedly inherent in them. This formalistic understanding of private law has recently been revitalized by the Canadian legal scholar Ernest Weinrib, who emphasizes

[14] Cf. Kantorowicz, 'Die Epochen der Rechtswissenschaft', p. 1.

[15] Cf. Kantorowicz, 'Die Epochen der Rechtswissenschaft', p. 14.

[16] Jhering develops this legal model mainly in the second part of his "Geist des römischen Rechts", see Rudolph von Jhering, *Geist des römischen Rechts*, vol. 2, sec. 1 and vol. 2, sec. 2 (Leipzig: Breitkopf & Härtel, 1858).

University of Vienna Law Review, Vol. 5 No 1 (2021), pp. 82-101, https://doi.org/10.25365/vlr-2021-5-1-82.

precisely the law's autonomy and exclusive orientation toward the production of its own conceptual forms as its decisive features[17], and who is currently at the center of transatlantic debates.[18]

However, Jhering himself already perceives this model (*1.1*) as defective in a kind of crisis experience[19] which is also phrased in terms of pure formalism's inaptness to fulfil the purposes of industrialized society.[20] This perceived failure, however, led Jhering to modify the aforementioned model which can also be understood as attempts at rescue. It is to be noted that with regard to the characteristics of self-determination and teleology, one is abandoned in favor of the other.

The first attempt at rescue – essentially to be located in Jhering's struggle for law (*Model 1.2*) – leaves law its autonomous movement but prevents its overshooting by binding it back into itself. This reconnection takes place through a closed-loop conception of law in which concrete (subjective) and abstract (objective) law supply each other with "life" and "force"[21] and thus mutually support and stabilize each other. The movement of law is directed to the mere reproduction of the legal order,

---

[17] Cf. Ernest J.Weinrib, *The Idea of Private Law* (Oxford: Oxford University Press, 2012).

[18] Another representative of this "private law idealism" of the newer school, also teaching in Canada, is Ripstein, cf. for instance Arthur Ripstein, *Private Wrongs* (Cambridge, MA / London: Harvard University Press, 2016) (see critically John Gardner, 'Private Authority in Ripstein's *Private Wrongs*' (2016) 14/1 *Jerusalem Review of Legal Studies* 52–63). In his habilitation thesis, just published in 2015, Rödl not only undertook an exposition of Weinrib's and Ripstein's main theses, but also attempted, taking into account domestic debates, to introduce their reception in German, see Florian Rödl, *Gerechtigkeit unter freien Gleichen. Eine normative Rekonstruktion von Delikt, Eigentum und Vertrag* (Baden-Baden: Nomos, 2015) (see also the thoroughly critical reviews by Lorenz Kähler, 'Pluralismus und Monismus in der normativen Rekonstruktion des Privatrechts. Zu Florian Rödls „Gerechtigkeit unter freien Gleichen"', Stefan Arnold, 'Freiheit, ausgleichende Gerechtigkeit und die Zwecke des Privatrechts', Bertram Lomfeld, 'Der Mythos vom unpolitischen Privatrecht', Peer Zumbansen: 'Wessen Herzschlag höre ich da? Den des Rechtssubjekts oder den des Markts? Fragen anlässlich Rödls »Gerechtigkeit unter freien Gleichen. Eine normative Rekonstruktion von Delikt, Eigentum und Vertrag«', all in Michael Grünberger and Nils Jansen (Hg.), *Privatrechtstheorie heute* (Tübingen: Mohr Siebeck, 2017), pp. 118-136, 137-150, 151-169, 170-177 respectively.

[19] Described and jurisprudentially processed by Jhering in one of his most famous articles, cf. Rudolph von Jhering, 'Über den Sinn des Satzes: Der Käufer trägt die Gefahr, mit besonderer Beziehung auf den Fall des mehrfachen Verkaufes' (1859) 3 Jahrbücher für die Dogmatik des heutigen römischen und deutschen Privatrechts 449-488, regarding the experience of a crisis see esp. p. 451. The impetus came from a legal case under commercial law for which a legal opinion by Jhering was commissioned (cf. pp. 451-453) and which he was not able to solve satisfactorily in terms of conceptual logic.

[20] Cf. Rudolph von Jhering, *Geist des römischen Rechts*, vol. 3, sec. 1, 8th edn. (Basel: Benno Schwabe & Co, 1954), p. 321.

[21] Rudolph von Jhering, *Der Kampf ums Recht*, 21st ed. (Wien: Manz, 1925), p. 47.

University of Vienna Law Review, Vol. 5 No 1 (2021), pp. 82-101, https://doi.org/10.25365/vlr-2021-5-1-82.

disregarding other purposes. It can be understood as a "defensive" strategy that seeks to save the autonomy of law in the face of industrial capitalism.

The other attempt at rescue – which is essentially to be found in Jhering's late two-volume work "Der Zweck im Recht"[22] (*Model 1.3*) – leaves law its purpose-driven progressive development, but prevents its overshooting by tying it to another carrier and place of origin: the bourgeois society. This is conceived as naturally unfolding towards its own well-being, i.e. in terms of utilitarian maximization.[23] This modification can be understood as an "offensive" strategy that actively seeks to adapt the law to industrial society, sacrificing the legal form to the pure teleology of social welfare.

