Translation

The Battle for Legal Science

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Foreword

A new movement has come to legal science. It strikes self-awareness into the minds of all jurists who falsely believe their deeds fully consistent with their ideals. It pierces and destroys these delusions and undertakes now, in light of new, less modest ideals, to justify our constant activity to ourselves: the creation of law. Yet, no matter how audibly our movement is simultaneously heralded in various fields, it still lacks unity and awareness of its power. Therefore, we venture an attempt here to summon all its best forces into unity: an attempt that deliberately ignores everything that separates discrete writers from one another, a unity that does not expect itself to be the system of any one person, nor the program of all of them, and therefore acts on its own responsibility.

It is unreasonable to demand complete conceptual clarity; no new movement has ever known exactly what it wanted, or wanted exactly what it achieved. Nor is it desirable to require from a manifesto, which must rush through the broadest fields in the shortest time, that everything be carefully reasoned and fully developed. We must take satisfaction from referring to what has already been achieved by the quills of our like-minded, and to that still expected to be. We have only been a bit more detailed where we had something distinct and new to offer (for example, in conceptualizing natural law, highlighting the voluntaristic movement, and presenting the logical and teleological debates). Lastly, we leave it to others to show in detail the contributions that this or that intellectual claims to have fathered within the realm of ideas presented herewith.

May this work recruit new fighters in the struggle for the liberation of legal science, for the assault on the last bastion of scholasticism.

Germany, February 1906

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[*] A pseudonym for Hermann Kantorowicz (1877-1940). The essay was most recently republished as HERMANN KANTOROWICZ, DER KAMPF UM DIE RECHTSWISSENSCHAFT (1906) (Berliner Wissenschafts-Verlag, 2002).

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Introduction

The reigning ideal image of the jurist is as follows: a higher civil servant with academic training, he sits in his cell, armed only with a thinking machine, certainly one of the finest kinds. The cell's only furnishing is a green table on which the State Code lies before him. Present him with any kind of situation, real or imaginary, and with the help of pure logical operations and a secret technique understood only by him, he is, as is demanded by his duty, able to deduce the decision in the legal code predetermined by the legislature with absolute precision.

This ideal, foreign to the Romans of Pax Romana, arose during their great political decline under the tyrannical rule of godlike emperors. The Middle Ages and the Renaissance disseminated it into theory, but denied it in practice and sometimes also in the legislature: they entrusted judges and scholars with the continuation and transformation of the law. Only the centralized bureaucratic state of modern absolutism once again conferred efficacy to the Byzantine ideal and provided the desired theoretical basis to Montesquieu's doctrine of the separation of legislative and judicial power. How completely wrong it was to have attributed this doctrine and its application to England's legal life is demonstrated by the free position which the judge has been granted since time immemorial and by the horror still felt today by the people of the Anglo-Saxon culture from this ideal. Continental Europe, however, not only made this ideal its own, but also moved it straight to the heart of its political beliefs and buttressed it with that most intense security of quasi-religious consecration. It has certainly never been lacking of adversaries, particularly in France; though in Germany some can also be mentioned: those among the stragglers of natural law, particularly Kirchmann,[1] and for completely different motives, Catholic legal philosophers; then Jhering[2] in his later period, who, like a meteor passing overhead, is likely to have left a deep impression, but no lasting effect. Then, later, voices appeared in the desert, particularly Kohler, Bülow (*Gesetz und Richteramt*, 1885), and G. Rümelin (*Werturteile und Willensentscheidungen*, 1891).[3] But only in the last few years has the

[1] Julius von Kirchmann (1802–1884) was a German jurist and philosopher. Kantorowicz mentions him in reference to his breakthrough work *Die Wertlosigkeit der Jurisprudenz als Wissenschaft* (1848).

[2] Rudolf von Jhering (1818–1892) was a German jurist and sociologist of law. The title of Kantorowicz's manifesto is likely to have been taken from Jhering's influential work, *Der Kampf ums Recht* (1872).

[3] Josef Kohler (1849–1919) was a German jurist who wrote extensively on comparative law, civil law, and the philosophy of law; Oskar Bülow (1837–1907) was a German jurist and legal scientist; Gustav von Rümelin (1848–1907) was a German legal scientist who taught Roman law at Universität Freiburg.

situation fundamentally changed: since Stammler[4] set the philosophy of law's skiff afloat again and Ehrlich[5] redirected its rudder toward the new target, voices have been rising from all sides—from theory and practice, in legal philosophy and jurisprudence, in public and private law, in Germany and France—voices, that, growing daily in number and determination, preach the conversion of jurisprudence. This new movement, which we may now call so, because it is no longer in the form of the isolated voices, but instead has emerged for the first time as a movement, has the characteristic of any true movement—namely, the multiple, independent generations of nearly all its current ideas in the air. It aims at removing no less than the entire previous ideal and erecting in all respects the exact opposite one. So then, lacking an appreciation for historical values, this movement seems radical, and as such, like every radical movement, is doomed to failure. But that does not seem to be the case, for we unanimously hold the conviction that the battle has not constitutive, but declarative significance. We should merely acknowledge what has unconsciously—even if for that reason, imperfectly—always and everywhere has been practiced: we need only express what *is*.

In the appendix, we have collected writings in which the friends of our movement have come forward *ex professo* (expressly)—excluding the older writings in which no demonstrable connection remains, those insignificant or possibly even compromising to the movement, those based on the conditions posed by Catholic legal philosophy, and finally, the works—no doubt many—which as a result of the deplorable lack of lack of bibliographies and journals in legal philosophy, are now unknown to us.

But still far more important than the approbations of scholars appears to be the fact that thousands of judges and lawyers are aligned with the new view, a fact that has not prominently come to the fore for the simple fact that these practitioners, unfortunately, do not consider it worthwhile to get heated over what for them has always been an obvious doctrine.

Let us now look at three stages of this new conception of law, legal science, and judicature, excluding new ideas about the nature and technology of legislation—lamentably, their theoretical foundations, despite the efforts of Zitelmann[6] and Kohler, have hardly been laid.

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[4] Rudolf Stammler (1856–1938) was a German philosopher of law who was critical to the promotion of pedagogical reform in the instruction of law around the turn of the twentieth century.

[5] Eugen Ehrlich (1862–1922) was an Austrian jurist and sociologist of law who departed from Hans Kelsen's views by emphasizing the plurality of social, cultural, and political forces constituting legal authority.

[6] Ernst Zitelmann (1852–1923) was a German jurist and professor at Universität Bonn who wrote on matters concerning the fallible juridical subject (see *Die juristische Willenserklärung* (1878) and *Irrtum und Rechtsgeschäft* (1879)) as well as the German Civil Code.

The New Conception

The new conception of law presents itself as a resurrection of natural law in renewed form. The positivism of the nineteenth century, which had emerged triumphant over natural law, dogmatized its conviction that there is no other kind of law than that recognized by the state. Natural law was pursued right down to its last hiding place, fed by the belief that the teachings of natural law were to be condemned because it dreamed of a universally valid law, unconditioned by the statute—that is to say, an absurdity. In the destruction of this image, no one noticed that nothing but an entirely meaningless description was being provided, that natural law was only being characterized by what it was *not*, because, according to assumption, it absolutely *couldn't* be that vainly-imagined, immutable law. But what had *really* been stipulated in a thousand works of the realm of thought—that question was never asked. We need but a simple "straightening out" to recognize how simple the answer is: namely, that natural law was a law that claimed to be valid independently from state power. Whilst we indicate every such law to be a *free law*, we may also characterize natural law first and foremost as a particular type of free law. Natural law itself does not assume its characterization as a universally valid law, but rather its *conception* by natural law makers, who in assuming the possibility of such a law not as jurists, but, following the opinion of the times, as philosophers, were mistaken. The law itself was (as Gierke[7] and Landsberg[8] have shown) just as firmly individually and historically conditioned as any. It is the fact that its philosophical view must have retroactively had a modified influence on its legal activities, as well as others, that fundamentally differs natural law from other contemporary forms of free law in a way that cannot be further elaborated here.

