Law, Modernity, Crisis: German Free Lawyers, American Legal Realists, and the Transatlantic Turn to "Life," 1903–1933

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ABSTRACT

Scholars have long recognized American jurists' idiosyncratic commitment to a prudent, pragmatic, and political style of legal reasoning. The origins of this style have been linked to the legacy of the most American legal movement of all: the realists. Conversely, German jurists' doctrinal, idealistic, and apolitical approach can be tied to the relative failure of Germany's equivalent movement: the free lawyers. How to account for the seemingly inverse fate of realistic jurisprudential reform projects on both sides of the Atlantic? In this paper I employ transnational history to shed light on this particular instance of German-American divergence.

The best lack all conviction, while the worst / Are full of passionate intensity.
—William Butler Yeats, *The Second Coming (1919)*

It was an illustrious group of jurists that had come together in the sleepy southern university town of Heidelberg in the summer of 1910.[1] For one, there was the "troublemaker" Hermann Kantorowicz from Prussia, then *Privatdozent* at the University of Heidelberg, whose anonymously published manifesto *Kampf um die Rechtswissenschaft* (The Battle for Legal Science) had shaken up the German jurisprudential establishment only four years earlier.[2] He was joined by his equally contumacious colleague Eugen Ehrlich who had travelled to Heidelberg from far-flung Czernowicz, located at the easternmost periphery of the Austro-Hungarian Empire. Ehrlich's various books, articles, and lectures had in the years preceding the Heidelberg meeting caused intellectual outrage similar to that of Kantorowicz's manifesto.

Since the turn of the century, Kantorowicz and Ehrlich had worked tirelessly on the generation and refinement of ideas associated with what subsequently came to

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be known as the *deutsche Freirechtsbewegung*—the German free law movement.[3] Together, they stood for a kind of alternative jurisprudence that aimed at replacing nineteenth-century dogmatics, historicism, and systematicity with more realistic and lifeward approaches. In the minds of the two men, the Heidelberg meeting would have been the first of many aimed at creating structures capable of catapulting slogans like "free law," "free judicial law-finding," and "free legal science" into the German jurisprudential mainstream. This paper is concerned with why and how they failed. It is also concerned with what the fact that they tried tells us about their intellectual preoccupations as well as about the intellectual preoccupations of their juristic and nonjuristic contemporaries.

In addition to Kantorowicz and Ehrlich a number of other remarkable jurists had made their way to Heidelberg. For one, the in many ways unorthodox Frankfurt practitioner Ernst Fuchs completed the triumvirate—not uncontroversially—associated with the German free law movement. While Fuchs's vitriolic case notes frequently crossed the line between constructive criticism and self-serving polemic, his relentless campaign against the "crypto-sociological" practices of the Imperial German judiciary made him a notable figure in his own right. In addition, the list of attendees boasted Frankfurt practitioner Hugo Sinzheimer, today known as the "Father of Labor Law," as well as Alfred Bozi, criminal law judge and justicial reformer from Bielefeld. Significantly, the gathering had been convened by Gustav Radbruch, then-extraordinary professor at the University of Heidelberg. Radbruch's natural law–inspired conception of the relationship between positive norms and morality would famously spearhead post–World War II processes of jurisprudential *Vergangenheitsbewältigung* and fundamentally influence the remaking of the German legal and political order.

According to memories of Fuchs's son Albert, the declared aim of the Heidelberg meeting had been to reinvent German legal science from the bottom up. Kantorowicz, Ehrlich, Fuchs, Sinzheimer, Bozi, and Radbruch thus intended nothing less than to methodologically revolutionize early twentieth-century law and legal science. But, intriguingly, nothing ever came of it and not so much as a published record remains of the first and final free law convention. The self-styled German free law movement had dissolved completely by the time World War I broke out. Today, the movement's intellectual legacy is troubled by ambiguity and confusion, with academic treatments of the subject oscillating between distant superciliousness and spiteful scholarly neglect. This in itself is interesting from the perspective of German legal historiography, especially given that post–World War II scholars have—rightly or wrongly—treated free law as something fundamentally different from anything that came before or after. Would one not expect contemporary German legal historians to dedicate more of their intellectual resources to the study and analysis of this particular moment of jurisprudential contingency, that is to say the brief window in time during which

German jurists could systematically have reimagined the methodological cornerstones of their discipline?