At the conclusion of Jhering's legal thought it can thus be observed that with the legal form also freedom of choice and the spheres of action warranted by it are eliminated.

B. Hayek

The neoliberal approach developed after World War II, as exemplified by Hayek, attempts to oppose this. Even if Hayek's explicit references to Jhering are limited[24], this approach explicitly sees itself as a critique of rationalist, collectivist and utilitarian models of society. Hayek reproaches them in equal measure, apparently for not leaving enough room for individual self-determination, and argues that collectivism of any kind always and necessarily leads to servitude and dictatorship (the title of his book "The Road to Serfdom" is tellingly programmatic). His theory of law, which I have examined as *Model 2*[25], can be reconstructed precisely as an attempt to reconcile

[22] Cf. Rudolph von Jhering, *Der Zweck im Recht*, vol. 1, 3rd ed. (Leipzig: Breitkopf & Härtel, 1893) and vol. 2, 1st ed. (Leipzig: Breitkopf & Härtel, 1883).

[23] The main reference for Jhering is, in fact, Bentham. He though distinguishes his model from Bentham's by dubbing his one as a "societal" utilitarianism whilst (arguably mis-)comprehending Bentham's utilitarianism as merely individual-oriented, cf. Jhering, *Der Zweck im Recht*, vol. 2, p. 211.

[24] But see for instance Friedrich A. Hayek, 'Rechtsordnung und Handelnsordnung', in Hayek, *Rechtsordnung und Handelnsordnung. Aufsätze zur Ordnungsökonomik* (ed. by Manfred E. Streit; Tübingen: Mohr Siebeck, 2003) 88-119, p. 58 f., there see especially fn 33 on p. 59; Friedrich A. Hayek, *Die Verfassung der Freiheit* (Tübingen: Mohr Siebeck, 1991), fn 25 on p. 306 with reference to Jhering, *Zweck I*, p. 421 f.; see further ibid., 301; see also Hayek, 'Rechtsordnung und Handelnsordnung', fn 49 on p. 70.

[25] The most comprehensive elaboration of a theory of law was undertaken by Hayek in his "Law, Law and Freedom" (cf. Friedrich A. Hayek, *Recht, Gesetz und Freiheit. Eine Neufassung der liberalen Grundsätze der Gerechtigkeit und der politischen Ökonomie* (ed. by Viktor Vanberg; Tübingen: Mohr Siebeck, 2003)). However, it is the aim of my study and of the chapter on Hayek to reconstruct

University of Vienna Law Review, Vol. 5 No 1 (2021), pp. 82-101, https://doi.org/10.25365/vlr-2021-5-1-82.

individual self-determination with economic maximization, in a way that both are bracketed together in the form of private-law contracts of exchange and the corresponding rules of conduct.

In doing so, Hayek seems to return to Jhering's first model (conceptual formalism), in the sense of a private-law based system of rules of conduct. However, a splitting into several levels takes place here. *Dogmatics* no longer determines itself out of itself but is understood as *determined by an (overlying) evolutionary force*. In doing so, it retains a *teleological content* but reduces it to a single normative purpose external to the law itself, namely the alleged *self-determination of the individual* (which manifests itself primarily in economic terms). Through the exertion of the latter and the market processes that are thereby actualized, the individual conversely contributes to the stabilization of order.[26] By recourse to the roots of the Hayekian model in Scottish liberalism, it can be shown that the orientation towards the reproduction of the established legal and economic order and the *generation of economic growth* is indeed the *decisive* one. For this model, individual self-determination is of instrumental value only; it thus fails by its own normative claims. In this respect, Hayek's liberally justified dogmatism ultimately *tips over into a kind of utilitarianism*. However, it is no longer the classical utilitarianism of Jhering, but one that has already abandoned the criterion of measurability and comparability of utility values in favor of an economic valuation that is merely subjectively produced and expressed in exchange processes. *Maximization*, accordingly, is then achieved *when all individually desired exchange processes have been carried out*. It is utilitarianism in the version of *Pareto-efficiency*[27], which in Hayek's model is still hidden under a liberal façade.

---

his conception of law as far as possible from his complete work and its various set pieces (which also contain the theory of evolution and psychology).

[26] In other words, one could say that people act according to a *latent* teleology, which remains alien to themselves, that they, without knowing, *functionally* bring about social harmony and economic prosperity through their own actions.

[27] Paretoeffiency, in the shortest possible definition, values any change that makes someone better off *without making someone else worse off* as an economic improvement (cf. Mathis, *Effizienz statt Gerechtigkeit?*, p. 49). As such, however, it can be (and indeed is) closely linked to the conditions of an ideal market insofar as it is assumed that "free" exchange contracts would lead to an improvement of the position of the exchangers (otherwise they would not enter into the exchange contract) without worsening the position of others (cf. Mathis, *Effizienz statt Gerechtigkeit?*, p. 51).