Having thus far separated natural law from its own theory, we appear to have justified our initially established thesis. For whether we look at Stammler's "*Richtiges Recht*" (1902), Ehrlich's "*Freie Rechtsfindung*" (1903), Mayer's[9] "*Kulturnormen*" (1903), Wurzel's[10]

[7] Otto von Gierke (1841–1921) was a German historian who specialized in the history of German law. He wrote on such subjects as natural law in Germany (see *Naturrrecht und Deutsches Recht* (1883)) and the concept of the *Rechtsstaat* (the legal state).

[8] Ernst Landsberg (1860–1927) was a German jurist and professor at Universität Bonn who specialized in the history of German legal science and constitutional law.

[9] Max Ernst Mayer (1875–1923) was a penologist and philosopher of law who, with Gustav Radbruch (one of Kantorowicz's most intimate friends—see Frank Kantorowicz Carter, *Gustav Radbruch and Hermann Kantorowicz: Two friends and a book – Reflections on Gnaeus Flavius's Der Kampf um die Rechtswissenschaft,* 7 GERMAN LAW JOURNAL, 7 (2006)), established the neo-Kantian school of legal philosophy in southwest Germany.

[10] Karl Georg Wurzel (1875–1931) was an Austrian sociologist of law whose work in legal reasoning was well received by American legal realists at the beginning of the twentieth century. Ehrlich was considerably influenced by Wurzel, although later in his career Wurzel thought Ehrlich too preoccupied with establishing a normative system of legal reasoning.

"*Projektion*" (1904), Stampe's[11] "*Interessenwägung*" (1905), or Rümelin's "*Werturteile*" (1891), propositions will always be determined that are certain to assess, complete, develop, or overthrow statutory law. Propositions that as a result of this function cannot be statutory law must be law, and therefore must be free law. We can certainly rob no one the harmless amusement of *naming* only statutory law "law." But then, of course, one would have to make other concessions: deny all the writings about a civil code that hasn't even entered into effect yet, and all the *de lege ferenda* (of the law that should come into force) discussions about the nature of juristic work; one would have to remove natural law—rather, almost the entirety of legal history—from legal history, shyly sneak around the issue of common law, and, finally, invent an entirely new name for free law and subordinate it to a new concept, for it differs just as well (or exactly as poorly) from morals and tradition as the statute.

As much as our free law corresponds with natural law at this central point, it is worth stressing again that our movement's conception of law is forever separate from natural law's. Because we can see the valuable judicial insights of the thinkers of the seventeenth and eighteenth centuries without needing to assume their metaphysical fallacies; for us sons of the nineteenth century, the world is eternally transforming and developing, and our free law is as transient and frail as the stars themselves. In fact, in a secondary respect, our conception of law is opposed to natural law's. The Historical School has taught us to acknowledge all law, and therefore all free law, as such only when it is "positive." We were taught that law exists not in nature, but if and only if a power, a will, an acknowledgement supports it. Our free law is, however, also a natural law—the natural law of the twentieth century. Our legal philosophy has little in common with that of Pufendorf and Wolff. [12]

By applying the same basic means of classification by which we separated free and statutory law to free law only, we recognize its two main forms, individual law and community law, according to which an individual accepts a legal proposition on the basis of either his own convictions or those of a community—although it is not yet out of the question that the same legal proposition could occur in both forms, or as a statutory law. The relationship between the dominions of individual and community law is a large, unresolved issue; therefore, in the following pages we neither care nor are able to more closely specify which of the two types of free law it concerns. But this much is likely established: individual law holds greater meaning for legal science, and community law holds greater meaning for judicature (whereas here we can only suggest the latter's close relation to common law). The division between existing and non-existing law is based on a

[11] Ernst Stampe (1856–1942) was a university professor at Greifswald who specialized in civil law.

[12] Samuel von Pufendorf (1632–1694) was a German jurist and philosopher of natural law; Christian Wolff (1679–1754) was a renowned natural philosopher who was deeply influenced by Leibniz. Wolff considered the logical law of contradiction to be the most fundamental to philosophy—Kantorowicz criticizes this position later in the manifesto.

different principle—determining qualities that could or could not befit statutory as well as free law. Recognizing and wanting or being able to obey are two different things. In what follows, we will identify our thus-far unnamed movement, in an analogy to free religion, as the Free Law Movement.

And this free law, so unexpectedly returning from its disappearance in legal theory, proves itself to be at least equal to statutory law in power and influence. It has the great advantage over statutory law that people are familiar with it. People hardly know statutory law, or more specifically, as M. E. Mayer noted, know it only when it agrees with them, but that is luckily often the case. Here we uncover the first of those fictions, those "placeholders of a better insight" (Merkel[13]), upon which the infrastructure of our legal conception has rested thus far: the fiction that the entire statutory law is known to everyone. This fiction contradicts the facts in the most flagrant way. The truth is that no one knows the law in the entirety of its immense scope—some know it in part, but the majority knows nothing about it. This is so true, that when a private citizen acquires a working knowledge of the statutory law, he usually belongs to a class of dark men of honor: the extortionist, the criminal's apprentice, the hatchet-man, the con-artist know the rules that interest them perfectly; the merchant, the artist, the officer, the statesman, the husband have only an occasional knowledge of the code, even the articles on trade, authorship, state, international, and family law, without being disturbed by the ignorance in their activities. Who could imagine a traveler in a strange land making himself familiar with the language, history, art, folk traditions, simply by opening his civil statutory code? No one! They all live according to free law, according to what strikes the bylaws of their particular domain or their individual judgment not as arbitrary, not as convenient, but as law.

Thus free law cultivates its powerful domains and lives independently from the statutory. But not the other way around. Free law is the basis from which statutory law proceeds. Almost all legislative concepts formerly existed as propositions of free law. All criticism of statutory law, the very means by which it develops further, must by definition be drawn on the basis of free law (which, for the critic, foreign statutory laws also belong to).

The civil code must at last be completed by free law; its gaps must be filled. And here we encounter the dogma of the statutory law's completeness, which found monumental expression in the famous Article 4 of the French *Code civil* (Civil Code):

> "*Le juge, qui refusera de luger, sous prétext du silence, de l'obscurité ou de l'insuffisance de la loi, pourra être poursuivi comme coupable de déni de justice.*" ("The

[13] Paul Merkel (1872–1943) was a German legal scientist and a teacher of criminal law who had connections with both Radbruch and Kantorowicz.

> judge who refuses to pass judgment under pretext of the law's silence, obscurity, or insufficiency, may be prosecuted as guilty of a denial of justice.")

The claims of these gaps' existence are fully incompatible with denials of free law's existence. According to this position, one must arrive effortlessly to the conclusion that whenever the statute cannot offer a decision, a dismissal or an acquittal always follows. There can be no discussion of gaps or their filling in (Zitelmann). Mere mention of them would mean a decision is offered based on free law, one that cannot be provided by the statutory law without accepting some conscious desire on the legislature's part to grant the dismissal or acquittal. Even the widespread theory that admits there are gaps in the statutory code and so demands and anticipates their filling by means of dogmatism is a concession to our view. But we should not take satisfaction from this concession. For it is not the case that gaps in the code are found here and there—no, we can confidently say that there are no fewer gaps than there are words. Not a single concept is dismantled into its smallest units, only a few are defined, these being defined only by other concepts which are themselves undefined. Only an unlikely fate could henceforth make a legal case so widespread that it was represented by all applicable legal concepts down to their sound conceptual cores, instead of only being recognized by their swimming contours. In this situation, the solution to fill in the gaps by means of legal interpretation would be an unnavigable task, even if this means were not as unfit as it will soon show itself to be. Faced with an individual case, only free law, with the spontaneity of its decisions and the emotional clarity of its content, can bring about this filling in, and has, in fact, brought it about. That the lawyer filling in these gaps believes such an activity—undeniably modifying the law—inadmissible, or completely refuses to acknowledge this as its nature, in no way changes that fact. And if the most recent gap-theorist, Zitelmann, most high-exultingly approving of this modifying activity, believes the expression "modification" needs to be "improved," because "at this, conscience strikes" him, then his restriction is so accepted with a knowing smile so common to the legal practitioner: for instead of filling the gaps with a "pre-existing, if perhaps also unknown" legal proposition, these gaps will be filled by free law, and that, to the delighted surprise of all, will subsequently be recognized as a statutory, "if perhaps also unknown," law.