As this article will show, there were at the time indeed good reasons to think that free law might be the answer to many of the questions that had plagued German legal science for centuries. Veritably astounding, rather than just interesting or surprising, however, is the ultimate fate of the free law movement, including the—seemingly—absent reception of its ideas in subsequent German legal science, when we broaden our perspective beyond western Europe. In order to grasp the peculiarity of free law's development in Germany, it is necessary to take account of what happened 4,000 miles across the Atlantic only two decades after Kantorowicz and his intellectual allies had both appeared and disappeared from the stage of German legal academia.

In the final issue of the 1930 *Columbia Law Review*, Karl Llewellyn, at the time leading US commercial law scholar and professor at Columbia Law School, threw down the gauntlet before Roscoe Pound, long-standing Dean of Harvard Law School.[4] Equating Pound's pontific rhetoric with "after-dinner speeches and legal bedtime stories for the tired bar," Llewellyn identified conventional formalistic approaches to law and legal science as farce.[5] In pronounced contradistinction to nineteenth- and early twentieth-century American legal scholars, he argued that substantive rules were not the "most useful center of reference" for discussions about law.[6] By way of alternative, he called for the social-scientific study of "area[s] of contact" between the behavior of judges and that of ordinary people.[7]

Pound's response to Llewellyn was not long in coming and appeared in the March issue of the 1931 *Harvard Law Review*.[8] Concerned that an exclusive focus on the interaction between judges and ordinary people would conflate law's normative and factual dimensions, Pound proposed a seven-part program for what he called a "relativist-realist" jurisprudence.[9] While echoing many of Llewellyn's demands, Pound ultimately remained committed to the worthwhileness of studying substantive legal rules in their own right. It was Pound's seeming commitment to conventional legal normativity that spurred Llewellyn to pen the third, most caustic volume of the Pound-Llewellyn trilogy, printed in a subsequent issue of the *Harvard Law Review*. In it he drew up a list of scholars he viewed as constituting realism's cause and canon. The list conspicuously excluded Pound.

The fallout from Llewellyn's attack on Pound was a somewhat artificial bifurcation of American jurisprudence into a law-positive before and a law-skeptical after. Especially Llewellyn's iconoclastic sideswipes at his senior colleague thus led subsequent scholars to portray the 1930/31 debate as that moment in time when American jurisprudence "found its own voice," as the birth of what many today consider to be the most American of all jurisprudential reform movements: the legal realist movement.[10] This paper challenges the perceived "Americanness" of legal realism based on

the movement's similitude to early twentieth-century German reform jurisprudence and its attendant calls for free law, free judicial law-finding, and free legal science. Instead of celebrating the transatlantic origins of a supposedly American phenomenon, however, this article seeks to promote the free law–legal realism connection as a lens through which to explore more general intellectual currents in early twentieth-century Germany and the US.

Llewellyn subsequently modified, adjusted, and refined his views on both Pound and the tenets of a more realistic jurisprudence. He also had to arrange himself with scholars who, though realists by name and affiliation, espoused ideas considerably at odds with his own. The credo a significant majority of legal realists extolled was that a distinction existed between "law in the books" and "law in action."[11] A further idea they venerated was that legal rules frequently underdetermined judicial decisions so that jurists had to turn away from law conventionally understood. As a consequence, the legal realists proclaimed that scholars were to focus on the way sociological, psychological, philosophical, economic, and political considerations codetermined legal outcomes. It is by fleshing out these broad commonalities that we see striking resemblances between the substantive and methodological claims espoused by the American legal realists in the late 1920s and early 1930s and those espoused by the German free lawyers in the 1900s and 1910s.[12]