University of Vienna Law Review, Vol. 5 No 1 (2021), pp. 82-101, https://doi.org/10.25365/vlr-2021-5-1-82.

C. Posner

Finally, *law & economics*, which emerged in the 1960s, explicates and formulates the efficiency-oriented thinking that Hayek had already articulated in the form of legal dogmatics in economic terms (*Model 3*)[28]. In this way, however, it explicitly turns against Hayek's attempt to revitalize liberalism[29] and ultimately returns to Jhering's utilitarian attempt to modify legal thinking.[30] With the economic formulation of private law, both the old legal dogmatics and the principle of exchange are finally left behind. Both now really come under the scrutiny of economic efficiency and cannot withstand it. In this respect, Posner is right when he writes that the principle of exchange and free consent are only the operational but not the theoretical basis of *Pareto-efficiency*. As soon as another principle is found that is better for economic maximization, the grounding in exchange processes is invalidated. This other principle emerges as the *Kaldor/Hicks criterion*. According to this criterion, a measure is considered to increase efficiency even if it has monetary disadvantages for certain individuals as long as those who are enriched by this measure could *hypothetically* compensate the losers (and a total advantage after compensation would still remain). *Actual* compensation is by no means required.[31]

---

[28] That is, in the final result, in those of the Kaldor/Hicks criterion or "wealth maximization". Law is now to be explicitly and exclusively explained and shaped according to these. The main references here are Richard Posner's approaches. Besides the other texts mentioned below and his textbook "Economic Analysis of Law" (cf. Richard A. Posner, *Economic Analysis of Law*, 3rd edn. (Boston: Little, Brown, 1986) two articles are of central relevance: Richard A. Posner, 'Utilitarianism, Economics, and Legal Theory' (1979) 8/1 The Journal of Legal Studies 103-140 and Richard A. Posner, 'Wealth Maximization Revisited' (1985) 2/1 Notre Dame Journal of Law, Ethics and Public Policy 85-105.

[29] Posner's case against Hayek's model is, inter alia, that it excessively curtails the discretion of judges by strictly binding them to the common law and its traditional terminology. Accordingly, it would not allow for judges or legislators to conduct a distinct economic analysis, cf. Richard A. Posner, *The Problems of Jurisprudence* (Cambridge, MA / London: Harvard University Press, 1993), p. 60; Richard A. Posner, *Law, Pragmatism, and Democracy* (Cambridge, MA / London: Harvard University Press, 2003), p. 280.

[30] In so far as it enables the economic "processing" and breaking of legal conceptual forms and associated private freedom spheres in order to maximize an overall value. This is essentially the effect of applying the Kaldor/Hicks criterion, see George P. Fletcher, *Basic Concepts of Legal Thought* (New York / Oxford: Oxford University Press, 1996), p. 161 f. Besides this utilitarian expression of Posner's theory, it also owes heavily and admittedly to the (American) pragmatist tradition, cf. Posner, *The Problems of Jurisprudence*, p. 27 f.

[31] Cf. Eidenmüller, *Effizienz als Rechtsprinzip*, p. 51.

University of Vienna Law Review, Vol. 5 No 1 (2021), pp. 82-101, https://doi.org/10.25365/vlr-2021-5-1-82.

How does this legal model now relate to Jhering's original criteria? Can it be described by them at all? Certainly, for, on the one hand, it is clearly *teleological* in its orientation toward *wealth maximization*. On the other hand, it is also self-determining. The instance which *determines itself* is just no longer the law, but the *economy*. With Jhering and Hayek, dogmatics still take up the impulses of the intensifying economic domination as external and try to transfer them into internal modifications. Whereas, with *law & economics* or Posner, *law internalizes* these impulses and transforms them, precisely as *economic efficiency* in the sense of the Kaldor/Hicks criterion, into its own "spirit" or normative content. In this way, it can again adopt the abstract criteria of dogmatics, and the recalibration of private-law thinking since Jhering's "crisis" comes to a conclusion. This economic thinking also operates formalistically. The struggle for efficiency is not an empirical assumption but a counterfactual principle that is consistently upheld.[32] In contrast to formal legal dogmatics, however, this thinking does not tolerate autonomous systems next to it but is the sole explanatory principle.

VI. The true character of self-determination and teleology

The reconstruction outlined here reveals the actual character of the criteria of *self-determination* and *teleology*. They *are assigned to law and economy themselves*, it is they who determine themselves respectively and are construed for the pursuit of purposes inherent to them. The *self-determination of individuals* merely plays a *subordinate, instrumental role*. Also, in the development of legal models examined here, the *teleological moment* on the whole emerges as the *ultimately decisive one in comparison with self-determination*. The latter has liberal implications, in Jhering's autonomous legal model, insofar as it represents a precursor of the complex

[32] Accordingly, the *homo oeconomicus* is less a description of empirical reality, but rather its reduction and abstraction (cf. Mathis, *Effizienz statt Gerechtigkeit?*, p. 28) in order to explain (cf. Gebhard Kirchgässner, *Homo Oeconomicus. Das ökonomische Modell individuellen Verhaltens und seine Anwendung in den Wirtschafts- und Sozialwissenschaften*, 3rd edn. (Tübingen: Mohr Siebeck, 2008), p. 3,7) and predict reality (cf. Milton Friedman, 'The Methodology of Positive Economics', in Friedman, *Essays in Positive Economics* (Chicago / London: Chicago University Press, 1953) 3-43, p. 15).