But we ourselves must also improve, if we do not want to fall into the traps of those friends of our movement who want to replace the dogma about the legal code's completeness with a dogma about the completeness of the law, be it free law or otherwise. We assert to the contrary that actually many legal cases permit no legal solution. Here, first, we must leave unaddressed the difficult, perhaps even futile question of whether it is possible that free law contains solutions beyond our recognition. Next, even supposing that free law always provides a recognizable solution, it is not even remotely certain that this solution is universally valid. Rather, it follows that our differences, as no one denies that people are different, especially where they concern

ranking assessments of life values, *have to be* expressed in at least part of the cases by an appropriately different solution. The general state of most controversies demonstrates that they may very well change their appearance over time, but come no closer to a solution. And how could it be otherwise? The individual factor asserts itself in every respect, even in the examples that would amend it. We see again and again that one man promotes a theory whose application provides an acceptable solution in a classroom example, while another rejects the leading theory because he desires the opposite outcome. Consider the problem of the impossibility defense. At a time in which the individual factor is heroically being brought to bear, a science like jurisprudence, always lagging behind the spiritual movement, can completely ignore this element. Yet the opinion must prevail that even in questions of law, a consistent verdict can be no more required and expected than a person can and may be compelled to recognize a storyline as good, or a painting as beautiful, when his deviating individuality necessarily produces a deviant emotional reaction.

But even the hope for such a—granted, subjective—solution to all legal questions is to be abandoned. And here we encounter an unpleasant peculiarity to jurisprudence: judicial megalomania. There isn't a single theoretical or practical science that believes it could be capable, let alone is already capable now, of solving every imaginable problem. Without hesitation, the biologist, the philologist, the historian, the art historian, the astronomer, the aesthete deny that of the questions posed to them, they can answer more than but a tiny part, insignificant when compared to the whole. And not only what concerns the minutia, but in many cases also in regards to the most fundamental questions and theories. Indignant, they would reject the possibility of answering every conceivable biological, historical, physical, *etc*. question at exams (*e.g.* What is the temperature of the star Alpha Cygni? What would have happened had Ramses the Great discovered America? Kindly enumerate, how, when, and where were Apelles's paintings destroyed? How is a visual impression propagated in the optic nerve, and how is it brought to cognition? Does Beethoven's instrumentation correspond with his treatment of beauty to a greater extent than Skopas's treatment of garment? Why isn't the canary green?) Even proud mathematics acknowledges that frequently it must stop after taking a first step, such as when solving a high-order mathematical equation. And even logic, since joining the mathematical band wagon, finds itself put on the threshold of unsolvable problem chains. Jurisprudence alone, because of its alleged systematic perfection, deigns to be able to solve every real and every imaginable problem, and demands this ability from every last one of its disciples. And yet it is hardly alone. The quack doctor, who finds the diagnosis even in the darkest case, and the treatment in the most desperate diagnosis, or the priest, who brazenly charges the penitent with God-willed atonement for each of his misconducts—they are models of the fatal cronyism that drags the dogmatic jurist down his path. Instead of first asking the question of whether a case is solvable at all, we throw ourselves into the discussion blind and certain of victory. The heroes of natural science have not the faculties to solve the Problem of Three Bodies; an assessor solves a hundred souls' problems every day. But indeed it hardly needs to be confirmed, given the rancid

complexity of social contexts, opposing economic interests, and the incompleteness of the civil code, that in a thousand cases the question would be offered a decisive "No." And our skepticism with respect to the problems of free law is perfectly called for, as the norms it is ensconced in form as little a system as statutory law does: the results of the various cultural epochs and societies formed organically; they are not conceived along a fixed plane, they are often laid for use unchecked and disorganized in the conscious and the subconscious. Should I be met with a complicated case, I strive to bring it under a norm; I must do so—and the more careful the consideration, the more baffling an extent this will be the case. And so must the different sides of the case bring one or another norm to the foreground so that of the values affected by the decision, sometimes the value to be damaged and at others, the value to be enhanced, appears greater. Despite all due efforts, the result will be a silence of moral sense among the honorable. Norms of a different sort, or simply arbitrariness, provide the decision, for, as we know, a decision must be made, and, of course, the benevolent Suggestion[14] simply regards the decision struck as correct, and the legal norm corresponding with it as having been the authoritative power from the beginning. In no way can that be taken from a legal decision, especially not when, as so frequently occurs, the problem is quantitative: when either the concepts employed by the norm aren't quantitatively determinable (*culpa lata* (gross negligence), gross neglect, good cause, *etc.*) or its concepts' applicability collapses at the immeasurability of emotions' size and the lack of common standards for a "weighing of interests."

We are quite pleased with these considerations of the problematic boundary that law and legal science separate, the object of a science that at once contains it. Wherein exists the new conception of legal science?

First, it follows from the above-stated that legal science's relationship to the legal code must be fully dismissed. If the legal code were unveiled in its nakedness, legal science would no longer be able to take pleasure in the role of mere mouthpiece, henchman of the legislature, exhausting himself in self-abnegation. Precisely because the legal code cannot satisfy them, the needs of legal life yearn for other powers—foremost, legal science—to freely and constructively step up to the challenge. Science as the source of law, a concept the old Historical School had often played with, must at last be made resolute. Next, the sciences have to supply their concepts with definitions—not by "construction," but rather by equipping concepts with those features provided by free law propositions. It must fill in the gaps—not by denying all case claims not granted by the code, but by affirming the direction free law indicates. It must clear away those elements of the civil code that have withered away and bring the blooming ones to maturity. And after all of this, the sciences finally and fully cease to be merely "the recognition of the recognized." The task now placed before it is greater, less modest. Free legal determination is where it discovers

[14] This is a reference to Hippolyte Bernheim's advocated method of hypnotism, "suggestion" as a form of psychological therapy.