The philosopher Brian Leiter recently described legal realism as "the major intellectual event in twentieth-century American legal practice and scholarship."[13] In accordance with this, contemporary views about law in the US can only be understood with an in-depth appreciation of the realists' contribution.[14] By contrast, the eminent legal historian Joachim Rückert recently described free law's legacy as a *"Gewissensschärfung"*—a "conscience-sharpening."[15] Given the current state of research, one would indeed be hard pressed to point to specific remnants of free law ideas in contemporary German legal thought, preoccupied as it is with eschewing any semblance of judicial arbitrariness. That said, Philipp Heck's *Interessenjurisprudenz*—similar to free law in origin, method, and vision—has had a lasting impact.[16] What is more, the "conscience-sharpening" effect Rückert diagnoses ought not to be discounted lightly. It is, after all, difficult to go back on the realization that law is not all there is—whatever contrary professional myth German jurists may have chosen to pass on to their students. But professional myths do matter, and the fact that mainstream German and American jurists have dealt—and are dealing—differently with their respective realistic heritage is telling.

Given traceable processes of German-American borrowing, criticism, and exchange as well as important similarities between German free law and American legal realism, the transatlantic divergence in legal thought I have described so far begs for some sort of explanation. Why did free law ideas seemingly fail to become part of the twentieth-century German jurisprudential mainstream while they—though modified

by the legal realists—are generally acknowledged to fundamentally have transformed modern American legal thought? Unthinking references to the American legal realist movement pervade as both a descriptive shorthand and an explanatory paradigm for American legal culture's alleged idiosyncrasies. Conversely, the free law movement, if at all part of contemporary German lawyers' historical consciousness, serves only to illustrate the perceived inescapability of Germany's jurisprudential journey in modern times. My aim in this paper is to use transnational intellectual legal history to contextualize and denaturalize German and American scholars' teleological assumptions about their respective legal cultures. While more research is necessary, this paper paves the way for more extensive explorations of early twentieth-century German and American jurisprudential reform movements as well as of the intellectual contexts in which they occurred.

In order to highlight previously overlooked similarities between the German free lawyers and the American legal realists and to situate them firmly in their respective historical contexts, I will reconstruct both movements as instances of a transatlantic "jurisprudence of life," that is to say as time-symptomatic responses to the practical and intellectual crises of late modernity. This step must necessarily precede any speculation about the reasons for early twentieth-century transatlantic divergences as it shows why we would expect German and American legal thought to have gone down similar paths in the first place. Interesting answers to questions of transatlantic divergence can only be found if equal attention is paid to all relevant participants. That said, the remarkable paucity of free law literature makes it necessary to focus disproportionately on the German side of the story.

Drawing on insights about early twentieth-century avant-garde movements in politics, philosophy, literature, and the arts, I will first identify certain parallels between these movements and "realistic" jurisprudential reform movements in Germany and the US. By reference to free lawyers' and legal realists' quasi-situationist focus on individual cases, their veneration of will-based judicial decision-making as well as their borderline-nihilistic critique of conventional legal normativity, I will underscore the time-symptomaticity of their avant-gardist turn away from conventional sources of normative guidance and towards "life" itself. I will then argue that in order to truly make sense of free law and legal realism it is necessary to abandon purely jurisprudential approaches in order to appreciate both movements as law-specific expressions of more general trends in early twentieth-century social, moral, and political thought.

The German Free Law Movement, 1903–1914

Frustratingly little is known about the initial free law meeting at Gustav Radbruch's house in Heidelberg in the summer of 1910. According to memories of Ernst Fuchs's son Albert, Radbruch's intention in calling together the *crème de la crème* of early twentieth-century German alternative jurists may have been to push for the creation

of a journal in which innovative ideas about law and legal science could have been discussed without the pressures inherent in more conventional academic platforms. This formed part of more general efforts on the part of Radbruch and his colleagues to formulate a common stance on where law—understood as both a social practice and an academic discipline—was headed. Between Kantorowicz, Ehrlich, Fuchs, Sinzheimer, Bozi, and Radbruch, there was certainly no shortage of reformist clout and this small group of alternative jurists may have had the potential to steer twentieth-century German legal thought into a completely novel direction. Had they succeeded in spreading and firmly establishing their views beyond the immediate circle of their colleagues and friends, the doctrinal, idealistic, and—at least *prima facie*—apathetic thrust of early twentieth-century German legal science might have been replaced with something altogether different. But succeed they did not and the reasons for this remain strikingly opaque.