University of Vienna Law Review, Vol. 5 No 1 (2021), pp. 82-101, https://doi.org/10.25365/vlr-2021-5-1-82.

liberalism of Luhmann's social theory[33] of independent (autopoietic) subsystems[34]; or explications, insofar as Hayek, in his recourse to "classical" Scottish liberalism, claims to combine political restraint with individual freedom. Whereas, teleology as a characteristic of law is close to utilitarianism already *ex definitione* (because of its consequentialism). Utilitarianism, in fact, at the latest in *law & economics* can be determined as the decisive mode of thinking for the reconceptualization of private law at work from the beginning of this reconstruction. Its three stages can ultimately be understood as three forms of utilitarianism: Jhering's final model (*1.3*) as classical utilitarianism aiming at the overall maximization of social utility, Hayek's model as the "anticipation"[35] of Pareto efficiency derived immanently from the law, *law & economics* as economic dogmatism built around the Kaldor/Hicks criterion or wealth maximization. Contrary to the egalitarian tenets of conceptual rationality, self-determination and liberalism, what emerges is a model of economic maximization that is in truth non-, if not anti-egalitarian. The short-circuiting of the pursuit of ends with economic calculation is, of course, not my own postulate but the result of the observed development in formal legal thinking through which other possible pursuits of goals are eliminated.

VII. Law & economics as private law taken to its logical conclusion

The elaboration of the systematic connection between the formalism of private law and the utilitarianism of *law & economics* also amounts, as already mentioned, to the thesis that the latter is basically private law taken to its logical conclusion. Since Jhering's "crisis", there have been other attempts at a systematic reconceptualization

[33] Such, in any case, is my understanding of systems theory, quasi as seen through Walzer's glasses (cf. Michael Walzer, *Spheres of Justice. A Defense of Pluralism and Equality* (New York: Basic Books, 1983). Luhmann himself, concededly, would have his problems with this attribution, for it would probably mean the description of systems theory from the partial perspective of the political subsystem and in its semantics.

[34] For one of his most extensive accounts, cf. Niklas Luhmann, *Soziale Systeme. Grundriss einer allgemeinen Theorie* (Frankfurt a.M.: Suhrkamp, 1987).

[35] Vilfredo Pareto's efficiency criterion, which later became known as the "Pareto criterion" (cf. Vilfredo Pareto, *The Mind and Society*, vol. 4 (London: Jonathan Cape, 1935), sec. 2127 -2129., pp. 1465-67), dates back to the 1910s. For legal theory, however, it acquired an explicit relevance only with *law & economics*. What regards Hayek's theory of law, he admittedly excludes giving criteria of economic efficiency distinctive consideration, since he generally rules out a transformation of the law to be carried out by a technocratic legislator; on the other hand, however, his thesis that a law consisting purely of rules of property and exchange is necessarily the most efficient law can very well and precisely be reconstructed as an implicit articulation of Pareto efficiency (in connection with the assumption of an ideal market cf. above, fn 25).

University of Vienna Law Review, Vol. 5 No 1 (2021), pp. 82-101, https://doi.org/10.25365/vlr-2021-5-1-82.

of law, but most of them are situated critically against and outside private-law dogmatics and range from classical Marxist approaches[36] to deconstruction-trained *critical legal studies*[37]. My dissertation project could at best relate to these in terms of its own questions. It claims as its object a general change in legal thinking that transcends the content of private law, but it wants to reconstruct it primarily *in and from private law*. In her habilitation thesis "Der privatrechtliche Diskurs der Moderne" ("The Private Law Discourse of Modernity"), published in 2014, Marietta Auer distinguishes between two different ways of conceptually processing the irritation of classical legal dogmatics by an externality that she locates in the "social" or the "public". One possibility would be to theoretically exclude or marginalize it, the other to transform the dogmatics and its concepts themselves.[38] Auer exemplarily elaborates on this in terms of property and its increasing restrictions since the 19th century. These, on the one hand, would typically be excluded from property law dogmatics, for instance by the concept of the "reservation of statutory powers" (*Gesetzesvorbehalt*)[39], and on the other hand, beginning with Jhering's demand for a different, "social" concept of property[40], would lead to shifts within dogmatics.[41] My approach is to focus entirely on the second perspective and processing method, the – to use Auer's words again – "dissolution of boundaries from within"[42], while claiming, of course, that the "dissolution of boundaries from the outside"[43] is reflected in it.