community law and brings it to application; it rises to free legal creation where it produces individual law and gives it worth. Being the source of law itself, it must then have the same nature as all other sources, and, as law itself, it must be *willed*. With this knowledge, legal science concludes its humanistic course of the nineteenth century and enters its voluntaristic phase. Surely in psychology, history, and other disciplines it makes little sense to put the will in the place of the mind—no, to recognize the will's previously-overlooked role as truly authoritative. Only in legal science can the voluntaristic view celebrate its highest triumphs. Nowhere is the primacy of the will more unquestionable than here, however simple empirical-psychological observations might teach what Schopenhauer's metaphysics of the will, like we ourselves, widely rejects. In truth, it is the will to arrive at a previously provided decision that guides the range of legal positions founded by that decision. Batolus, the most famous of all jurists, is the classic example: history recounts that he made a decision first and then had the body of judicial positions appropriate to them be exhibited by his friend Tigrinius, "because he himself possessed little memory." The relationship between the will and the mind will be obscured everywhere by the fact that the mind *ex post facto* (from after the action) wants know the true circumstances inside-out, and, particularly regarding judicial practice, by the fact that the legal will—fortunately very frequently—demands the result the interpreting mind would have arrived at without its guidance. But who of the two in the long run remains the true driving force becomes obvious as soon as a theoretician or practitioner feels obligated on the basis of his wording of a legal text to deduce a result that strikes in the face an important question of a powerful free legal conviction (an "undesired result"). Among these are those well-known *Reichsgericht* (German Imperial Court) decisions that, recurring from time to time, arouse a storm. Then every time it is the same drama: the will sets a hundred springs in motion, which from this or that legal position and—if need be—by use of time-honored rules of interpretation, arrives at the reverse, "welcome" result in a logically-compelling way. The *Reichsgericht* either adheres to the other theory after a more or less long spell of unwieldiness, or insists on its point of view, which for the most part only occurs when either the free law of the seven *Reichsgericht* counsels contains the same proposition as their legal text, or they have the empirically well-grounded hope that precisely as a result of their inflexibility, our industrious—albeit deliberate—legislation will correctively intervene in the desired sense. Were this machine, as once during the Holy Roman Empire, to cease to operate, the entire practice, up to the high court at the top, would succumb sooner or later to the spirit of the new free law. The most memorable example of this trend, affirmed by all of legal history, is the elimination of that embarrassing court reign during the common law practice of the Enlightenment. Here we encounter the familiar issue of juristic construction. It is at most nothing but a proof that only the application of certain legal concepts grants the desired legal outcome—so the very construction is the consequence of its own consequences. Conversely, the beloved *ad absurdum* (to the absurd) argument against an enemy construction consists in asserting before one's adversary that this or that consequence could not possibly have been intended by the legislature, that the entire basis of such an assumption consists of the further naïve and—of course—completely unintentional assumption that the legislature wants exactly what

the speaker does. By the way, it is not at all necessary to openly condemn unwanted consequences as such. It usually suffices to simply develop them and then leave the reader to reject the construction presented and accordingly settle for the opposite. However, by merely stipulating such a construction, one comes closer to yielding quite unforeseen and undesirable consequences. *Fiat justitia, pereat mundus* (let there be justice though the world perish)—the jurist binds himself to his post and announces proudly: "Here I stand—I can do nothing else." Had one equally considered those consequences, one once again would have devised a different construction *ad hoc*—it is always the will that leads the mind by the apron strings.

Of course, the anti-rational sentiment goes hand-in-hand with the voluntaristic trend. It is well known that the mind is not the sole authority, and thus the eye sharpens toward the sins that have been committed in its name, in the name of logic. Though, the new movement would have been consigned to ridicule from the start had it, as the hotheads of the Historical School so often did, dismissed logic as worthless. Logic has invariable right. But what does judicial logic and how it serves the traditional hermeneutic—which the young Sternberg[15] so happily pilloried—possibly have in common with the *Scientia Scientiarium*? Which forms will be foisted as the sons of mother Logic? For example, there is the famous judicial "analogy," extensively and devoutly regarded by our methodology as a dogmatic method, the procedure that does not assign the application of legal propositions to cases in a logical way, but instead teaches cases similar to the one assigned. As if it were so easy to provide a case that had nothing in common with any other—even they would have similarities, if only to a miniscule degree. One could apply practically every legal proposition in practically every case and it would go on forever, without ever being able to draw the boundary of the permissible which confronts all that is quantitative and material with utter indifference. And now that "extensive interpretation" has no motive or vehicle other than case similarity, it is subject to the same criticism as analogy, whose role it plays often enough when analogy's presence is prohibited (§2 StrGB, *Strafgesetzbuch* (German Criminal Code)). And it plays it well. One pushes a wording to its extreme limit, and then goes a little bit further. The rarities and oddities cabinets of our court archives effectively demonstrate how one could confiscate anything under the label "dangerous instrument." Conversely, no one invokes the term "manufacturer," who, according to §950 of the German Civil Code, acquires the titles to new items through specification, to understand the factory worker or journeyman, because then we would have a socialist economic order. What calls us in one case to be extensive or analogical, and in another case literal or restrictive, is certainly not the legal code or logic, but free law and the will—at one moment, the will to achieve desirable results, at another, to avoid the undesirable ones. We do not accept a construction with all its consequences *because* it is the most unceremonious, the most logical, the most natural or the best, but conversely, a

[15] Theodor Hermann Sternberg (1878–1950) was a German jurist and philosopher of law who primarily taught at Japanese universities. He is considered to be an important figure in the free law movement.

construction appears to us as such when its consequences are such that we could desire them.

In the same way that today's analogy can be dismissed, we can dismiss the juristic "fiction," which is nothing but another species of analogy. It's only bearable when it is used by a culture in a conservative sense, like the Romans did, toward the historical advancement of an institution, and unbearable, by contrast, when it is used toward the systematic extension of a particular legal proposition to cases not ascribed to it, simply because one is too lazy to think through a common, general proposition, or fears an inconsistency would permit its invocation by those who would not notice the fictionalized nature of its contraband consequences. To the fullest extent, "fiction" is scientifically worthless in other capacities where it is nothing but a lie's distinguished disguise in the service of fraudulent methods or practical interests. In no case can judicial fictions become comparable to those thoroughly legitimate, albeit sometimes dangerous, sound-proofing abstractions of other sciences (*e.g.* the vacuum, "autarky" in the economic sense), that are sometimes also probably called fictions. Whereas those methodical "fictions" are but the tools of research which considers its results thus far only partially valid, the material fictions of jurisprudence are barriers to knowledge because they will be regarded by theory as lasting components, in which we where possible will take particular pride.

The popular operation by *ratio legis* (the reason of the law), a process which will likewise be foisted as a positive dogmatic method, functioning only by the common means of logic, has the same logical worth as analogy and fiction. It consists in extracting from given legal propositions the more general ones which form their basis, and therefore should be positive law as well, to once again deduce from these interpolated propositions not only those already existing, but also all other conceivable propositions (Thöl, Unger[16]). This method of interpolation, however, which, incidentally, will always be used in the creation of "common parts," has an incurable defect: for there is a well-known and fixed relationship between premise and conclusion, not just between conclusion and premise. To $a = b$ there are not only the premises $a = c$, $c = b$, but also $a = \sim c$, $\sim c = b$, and further, $a = d$, $d = b$, $a = e$, $e = b$, and so on, which is to say, every pair of propositions (true as well as false), in so far as they only possess the formal properties of the recognized elements of logic. Logically-speaking, any arbitrary proposition can serve as a premise for a legal proposition, as a *lex legum* (law of laws) for early scholasticism, as a *ratio legis* for its successors, and accordingly any legal proposition can be awarded as a logical conclusion. But a force is at work here, a force that among all possible premises selects those that provide only the desired conclusions. A force that according to what has been stated must be the will, and not the mind. The misconception can be explained psychologically by the

[16] Johann Heinrich Thöl (1807–1884) was a German professor of law whose work in commercial law and the commercial code greatly influenced Germany's present commercial code; Joseph Unger (1828–1913) was an Austrian jurist and professor of jurisprudence at the University of Vienna. Because of his comparative work in Austrian civil law and German legal science, he is considered the founder of Austrian legal science.

fact that the premises entirely unsuitable to the achievement of the required result never even come to toe the threshold of legal consciousness. Thus the system and its common parts cannot be established in the way that would result from *"the"* premises of the legal code, but, rather, those propositions are presented as premises which would allow the system to expand in the postulated way.