The introduction to this paper makes clear that all of the participants of the 1910 Heidelberg meeting were "caught between two chairs."[17] To some extent, they themselves formed part of the German jurisprudential establishment: Kantorowicz, Ehrlich, and Radbruch as aspiring academics, Fuchs and Sinzheimer as practitioners, Bozi as a judge. The degree to which they could act out their contrarianism was limited as a consequence. At the same time, they certainly viewed themselves as alternative, if not subversive. What exactly did they stand for—or, for that matter, against? In 1910, the much-anticipated German Civil Code had been in force for just over ten years. While nineteenth-century jurists had been sanguine about the unifying power of a comprehensive private law codification, their twentieth-century colleagues soon realized that German legal science suffered from problems that ran far deeper than anyone had imagined.

The adoption of the German Civil Code had left important questions unanswered. The delineation of competences between the legislature and the judiciary was still nebulous at best. It was also still unclear how German law was to be infused with the "drop of social oil" lawyer-politician Otto von Gierke had famously called for only years earlier. What is more, the code's coming into force had raised new questions. How exactly were judges to incorporate this supposedly authoritative document into their deliberative processes? How far were they supposed to go in interpreting its provisions where these provisions were at odds with social reality? What were they to do when the law contained "gaps," that is to say when the code provided no answer because its drafters had not anticipated a certain scenario?

The situation was exacerbated by the social, political, and economic turmoil of the years leading up to World War I. The general atmosphere of the *Kaiserreich* was one of anticipation and apprehension. Life seemed to be accelerating at an uncontrollable speed and answers to an ever-growing number of questions were needed. The feeling spread that proponents of conventional approaches were at their wit's

end. Ideologically, the tension between laissez faire capitalism and socially progressive politics was far from resolved in favor of one or the other. At the international level, the carefully calibrated balance of power agreed upon among the European super powers was increasingly yielding to imperialist rhetoric and prewar saber rattling. Philosophically, the ideas of neo-Kantianism and neo-Hegelianism held great purchase. In particular, they captured the particular fin-de-siècle Zeitgeist of blurred boundaries between method and substance, object and value, facticity and normativity. In literature and the arts, avant-gardism was in full swing. Expressionists and related artistic movements gave testimony to the perceived precariousness of life at the beginning of the twentieth century.

Somewhat anticlimatically, the German Civil Code of 1900 had become the problem rather than the solution of German life and German legal science. It stood almost as a symbol for the half-hearted and ultimately self-destructive compromises modern society exacted from its denizens. Against this background, the free lawyers and their affiliates formulated an alternative approach to law and legal science. Their main point of critique related to the so-called gaplessness dogma, that is to say the idea that the civil code—a product of nineteenth-century conceptualist and positivistic legal science—contained one right answer for every legal question. The gaplessness dogma, they feared, enabled judges to covertly infuse their decisions with subjective value judgments, which—given the conservative, bureaucratic, and regime-loyal nature of the Imperial German judiciary—was at odds with free lawyers' political and ideological commitments. By retrospectively constructing their decisions as having been contained in the law all along, rather than openly admitting to the use of their professional discretion, judges were not only able to spin German society into a direction that was undesirable from the perspective of many of the alternative jurists present at the Heidelberg meeting. They also undermined legal certainty and predictability.

Contrary to their reputation the free lawyers cared deeply about certainty and predictability. As an alternative to conventional approaches they proposed a turn to overt judicial law creation in cases where the law was incomplete or ambiguous as well as in cases where its application would have led to results that were incompatible with social reality or equitable judicial sentiment. Essentially, judges were supposed to openly recognize that the law had, so to speak, "run out;" furthermore, they were to openly declare which considerations ultimately determined their decisions in favor of one solution over another. In theory, the free lawyers venerated either a kind of psychological-sociological insight into real-life processes or the exercise of judicial responsibility constrained by proper moral and legal education as an adequate source of normativity. In practice, the free lawyers frequently made reference to § 1(2) of the Swiss Civil Code, which under certain circumstances authorized judges to decide cases in accordance with the rule they themselves would have made as a legislator. In particular, the free lawyers went to great lengths to debunk the so-called *contra-legem*

myth, that is to say the accusation that they encouraged judicial rebellion against clear and unambiguous norms.