VIII. Making visible the political nature of private law

As already mentioned, connected with this reconstructive claim is a critical one. It aims at revealing the normative implications of private law and its political character,

---

[36] Cf. fundamentally Jewgeni B. Paschukanis, *Allgemeine Rechtslehre und Marxismus Versuch einer Kritik der juristischen Grundbegriffe* (Wien: Verlag für Literatur und Politik, 1929).

[37] Cf., for instance, Mark Kelman, *A Guide to Critical Legal Studies* (Cambridge, MA / London: Harvard University Press, 1987).

[38] Cf. Marietta Auer, *Der privatrechtliche Diskurs der Moderne* (Tübingen: Mohr Siebeck, 2014), pp. 130 ff.

[39] Cf. Auer, *Der privatrechtliche Diskurs der Moderne*, pp. 131, 136.

[40] Cf. Auer, *Der privatrechtliche Diskurs der Moderne*, p. 133; see Jhering, Zweck I, pp. 519, 523, 526 f.

[41] Cf. Auer, *Der privatrechtliche Diskurs der Moderne*, p. 142.

[42] Auer, *Der privatrechtliche Diskurs der Moderne*, p. 165.

[43] Auer, *Der privatrechtliche Diskurs der Moderne*, p. 166.

University of Vienna Law Review, Vol. 5 No 1 (2021), pp. 82-101, https://doi.org/10.25365/vlr-2021-5-1-82.

namely as one that does not merely allow life by creating abstract spaces of freedom, but also *makes life*[44], that is, proactively shapes society toward certain normative goals. These goals are, of course, not constant but shift with the different recourses to economic thinking, or rather with the changing definition of the efficiency criterion. My reproduction of this shift in legal thinking wants to be understood, in all modesty, as a study of the *reflection in legal thinking of changes which themselves transcend the law*. Thus, a line of thought is recalled which assumes a shift from private law to public law taking place in the 19th and especially in the 20th century and wants to explain it in terms of a development leading from freedom to social responsibility.[45] In her habilitation thesis, Auer has subjected this approach to a critical revision which allows her to understand the modern development of private law essentially as (this is her actual thesis) a *reflexivity of private law to its own foundations*. The development of private law is thus conceived as a discursive process of enlightenment, in which the principle of autonomy and its piercings complement each other.[46] Not least, this conception is based on the narrative of the rise of the welfare state. However, the historical development points into a different direction. The achievements of the welfare state are about to be dismantled, its heyday, the *Trente Glorieuses*, appearing in retrospect almost only as an interlude in the gigantic process of capitalist economization and accumulation that has been underway since the 1850s at the latest. My approach consists in adhering to this process, or, rather, proving that the development of private law in its reflexive dimension can be narrated more plausibly and more profitably for the critical interest as a reflection of such process than by a (more or less) idealizing disguise.

IX. Recalling and refreshing the heritage of Legal Realism

In this respect, it is also a concern to build on the critical and progressive heritage of Legal Realism. "You see how the vague circumference of the notion of duty shrinks and at the same time grows more precise when we wash it with cynical acid and expel

[44] Cf. Michel Foucault, *Der Wille zum Wissen. Sexualität und Wahrheit,* vol. 1, *Der Wille zum Wissen* (Frankfurt a.M.: Suhrkamp, 1977), p. 165: "One could say that the old right [of the sovereign, my annotation] to make die or let live is replaced by a power to make live or expel into death" (translated from the German text).

[45] Cf., for instance, the classical piece by Franz Wieacker, *Das Sozialmodell der klassischen Privatrechtsgesetzbücher und die Entwicklung der modernen Gesellschaft* (Juristische Studiengesellschaft Karlsruhe Schriftenreihe, Heft 3; Karlsruhe: Verlag C.F. Müller, 1953); cf. also the references to it in *Auer*, Der privatrechtliche Diskurs der Moderne, pp. 1, 4 f., 135 ff.

[46] Cf. Auer, Der privatrechtliche Diskurs der Moderne, pp. 46 f., 60 ff.

University of Vienna Law Review, Vol. 5 No 1 (2021), pp. 82-101, https://doi.org/10.25365/vlr-2021-5-1-82.

everything except the object of our study, the operations of the law", Holmes wrote in "The Path of the Law" in 1897[47], thus, as its pioneer, laying the foundations for *American Legal Realism*. Through a very sober view of the law, which Holmes famously described as that of a "bad man"[48], it is possible to detach one's subjection to the law from normative overload and to reduce it to a minimum. This view of the law is already of an inherently economic character in Holmes: the "bad man" adheres to the law only if and insofar as it is more profitable to do so than refusing to obey it.[49] In *law & economics*, this reductive view is linked to a fundamentally progressive political agenda.[50] Following Michael Green, this link can be understood in the sense that Legal Realism, by depriving jurisprudence of the pretense of a morality inherent in legal concepts, commits it to a moral scrutiny of decisions (and their consequences) in the proper sense.[51] Would it not be possible, under certain circumstances, to conceive of *law & economics* as a continuation of this tradition understood in this way?