And all other arts of interpretation are as little good for employing logical means to fill in the fragments of the legal code, for merging the appropriate legal system with all cases of life, as the above-considered. Nevertheless, jurisprudence has always advanced confidently in its impossible task, has sought again and again to undo all the locks with its few keys; so it cannot help but sometimes resort to grabbing at Dietrich, to breaking the locks; erecting constructions so violent that their incompatibility with the text of the legal code was obvious even to the dullest eye; or, conversely, clinging to the code in order to achieve results that stood in blatant contradiction to the necessities of life (*i.e*. nothing less than the free law of merchants, women, workers). However, underlying those impossible defenses of dogma was the idealistic assumption that it was only necessary to fit a few missing tiles here and there to complete the great mosaic of legal concepts. In truth, the task is just the opposite. Because the elements from which the undefined elements ought to be ascertained are in large part also in need of definition by others, from which the same is needed—or worse, by those first elements sought, so that we either must turn eternally in vicious circles or be endlessly carried away. The few air-tight elements we have do not even remotely aid in deciding according to the law of contradiction the only permissible outcome from the myriad possible combinations. An entire animal can be constructed from as little as a single bone—despite Cuvier.[17] Indeed, dogmatic jurisprudence also wisely avoids any real activation of even a small part of the operations needed, and instead makes cursory references to the famous "Spirit of the Law." But as we've seen, it would likely be easy to ascertain very many such spirits, but quite impossible to establish a single such one. And what will be passed off as it, what has become aptly referred to as "the masters of one's own spirit," is nothing but the spirit that one would gladly see prevail in the law according to one's highest personal taste.

Thus those massive systems of individual laws set down in textbooks can be complete and uncontradicted to the extent that they are the individualities of their creators, but also must contradict each other, to the extent that the individualities of their creators contradict themselves. They are educating and influencing the practice to the extent that the individualities of their creators coincide with those of the other jurists; they contain as many pieces of statutory law as is compatible with their individual legal view, and take on more only in those cases when the hope exists that sometime or another the legal code

[17] This is referring to Georges Cuvier's principle of the correlation of parts, comparative anatomy as able to determine genus from a single bone. Kantorowicz's reference to him in contrast to the view being expounded was likely done in error.

could be altered in their favor. Only where the legal code is still young is the will most capable to purely embody it, sharply and successfully, and the dogmatic value of the textbook then at its lowest, as is being proven by numerous textbooks on the new civil code. To the extent, however, that theory and practice call new instances of doubt into light that could obviously never be resolved by the legal code alone, the textbooks depart from the legal code. The Justinians would hardly have been able to empathize with Dernburg's system,[18] while the commonalities of the great antipodes Liszt and Binding's[19] criminal justice systems are offered before us "light and easy, as if from nothing sprung.[20]" All these textbooks and systems have in common is that they bring the identities of their creators, with all their moral, political, legal sentiments, to expression with clarity—what together with most of the aforementioned would be quite impossible if, as their title suggests, they really represented statutory law. For this price alone could they have achieved their impressive systematic completeness. However, in an age of increasing individualism the hunt for a universally valid system of propositions, irrespective of whether it is statutory or free law, is nothing but the utopia of a dilettante logic.

But a renunciative, deductive systematic resigned to positivity and universal validity cannot endure logic's judgment. While at first it seems that only the deductions of legal science, by virtue of universality conceptually befitting their propositions, are immune to the running objection, well-known to the name Mill, to the *petitio principii* (assuming the initial point) in syllogisms, it in fact behaves just the opposite. For while the theory of natural sciences, rejecting the recourse proposed in the gall of despair to identify the conclusion from particular to particular in a syllogism, was content with the hypothetical nature of all knowledge, and verification of a hypothesis by experimentation or direct observation has been decreed a necessary and indispensible corollary, the normative nature of legal propositions quite certainly forbids anything such a verification through empirical knowledge would likewise observe. It will therefore always be the natural sciences, at least since natural philosophy has played out, that will infer from the falsity of a correctly-deduced fact the falsity of the theory, and change them accordingly. The deducing jurist by contrast, abstaining from instruction in empiricism, must embody the ludicrous behavior of those aesthetes who when faced with a physical work of art prefer to lie about their impression than change the theory that contradicts it.

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[18] Heinrich Dernburg (1829–1907) was a German jurist who promoted Pandectism, the study of Roman law under the Justinian Pandects as a model of *Konstruktionsjurisprudenz* (conceptual jurisprudence).

[19] Franz von Liszt (1898–1917) was a professor of criminal law at Universität Berlin whose theory of punishment called for a utilitarian evaluation of a crime's severity and the imposition of punishment for the sake of protecting basic social norms. His theory thus stood in stark contrast to that of Karl Binding (1841–1920), who figured punishment solely a means of reinforcing state authority.

[20] "schlank und leicht wie aus dem Nichts gesprungen" (*Das Reich der Schatten*, Schiller, 1795)

On the one side, judicial deduction hangs in the air; on the other, its bridge support is built on sand. In the natural sciences, ambition is entitled to freely deduce their propositions as corollaries of the infinitely higher, and develop their concepts as partial contents of the infinitely more extensive. In jurisprudence, however, propositions become more worthless and unusable the more abstract they are—at least starting from the degree that will soon be reached. For it becomes more incredible and utterly out of the question that the creator of a legal proposition had foreseen all cases subordinate to it, and, if he had, would have decided in favor of that proposition. So then no legislator, no power, no will, not that mystical "will of the legal code," and certainly no reality will stick any more behind those universal propositions, and their increasing number of cases within the general public, than the hollow sound of words and the ink of printed paper. Therefore, repulsive is the individual who fails to examine an individual case freshly and independently out of fealty to a rashly binding moral-legal imperative, and deplorable is the judge, who "in the name of the king" believes it necessary to declare law to be only what that paper authority commands.

In so far as our movement rejects this paper jurisprudence, it testifies that it itself is founded on the basis of a historic conception that dogmatism unknowingly denies. For in contrast to earlier legal philosophies that believed that there was a law validated by nature, the main proposition of the Historical School, as already mentioned, is that all law is *positive*, and therefore law exists if and only if some reality (power, will, recognition) supports the legal proposition. So, positive law can never be won through "conceptual jurisprudence." This one point already sheds light on the erroneous belief held by so many non-jurists that jurisprudence is the classic foster home of historical sentiment. In no way has the Historical School of law, least of which its romantic branch, shown itself to be a match for its task, and likewise its achievements don't even remotely compare with those, for instance, of the arts, philosophy, and national economy. Naturally, the philosophy of law's conception of the historical nature of law is fixed for all time. But only this theory about juristic theory has been historically modified, not the theory itself. Indeed, an external symptom is the fact little-known to outsiders that despite the amount of basic scholarly monographs, whose soundness will not be surpassed by any other science, very few branches possess a comprehensive overview of legal history, to say nothing of the history of law's interpretations as a whole. How little we have taken seriously the second main proposition of the Historical School that a legal proposition can only be fully understood by him who knows its entire development, is amply proven by the almost complete neglect of the entire dogmatic history between Justinian and Savigny. Indeed, many a lawyer who has respectfully left Savigny's seven-volume *History of Roman Law during the Middle Ages* uncracked, strongly believe that there this ancient legal task is dealt with once and for all, despite the fact that absolutely nothing related to it can be found in them. And how many minutes of their lives did Savigny's followers, the famous Romanists, spend on the study of the glossators and the jurists of the *Corpus Juris Civilis*? Their studies would be akin to those of an art historian who with a few embarrassed phrases skips from the Hagia Sophia, over the art of the Middle Ages, the Renaissance, and

the Baroque period, and so forth until reaching Canova, if such an art historian were conceivable at all. The theorists of our imperial law don't even discuss the writers from and for the practice! The historical introductions that preface half of their works—out of decorum, so as not a single time to refer back to them in the text—and are likely manufactured only after everything left over is finally thought, prove to the expert that their authors have almost never dealt with historical material in an original way. Few, fortunately, have the courage to omit the entire historical apparatus. Fortunately, because no one has been able to show that a significant dogmatic error has been made based on historic ignorance. The law that we live and feel living in us, we do not need to conjure up again in the historical alembic any more than we need to know Sanskrit in order to speak German. For once, we need to take the Historical School's famous comparison of law and language seriously. Conscientious, detailed research (in no way like the hasty summary statements, from which the young student will just become tired, confused and embittered) can add a line here and there to the image of today's law. But the historical position on dogmatism would have served a far greater purpose had it been used to dig its own grave! "The law developed organically, as a natural product"—good, then like any natural product, it is also irrational. So then we must also see rationalism collapse before the victoriously advancing historical conception. But the Historical School of law not only failed to conquer rationalism, but instead, proffered it up before the Lord and served it with a zealousness like no one before. The concept of jurisprudence is the Historical School of law's creation. It very well might have conquered the metaphysics of natural law had it not surrendered quickly and unconditionally to the methods of natural law. Our movement issues from here, from the abandoned legacy of the better beginnings of the Historical School.