Should such attempt not be misleading, it will, in any case, succeed only if the economic school of law itself is freed from its own dogmatism and given a new realism. How this could be achieved can be shown tentatively on the basis of *behavioral law & economics*[52] and the economic branch of *critical legal studies*[53]. Whilst *behavioral law & economics*, by its methodology of nudging[54], ultimately inscribes itself into the project of economic liberalism and its "mobilization" and "utilization" of decisions based on subjective will, *critical legal studies* more radically

[47] Oliver Wendell Holmes Jr., 'The Path of the Law' (1897) 10/8 *Harvard Law Review* 457-478, pp. 461 f.

[48] Cf. Holmes, The Path of the Law, pp. 459-461.

[49] Cf. Holmes, The Path of the Law, pp. 459. Pointing to the "kinship" between homo economicus and the "bad man", see also Eidenmüller, Effizienz als Rechtsprinzip, p. 36.

[50] Cf. Michael S. Green, 'Legal Realism as Theory of Law' (2005) 46/6 *William & Mary Law Review* 1915-2000, p. 1968.

[51] Cf. Michael S. Green, 'Legal Realism as Theory of Law' (2005) 46/6 *William & Mary Law Review* 1915-2000, p. 1970 ff.

[52] For a comprehensive and recent overview cf. Eyal Zamir and Doron Teichmann, *Behavioral Law and Economics* (Oxford: Oxford University Press, 2018).

[53] As represented, amongst others, by Mark Kelman and Duncan Kennedy.

[54] Cf. Cass R. Sunstein, 'Nudging: A Very Short Guide' (2014) 37/4 Journal of Consumer Policy, 583–588.

University of Vienna Law Review, Vol. 5 No 1 (2021), pp. 82-101, https://doi.org/10.25365/vlr-2021-5-1-82.

scrutinize and bring into question the assumptions of economy-oriented thinking by showing the lack of coherence and definiteness of its efficiency criteria.[55]

X. Conclusion

Along these lines, the reconstruction ends on a positive note. The *contents of an economic analysis* are not theoretically fixed but *variable* and *accessible to political design*. An economic analysis of law with other normative contents, such as one that considers the distributive consequences of legal provisions[56], is possible. With this thesis of the political formability of law, this *other analysis* would, on the one hand, take up the legacy of *Legal Realism* in order to reactivate its progressive potential, and, on the other hand, free itself from dogmatism in its most diverse manifestations. Indeed, private-law formalism, whether articulated in (early Jhering's) precursory terms of systems theory or "pareto-liberally", has proven to be an all too compliant mediator of efficiency-oriented thinking, while efficiency thinking itself has proven to be the new dogmatism with the same constraints of an allegedly inescapable logic.

XI. Bibliography

Stefan Arnold, 'Freiheit, ausgleichende Gerechtigkeit und die Zwecke des Privatrechts', in Michael Grünberger and Nils Jansen (ed.), *Privatrechtstheorie heute* (Tübingen: Mohr Siebeck, 2017) 137-150.

Marietta Auer, *Der privatrechtliche Diskurs der Moderne* (Tübingen: Mohr Siebeck, 2014).

Felix S. Cohen, 'Transcendental Nonsense and the Functional Approach' (1935) 35/6 Columbia Law Review 809-849.

Hanoch Dagan and Avihay Dorfman, 'Just Relationships' (2016) 116 *Columbia Law Review* 1395-1460.

Maurice Dobb, *Entwicklung des Kapitalismus. Vom Spätfeudalismus bis zur Gegenwart*, 2nd edn. (Köln / Berlin: Kiepenheuer & Witsch, 1972).

[55] Cf. Duncan Kennedy, 'Cost-Benefit Analysis of Entitlement Problems: A Critique' (1981) 33/3 Stanford Law Review 387–445, p. 388 f.

[56] Cf. Duncan Kennedy, 'law-and-economics from the perspective of critical legal studies', in Peter Newman (ed.), *The New Palgrave Dictionary of Economics and the Law* (Houndsmills, Basingstoke / London: Palgrave Macmillan, 1998) 2:465-474, p. 473.

Horst Eidenmüller, *Effizienz als Rechtsprinzip. Möglichkeiten und Grenzen der ökonomischen Analyse des Rechts* (Tübingen: Mohr Siebeck, 1995).

George P. Fletcher, *Basic Concepts of Legal Thought* (New York / Oxford: Oxford University Press, 1996).

Michel Foucault, *Der Wille zum Wissen. Sexualität und Wahrheit,* vol. 1*, Der Wille zum Wissen* (Frankfurt a.M.: Suhrkamp, 1977).

Milton Friedman, 'The Methodology of Positive Economics', in Friedman, *Essays in Positive Economics* (Chicago / London: Chicago University Press, 1953) 3-43.

John Gardner*,* 'Private Authority in Ripstein's *Private Wrongs*' (2016) 14/1 *Jerusalem Review of Legal Studies* 52–63.

Michael S. Green, 'Legal Realism as Theory of Law' (2005) 46/6 *William & Mary Law Review* 1915-2000.