But only living law can dispense with the historical treatment; we can no longer ignore, as the rationalists did, the knowledge that the past cannot be mastered by the size of the present, that rather, every dead legal system no longer immediately accessible to our senses can only be made psychologically and logically accessible by even earlier phases of its development. For all unconscious or complicatedly-stored elements can only be understood—or even discovered at all—by comparing those phases in which they found conscious and clear expression. But more often than not the Historical School has sinned even at this. This school, whose dogmatic tasks we've seen modeled so little in the historical spirit, has done great things in the ill-fated venture of dogmatically disfiguring its historical tasks. For, think about dogmatism in and of itself as you will, its admirer will at least have to admit, as Jellinek[21] has recently pointed out, that it simply makes no sense to adapt a no longer valid law by means of juristic art—and the same also holds, as Radbruch has shown, for comparative law. All this unspeakable amount of mental power pursues is simply the goal to spare judges from being forced to describe a legal authority as obscure,

[21] Georg Jellinek (1851–1911) was an Austrian public lawyer who was closely associated with Hans Kelsen and the Austrian logical positivist movement in law.

a case as undecidable according to the law. But as soon as the legal code no longer concerns the judge, that necessity will certainly cease to exist, and, if necessary, nothing in the world will prevent the legal code from being described and imagined as fragmentary, incomprehensible, unreasonable. Nothing more prevented and, further, everything corresponding with truth demanded—that is the sole achievement of historical research. For history serves no practical purpose, and certainly no purposes that are no longer anyone's purposes at all. Worthless: we must declare that immense literature, which is granted to the current law, which adapts the most antiquated institutes of the law of the twelve tables, the *Sachsenspiegel*, and the *Constitutio Criminalis Carolina* according to the model of its dogmatism, entirely worthless—as worthless as the work of the alchemists and the astrologists. It must and will vanish without a trace as soon as a movement comes forth that soundly rejects this model.

With this final late classification of jurisprudence in the common creed of all cultural sciences arises the dividing wall that man has wanted to erect between jurisprudence and all the rest. The representatives of the dualistic method have placed too much weight on the belief that the social sciences depict what "is," and legal science, what "should be." For the fact cannot be overlooked that all that "should be" *already "is."* Should is *would*, albeit a peculiarly colored kind of willing: one's own, if a recognized Should is present, and but another's if unrecognized. The conflicts between would and should are the conflicts of a two-fold Would. A Should that will not be considered the Would of an individual or collective personality, be it one's own or alien, a so-called "objective" standard, is an unenforceable, empty perception. And so jurisprudence must also adapt a positive fabric of being, namely a psychological fabric, as many other sciences also do. Jurisprudence can never go beyond the range of the Would, and only within it can it find the scope of the judgment of existence, only within it can it find indications of the goal. Being can only be judged by being. The *dos moi pou sto*[22] of the objective philosophy of law remains forever unheard. Thus, a fundamental scientific-theoretical difference cannot be established for jurisprudence at this point; therefore, a combination of jurisprudence and psychology on the one hand, and the social sciences on the other, is being sought by most representatives of the free law movement as between related sciences, and with good reason.

Which is to say it must dissolve its ties with its former kindred spirit, theology. The material liberation of jurisprudence from theology is clearly as good as consummated, after the seventeenth century expelled the *ius natural divinum* (divine natural law) from legal philosophy, the eighteenth century, the Bible as legal source from ecclesiastic law, and the nineteenth century, the dogma of retaliation from penal law. But the twentieth century alone has been charged with the most difficult task: to drive out the spirit of theology from a rejuvenated legal science.

[22] Taken from Archimedes's line, δος μοι που στω και κινω την γην: Give me a place where I may stand, and I shall move the earth.

The parallelism between dogmatic jurisprudence and orthodox theology that remains today—to which the discussion here solely pertains—is obvious. There God, here the "Legislator"—both are entities inaccessible to experience. Their intentions are concealed or only vaguely known to the profane mass; a privileged caste of theologians, the jurists impart their revelations. Both pretend to represent the will of these entities, while in truth both are being masqueraded as the will that one wishes were recognized—be it law or religion. This is inevitable, for only fragments are provided for the construction of this will—be it the Holy Scriptures or the legal code. Regardless, the task remains to clearly and plainly answer all questions from these fragments. The jurist must be able to establish every action as either right or wrong, the theologian to establish every action as either as God-willing or God-forbidding. An artificial and dishonest system of cycles and epicycles must therefore be enacted. Just as we have seen the jurist do, the theologian instructs with merely a glance at the explications of the Ten Commandments in the catechism. And as the jurist depicts each of his decisions as substantiated in the code, the Church believes that each of its institutions, even the smallest of the liturgy, must be traced back to a place in the Holy Scriptures. The arts of interpretation we see jurists have to summon for this purpose do not even come close to the perversion allowed by theologians: that perversion has aroused indignation from all friends of truth as well as theologians of other denominations. Further, just as the code and the scriptures are incomplete, so are they self-contradictory and fully contradictory of the reality to which they relate. Yet, regardless, both ought to be depicted as contradictory systems in which a thousand years of progress, a thousand crossings of different cultural systems recorded in them, have revealed nothing. Moses and Thomas Aquinas, Augustus and Bismarck are being merged into one. The jurist finds a "spirit of the law" in the most timely and factually remote legal codes. Mopping the sweat off his brow, the theologian searches for "concordances" in the Old and New Testament that would excite the great amusement of the historian. For this, the appropriate tools are required. The jurist avails himself of *regulae juris*[23]; the theologian draws upon such self-contradictory concepts as the trinity, god-man, virgin-mother, and is able to employ their one side or other at will. Thus the theologian effortlessly attributes the fortune of the good to God's mercy, the misfortune of the good to a trial of God, the misfortune of the wicked to God's justice, and the fortune of the wicked to God's unfathomable intention. Similarly, the jurist attributes one desirable application of the code to His Holiness, another to a lax equitableness; when he wants to use it indiscriminately, he invokes *lege non distinguente nec nobis est distinguere* (a distinction shall not be made where the law does not make one) and in the opposite case, *qui bene distinguit, bene docet* (he who distinguishes well, learns well); or, *cessante ratione legis, cessat lex ipsa* (when the reason for a law ceases, the law itself ceases). As his "will to

[23] Literally meaning "rules of law," the phrase is used by Kantorowicz to compare the tools of formalist jurisprudence with the Church's *regulae juris*, the set of axioms found in the *Corpus Juris*, the Church's body of laws.

law" calls for, sometimes the restrictive, and sometimes the extensive interpretation will be applied without—and here we recapitulate Wurzel's fundamental attack—even making an attempt to provide criteria under which this or that interpretive practice is offered. In general, the relationship of the will to the mind and the senses is the same in both sciences. Countless times, the interpretive mind arrives at a result that for the moment brazenly contradicts either one's religious or legal sense. The will, however, demands the agreement of both. Thus either the mind will be conformed to the senses—particularly in the case of jurisprudence—or the senses to the mind—what happens more often in theology. The theologian proves the belief systems of the religious group he, in the greatest number of cases, belongs to by dint of birth with great virtuosity, but also true conviction—the conviction with which we utter the old and ageless argument that all apologetics of contemptuousness handed down. (Seldom can one read such a written justification without being overcome with the conviction that the same author could have proven a quatrinity instead of merely a trinity had an elder counsel simply elevated this to the status of dogma.) However, set the individually- and powerfully-trained senses inflexibly against it, and the mind must yield; the "reformer" deduces the new view from the old texts with a savage logic; that is, as we saw, the rule in jurisprudence, but in no way is the antithesis lacking here: when the jurist justifies his principle institutions, he finds the rules prescribed by the legal system immediately justified, and tomorrow will justify the opposite, should an unfamiliar legal code be imposed upon him. In all of these cases the will is still the true agent, and logical deduction but an empty pretense. It serves not truth, but interest.