Dieter Grimm, *Recht und Staat der bürgerlichen Gesellschaft* (Frankfurt a.M.: Suhrkamp, 1987).

Friedrich A. Hayek, *Die Verfassung der Freiheit* (Tübingen: Mohr Siebeck, 1991).

Friedrich A. Hayek, 'Liberalismus', in Hayek, *Grundsätze einer liberalen Gesellschaftsordnung. Aufsätze zur Politischen Philosophie und Theorie* (ed. by. Viktor Vanberg; Tübingen: Mohr Siebeck, 2002).

Friedrich A. Hayek, *Recht, Gesetz und Freiheit. Eine Neufassung der liberalen Grundsätze der Gerechtigkeit und der politischen Ökonomie* (ed. by Viktor Vanberg; Tübingen: Mohr Siebeck, 2003).

Friedrich A. Hayek, 'Rechtsordnung und Handelnsordnung', in Hayek, *Rechtsordnung und Handelnsordnung. Aufsätze zur Ordnungsökonomik* (ed. by Manfred E. Streit; Tübingen: Mohr Siebeck, 2003) 88-119.

Eric J. Hobsbawm, *Die Blütezeit des Kapitals 1848-1875* (Das lange 19. Jahrhundert, vol. 2; Darmstadt: Theiss / WBG, 2017).

Eric J. Hobsbawm, *Das imperiale Zeitalter 1875-1914* (Das lange 19. Jahrhundert, vol. 3; Darmstadt: Theiss / WBG, 2017).

Oliver Wendell Holmes Jr., 'The Path of the Law' (1897) 10/8 Harvard Law Review 457-478.

Herbert Hovenkamp, *The Opening of American Law. Neoclassical Legal Thought, 1870-1970* (Oxford: Oxford University Press, 2015).

University of Vienna Law Review, Vol. 5 No 1 (2021), pp. 82-101, https://doi.org/10.25365/vlr-2021-5-1-82.

William Stanley Jevons, *The Theory of Political Economy*, 3rd edn. (London: Macmillan, 1888).

Rudolph von Jhering, *Der Kampf ums Recht*, 21st edn. (Wien: Manz, 1925).

Rudolph von Jhering, *Der Zweck im Recht*, vol. 1, 3rd edn. (Leipzig: Breitkopf & Härtel, 1893).

Rudolph von Jhering, *Der Zweck im Recht*, vol. 2, 1st edn. (Leipzig: Breitkopf & Härtel, 1883).

Rudolph von Jhering, *Geist des römischen Rechts auf den verschiedenen Stufen seiner Entwicklung*, vol. 2, sec. 1 (Leipzig: Breitkopf & Härtel, 1854).

Rudolph von Jhering, *Geist des römischen Rechts auf den verschiedenen Stufen seiner Entwicklung*, vol. 2, sec. 2 (Leipzig: Breitkopf & Härtel, 1858).

Rudolph von Jhering, *Geist des römischen Rechts auf den verschiedenen Stufen seiner Entwicklung*, vol. 3, sec. 1, 8th edn. (Basel: Benno Schwabe & Co, 1954).

Rudolph von Jhering, *Scherz und Ernst in der Jurisprudenz. Eine Weihnachtsgabe für das juristische Publikum*, reprint of the 13th edn. (Darmstadt: Wissenschaftliche Buchgesellschaft, 1992).

Rudolph von Jhering, 'Über den Sinn des Satzes: Der Käufer trägt die Gefahr, mit besonderer Beziehung auf den Fall des mehrfachen Verkaufes' (1859) 3 Jahrbücher für die Dogmatik des heutigen römischen und deutschen Privatrechts 449-488.

Lorenz Kähler, 'Pluralismus und Monismus in der normativen Rekonstruktion des Privatrechts. Zu Florian Rödls „Gerechtigkeit unter freien Gleichen"', in Michael Grünberger and Nils Jansen (Hg.), *Privatrechtstheorie heute* (Tübingen: Mohr Siebeck, 2017) 118-136.

Mark Kelman, *A Guide to Critical Legal Studies* (Cambridge, MA / London: Harvard University Press, 1987).

Hermann Kantorowicz, 'Die Epochen der Rechtswissenschaft', in Kantorowicz, *Rechtshistorische Schriften* (ed. by Helmut Coing and Gerhard Immel; Karlsruhe: Verlag C.F. Müller, 1970) 1-14.

Duncan Kennedy, 'Cost-Benefit Analysis of Entitlement Problems: A Critique' (1981) 33/3 Stanford Law Review 387–445.

University of Vienna Law Review, Vol. 5 No 1 (2021), pp. 82-101, https://doi.org/10.25365/vlr-2021-5-1-82.

Duncan Kennedy, 'law-and-economics from the perspective of critical legal studies', in Peter Newman (ed.), *The New Palgrave Dictionary of Economics and the Law* (Houndsmills, Basingstoke / London: Palgrave Macmillan, 1998) 2:465-474.