We needn't draw this parallel further. What has been said is sufficient to rediscover the essence of orthodox theology in the essence of juristic dogmatism. But after learning so much evil from its teacher, jurisprudence now has the opportunity to be set on the right path once again. For after the Schleiermacher reform, similarly to its kindred Savigny reform, failed to permanently free its science from the bonds of rationalism, we are now, as everyone knows, experiencing a drastic reversal. We believe this direction of theology to be the last rally of Pfleiderer's "*Die Entstehung des Christentums*" (1905). It recognizes "myths," fables without historical basis, in the content of Christian dogma and therefore does not require the theological technology that had to be invented in order to justify these false assumptions. It undertakes to explore its object "according to the same principles and methods" as other sciences; it ruthlessly tramples upon the venerable fictions of theology; it turns away in disgust from the "dubious arts of interpretation" previously used to deceive away those gaping contradictions which it, quite to the contrary, readily admits.

Thus free religion's essential identity with our free law movement requires no explanation. And yes, there is a difference between the two: while the spirit of the Reformation consummated itself there beautifully, most still remains to be achieved for jurisprudence, which slept through its reformation. The spirit of the German Reformation speaks well from the ideals of our movement, a spirit which overcame the letters, liberated the

individual, began to give sense its law, and taught it to listen to the inner voice of its conscience. However, jurisprudence has thus far waited in vain for the man who would feel the force within himself to become its Luther.

This is the legal science we aspire towards. But despite these efforts, does it not seem that all postulates of judicature, these ideals in which we are accustomed to seeing the most sacred achievements of our political and cultural existence, rear up terrifyingly? If legal science recognizes free law, then judicature will no longer be able to be based on statutory law! If it is creative, then judicature will no longer be merely the servant of the code! If the science constantly has gaps to fill, the practice will not be able to correctly decide every case! If theory makes room for emotional values, an exactly-reasoned verdict will no longer be necessary! If theory's individual factor were acknowledged, the practice would lose its quality of predictability, uniformity! Should the theory itself become anti-dogmatic, judicature could no longer be scientific! If the will is predominant in judicature, then it can no longer remain affectless! In short, the ideals of legality, passivity, merit, scientific nature, legal certainty, and objectivity appear to be irreconcilable with the new movement. But—fortunately—it can be shown that these postulates in part still haven't been realized, and some do not deserve to be realized.

"Base All Judgment on the Civil Code." But today we subject ourselves to an ever-increasingly delightful degree of arbitration, from which statutory law ought to be expressly excluded. And state courts refer ever more to truth and faith, to good practice, to the concept of service, to reasonable discretion and other surrogates of the code. Of course: "following explicit state orders," goes the popular objection—we are still able to recognize the will in its self-annihilation. Perhaps one might also say that the judge would judge solely according to the code, even if our code contained only a paragraph: the judge decides according to reasonable discretion.

"The Judge shall be the servant of the Law." And yet we celebrate both the practice of reception that helped the superior law to victory over ancient sacred statute and the practice of the French courts that maintain a century's work of the *Code civil* with fresh life, and we likewise anticipate that the German courts of the future will understand that the civil code will always adapt to new needs.

"Every conceivable case should be decided, and by the code alone." So thinks the *Code civil* in that famous Article 4. But on the other side we have a legislative work, the preliminary draft of the Swiss Civil Code from 1900, which fanciers have called the most significant product of modern jurisprudence, which states in Article 1 that if all else fails, the judge ought to decide according to the rule that he himself would have established as a legislator. In these two paragraphs lies everything that we shirk, everything that we must strive to do. How far the "emancipation of the judge from the Code" is to rise, however, is neither a specific nor general issue to be resolved, as quantitative problems in qualitative sciences always are. So we see opinions on this subject among individual representatives

of the trend broadly diverge, depending on whether their assessment of the value of the individual and particular according to their different natures is higher or lower in relation to the value of the state and community. We, who are of the opinion that even foreign feelings deserve respect, find there is no specific solution (*i.e.* corresponding with *our* feelings) to praise as the right one and to hail as exemplary to all the others: we share ours in the hope that others might also find a suitable solution in it. We also assume that the administration of justice is and must remain the main activity of the state. We therefore demand that the judge, bound by his oath, decide a case as much as a case can be decided according to the clear wording of the code. He may and should abandon this, first, the moment the code appears to him not to offer an undisputed decision; secondly, if it, according to his free and conscientious conviction, is not likely that the state authority in power at the time of the decision would have come to the decision as required by law. In both cases he ought to arrive at the decision that, according to his conviction, the present state power would have arrived at had it had the individual case in mind. Should he be unable to produce such conviction, he should then decide according to free law. Finally, in desperately involved or only quantitatively questionable cases such as indemnity for emotional damages, he should —and he must—decide according to free will. But in a civil procedure the parties should always, by joint application, be at liberty to release the judge from his duty of observing some kind of statutory legal norm.

It does not hold that that this judicial conviction is intractable and that our proposals thus give free rein to judicial discretion. For if we can no longer rely on the judge's oath, which demands serious conviction, everything comes to an end. Even today we leave what he, interpreting, declares legitimate law, and what he, investigating, declares truth, to the discretion of the judge's free, uncontrollable conviction. A compensatory plurality of heads at the judicial bench and the appeals system sufficiently protect against the excesses of subjectivity.

We believe that we give no more to the judge than what he has already—necessarily—taken himself, and much less than what we Germans in earlier times—to say nothing of the Roman prator—allowed, as well as what the English still allow today. For we've already seen how all juristic technique becomes dominated by the will and each judgment based on it; accordingly, the entire civil code is *lex specialis* (law governing a specific matter).

So why all the noise? Because it is better for the correct practice to also possess the correct theory, to be founded by it, instead of by one quite contradictory and perverse to it; and because it is better to approach the correct target from the straight road than from a crooked, complicated, dangerous and dishonest short cut; finally, because only the proud awareness of appropriate, responsible behavior can provide the great judicial personalities the English possess in their judges, who are second to none in popular appeal on the island kingdom.

"Every Judgment must be motivated." In no way do we overlook the great value of this postulate. But we have had long epochs of judicature which did not know it, this postulate, that on the one hand is always a sign of a lack of confidence, and on the other hand, a sign of a lack of authority. The faithful do not demand motivated decisions from the young judge! And we immediately entrust our highest good to those classes of judges who do not need to justify their verdicts—the *Schwurgericht* (the jury court).[24] And how does it stand with our modern justifications? No one demands them using *ius clarum in thesi* (indisputable legal propositions); as we've seen, they are not validated by use of dubious law, but instead merely obtained deviously, subjectively, psychologically. At best, they favor the winning party, which would have been satisfied had the losing party simply been issued a decisive "no." And what the overruled judges, who incidentally could form a majority through organization by process of appeals, think of the grounds of a judgment, need not be said.

"A judgment must be foreseeable." A lovely idea of course, but eternally unattainable. If a judgment were foreseeable, there would be no litigation as well as no judgments, for who would endure a lawsuit in which he, as it was foreseen, would lose? Or perhaps one would insist that the losing party's attorneys were ignoramuses or frauds? (It would be a judicial statistic of incomparable worth if some of these aforementioned attorneys calculated the percentage of cases in which the judgment completely contradicted their expectations).

"A judgment shall be objective, and may not be personal." But man can't help but impose the stamp of his personality on all that he does; everyone who is not a completely naive stranger in the house of Themis, and everyone who observes that changes in court decisions keep pace with the change of personalities in its leadership, knows that a judge's personality is a decisive influence on the outcome of the verdict.

"A judgment ought to be a strictly scientific achievement." But how does the undeniable contrast between theorists and practitioners chime with the fact that there is nothing we appreciate more than the juristic stroke, that we laud the art of judicature, and that we entrust it in large part to lay people?

"Judicature ought to be ineffectual." That should and shall remain in the future, for the Will becomes blind only when it encounters obstacles, which, given the omnipotence and impartiality of today's judge, is not the case. And seeing as effects will remain and perhaps even increase, they are, apart from the fact that they are inevitable in every design of these things, not to be feared because, thankfully, human nature is created in such a way that a completely uninvolved third party never consciously chooses the worse thing in a dispute. Even the greatest of pessimists must admit to this.

[24] Criminal court comprising three professional and two lay judges that decides most serious crimes.

Of course it can be said in opposition to part of what has been listed here that ideals are not contradicted at all by the fact that one can show reality contradicts them. But the relevant arguments needn't be more than *ad hominem* (to the man) arguments, directed against those opponents who fight against our movement in the name of those ideals which are so hopelessly far removed, even from the current state they seek to preserve. Let's now proceed to draw our gaze from these partly unpursuable, partly unachievable, partly not at all endangered ideals to other, higher ideals contradicting them, which have already been implemented and will be more completely realized once the free law movement gains acceptance.

There is first the ideal of "traditionality," an ideal that was realized during the long epochs of Roman and German past, and is still realized in England, but which we are still infinitely far removed from. The causes of this condition are continually made clear—they lie entirely in the character of legal science and judicature we oppose. The damage of this intolerable condition is well known enough; it too will have to disappear as soon as we are given a judicature that lives in tradition, brings free law to expression, and expels the old secret methods incomprehensible to and hated by the distant layman.

But this goal need not be advanced along the shameful path that in an age of ever increasing professionalism puts jurisprudence in the hands of the laypeople, *i.e.* the dilettantes. The hour of trial by jury has struck: here they fall, as other illusions of this terrific year also did (although perhaps the old names will be transferred to the new institution). The jury, the commercial court, as well as other mixed courts and all their apprehensions will at last be rendered superfluous once the obvious requirement that a judge—like all other laborers—do all he does as a professional, is realized. We need judges who are as familiar with the legal opinions dominant in tradition as they are with the facts of life and the findings of neighboring sciences; those who, equipped with the most foundational national economic and commercial education, no longer helplessly confront bank litigation; those who are as prepared to take action against the tricks of the modern criminal for hire as they are familiar with the peculiarities of an artist's professional circumstances. Obviously then space must be given to the very same type of specialization within the judicial profession, as in all others, whereas whether it needs to begin at university or after the completion of studies remains an open question. Here too we find some promising signs of the times: the merging of legal and government academic departments; the increasing emphasis on national economic instruction to jurists; the emergence of juristic-psychological tutorials and associations; investigations into the psychology of testimony (a problem of immense scope); rapidly expanding philosophical schooling; sociological and real-life studies by criminologists. Specialists of the state of affairs needs to be the slogan, not jacks of all legal trades. In the future, instead of depicting theory and practice as the two men from the parable in which the one milks a goat and the other holds a sieve underneath, we want to have a literature that, in addition to the operations of jurisprudence, imagines living conditions, concrete legal conditions—not only what should be, but also what is (Ehrlich). And we want judges who know to

litigate based on themselves and their own experience, in full knowledge of every legal proposition's social function and the social impact of their decision. To understand everything is to justly evaluate everything.

Only then will the ideal of impartiality be achieved, that holy judicial capacity which such broad circles of tradition no longer believe in, cannot believe in anymore. For partiality, which—it may be denied—is proffered in so many criminal judgments, doesn't stem from ill will, but from bare ignorance of the social facts and opinions, from the bias in naïve class prejudices which take root and shelter in precisely that ignorance. Impartiality of course assumes far more—namely independence—which can be fully addressed as long as the civic advancement of the judicial individuality depends on political leaders. However, relaxing the relationships between state will and judicial verdicts will create change in ways that are still not too overlooked, perhaps through the popular election of judges according to the Swiss model.

Thus the movement strives with all its might towards a goal that contains all the others stated, the highest goal of all legal action: justice. Only where the narrow canon of a few paragraphs is burst open and free law's abundance imparts the opportunity to provide every case with its appropriate ruling, is there justice. Only where there is freedom is there justice. Only where, instead of a barren thistle, a creative will gives rise to new thought, only where there is personality, is there justice. Only where a forward-directed glance from the book to life measures an action's distant consequences and requirements, only where there is wisdom, is there justice.

Conclusion

This is our movement; these are our ideals by which we resist the present state with confidence and determination.

And yet we are the last that want to recognize nothing but abuse in centuries' worth of practice. Rather, if one looks to the two great nation-states, the Romans and the British, one recognizes the relative preference given to juristic dogmatism and its attendant ills, unknown to both nations. For it is a means, albeit crude, of imposing a stumbling block upon so-called reckless innovation in the deliberations of judicature. Only when the political culture of the judiciary was of high enough status to never allow the conservative factor in those deliberations to be cheated, did it not require that means. Yet our judiciary is plenty mature enough now to do without those old apron springs, and far more mature than the majority of those political hacks masquerading as legislators.

In the last analysis, all progress in legal developments depends on a judge's cultural background. And herein, drawing this manifesto to a close, we wish to present a historical comparison. We no longer believe, as the rationalists' conception of history once did, that the former reign of formal proof theory was a total aberration. Rather, we know that the

responsibility of establishing guilt has long had to be tied up with external conditions such as confession and two-witness evidence when the culture of the judge prevented him from grasping the logical, psychological, sociological evidence independently. But when the intellectual frenzy over mankind came, beginning with the birth of exact mathematical sciences in the seventeenth century, and achieved global and historic status with the Enlightenment in the eighteenth century, the hour had also struck for a jurisprudence that could develop a free-exploratory, non-presupposing scientific activity. The judge no longer needed to bear down upon the accused with whips and forceps and hot irons in order to extract a confession of facts that his well-spoken mind could have determined independently. So too will come the time when a jurist need not bear down upon the code with fictions and interpretations and constructions in order to extract a ruling that his own will, now awakened to individual life, could find.

For after the nineteenth century is over, after this era of half measures and compromise, we shall come to meet a twentieth, which, if the signs do not deceive us, will be a century of sense and the will in art and science and religion. From the ruins of torture arose triumphantly, to the horror of all the discouraged, the free examination of evidence, the pride of the present; from the ruins of dogmatism will rise, to the horror of all the uncertain, the pride of the future: the free creation of law.

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Appendix

Ehrlich, *Freie Rechtsfindung und Freie Rechtswissenschaft*. 1903 (and in earlier writings)
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-- *Rechtsfindung durch Interessenwägung*, ibid., 713.
-- *Gesetz und Richtermacht*, ibid., 1018.

Sternberg, *Allgemeine Rechtslehre*, I., 1904.

Wurzel, *Das juristische Denken*, 1904.

Zitelmann, *Lücken im Recht*, 1903.

There is yet a multitude of passing remarks, made in particular by Jellinek (recently, *Allgemeine Staatslehre* 2nd edition (1905) 50, 51, 347–351) and Kohler (recently, *Lehrbuch des B.G.B*. 1 (1904) 82–85, 111–113, 126–133), and further by A. Menger, Huber, Dohna, Dernburg, E.J. Bekker, Oertmann, Kuhlenbeck, and many other jurists; likewise philosophers such as Wundt, Brentano, et al.