Gebhard Kirchgässner, *Homo Oeconomicus. Das ökonomische Modell individuellen Verhaltens und seine Anwendung in den Wirtschafts- und Sozialwissenschaften*, 3rd edn. (Tübingen: Mohr Siebeck, 2008).

Michael Kunze, 'Rudolf von Jhering – ein Lebensbild', in Okko Behrends (ed.), Rudolf von Jhering. Beiträge und Zeugnisse aus Anlaß der einhundertsten Wiederkehr seines Todestages am 17.9.1992, 2nd edn. (Göttingen: Wallstein, 1993) 11-28.

Bertram Lomfeld, 'Der Mythos vom unpolitischen Privatrecht', in Michael Grünberger and Nils Jansen (Hg.), *Privatrechtstheorie heute* (Tübingen: Mohr Siebeck, 2017) 151-169.

Niklas Luhmann, *Ausdifferenzierung des Rechts. Beiträge zur Rechtssoziologie und Rechtstheorie* (Frankfurt a.M.: Suhrkamp, 1999).

Niklas Luhmann, *Rechtssoziologie*, vol. 1/2, 3rd edn. (Opladen: Westdeutscher Verlag, 1987).

Niklas Luhmann, *Soziale Systeme. Grundriss einer allgemeinen Theorie* (Frankfurt a.M.: Suhrkamp, 1987).

Niklas Luhmann, *Die Wirtschaft der Gesellschaft* (Frankfurt a.M.: Suhrkamp, 1996).

Klaus Mathis, *Effizienz statt Gerechtigkeit? Auf der Suche nach den philosophischen Grundlagen der Ökonomischen Analyse des Rechts*, 3rd edn. (Berlin: Duncker & Humblot, 2009).

Klaus Mathis, *Law and Economics in Europe. Foundations and Applications* (New York / Wien: Springer, 2014).

Carl Menger, *Grundsätze der Volkswirtschaftslehre* (Wien: Braumüller, 1871).

Vilfredo Pareto, *The Mind and Society*, vol. 4 (London: Jonathan Cape, 1935).

Jewgeni B. Paschukanis, *Allgemeine Rechtslehre und Marxismus Versuch einer Kritik der juristischen Grundbegriffe* (Wien: Verlag für Literatur und Politik, 1929).

Richard A. Posner, *Economic Analysis of Law*, 3rd edn. (Boston: Little, Brown, 1986).

University of Vienna Law Review, Vol. 5 No 1 (2021), pp. 82-101, https://doi.org/10.25365/vlr-2021-5-1-82.

Richard A. Posner, *Law, Pragmatism, and Democracy* (Cambridge, MA / London: Harvard University Press, 2003).

Richard A. Posner, 'The Ethical and Political Basis of the Efficiency Norm in Common Law Adjudication' (1980) 8/3 Hofstra Law Review 487-507.

Richard A. Posner, *The Problems of Jurisprudence* (Cambridge, MA / London: Harvard University Press, 1993).

Richard A. Posner, 'Utilitarianism, Economics, and Legal Theory' (1979) 8/1 The Journal of Legal Studies 103-140.

Richard A. Posner, 'Wealth Maximization Revisited' (1985) 2/1 Notre Dame Journal of Law, Ethics and Public Policy 85-105.

Arthur Ripstein, *Private Wrongs* (Cambridge, MA / London: Harvard University Press, 2016).

Florian Rödl, *Gerechtigkeit unter freien Gleichen. Eine normative Rekonstruktion von Delikt, Eigentum und Vertrag* (Baden-Baden: Nomos, 2015).

Cass R. Sunstein, 'Nudging: A Very Short Guide' (2014) 37/4 Journal of Consumer Policy, 583–588.

Léon Walras, *Elements of Pure Economics or The Theory of Social Wealth* (London: Routledge, 2003).

Michael Walzer, *Spheres of Justice. A Defense of Pluralism and Equality* (New York: Basic Books, 1983).

Franz Wieacker, *Das Sozialmodell der klassischen Privatrechtsgesetzbücher und die Entwicklung der modernen Gesellschaft* (Juristische Studiengesellschaft Karlsruhe Schriftenreihe, Heft 3; Karlsruhe: Verlag C.F. Müller, 1953).

Ernest J.Weinrib, *The Idea of Private Law* (Oxford: Oxford University Press, 2012).

Eyal Zamir and Doron Teichmann, *Behavioral Law and Economics* (Oxford: Oxford University Press, 2018).

Peer Zumbansen: 'Wessen Herzschlag höre ich da? Den des Rechtssubjekts oder den des Markts? Fragen anlässlich Rödls »Gerechtigkeit unter freien Gleichen. Eine normative Rekonstruktion von Delikt, Eigentum und Vertrag«', in Michael Grünberger and Nils Jansen (Hg.), *Privatrechtstheorie heute* (Tübingen: Mohr Siebeck, 2017) 170-177.

University of Vienna Law Review, Vol. 5 No 1 (2021), pp. 82-101, https://doi.org/10.25365/vlr-2021-5-1-82.