From a theoretical point of view, Kantorowicz, Ehrlich, and Fuchs were interested in law's idiosyncratic pull between flexibility and consistency, dynamism and stability, pragmatism and normativity. What had captured their imagination from a more practical perspective was the general tension between law and life that had come to the foreground during the transition from the nineteenth to the twentieth century. Their quasi-situationist focus on individual cases, their emphasis on the exercise of will on the part of judges as well as their borderline-nihilistic critique of the possibility of conventional legal normativity made the ideas propagated by the free lawyers symptomatic of a particular *Zeitgeist*. There are furthermore good reasons to think that this time-symptomaticity was what, some time later, attracted the American legal realists. In light of this, it is difficult to overstate the enormous potential of the Heidelberg meeting. With their undeniable intellectual prowess and reformist clout, the small group of alternative jurists that had come together at Radbruch's house had the potential to steer twentieth-century German legal thought into a completely novel direction. Why, then, is contemporary German legal thought not more "American" today?[18]

As much fervor and revolutionary spirit as there may have been at the Heidelberg meeting, German free law—at least as a discrete jurisprudential movement—disappeared with the outbreak of World War I and the subsequent beginnings of institutionalized nationalism, antisemitism, and rightwing idealism. Further research may well reveal that what the free lawyers left behind was much more than a "conscience-sharpening." The German 1920s, 1930s, and early 1940s were after all full of disconcerting legal experimentalism which, as I will describe in more detail below, continued to circle around the idea of "life." However, the particular jurisprudential contingency epitomized by the free law movement, that is to say the brief window of time during which German jurists could comprehensively and systematically have reimagined the methodological cornerstones of their discipline, closed unceremoniously.

This relative failure of German alternative jurisprudence calls for an explanation because the reasons behind it are essential for understanding modern, postmodern and contemporary German legal thought. After all, German and American jurisprudence might not be so different today, had the free lawyers been more successful. In addition, the ultimate failure of German alternative jurisprudence calls for an explanation because those factors that account for the ascent and ultimate descent of free law may themselves go some way towards explaining the ascent and ultimate ascendancy of American legal realism. After all, American jurisprudence might be more "German" today had the legal realists been less successful. Why is it that the

free lawyers, unlike the legal realists, never managed to capture the imagination of their juristic—or for that matter—nonjuristic contemporaries?

To establish why one would assume German and American alternative jurists to have gone down similar paths in the first place, I will now show that both free law and legal realism constituted time-symptomatic responses to a shared transatlantic crisis of modernity—a crisis the legal dimension of which has so far only insufficiently been explored.

German Free Law and American Legal Realism as Instances of a Transatlantic "Jurisprudence of Life"

More than twenty-five years ago, James E. Herget and Stephen Wallace substantially revised conventional accounts of modern American legal history by identifying the—until then almost entirely unknown—German free law movement as the "source" of American legal realism.[19] While Herget and Wallace were first to introduce the connection between German and American alternative jurisprudence to an English-speaking audience, their study suffers from a number of shortcomings. For one, their predominantly textual comparison between free law and legal realist writings fails to address important transatlantic processes of borrowing, criticism, and exchange. Most importantly, it takes little note of how free law ideas were transformed by their journey across the Atlantic as well as how the different institutional settings prevalent in Germany and the US at the relevant time affected the way such ideas were born, the way they matured, and ultimately developed lives of their own. In addition, Herget and Wallace failed to explain why early twentieth-century German and American legal thought should be the subject of comparison in the first place. Why expect any sort of German-American convergence or uniformity, the absence of which demands clarification?

In a 1934 article—one of only a handful of instances in which free lawyers and legal realists directly engaged with one another—Hermann Kantorowicz famously sought to infuse legal realism with "some rationalism."[20] Kantorowicz attributed to the realists the view that law "is not a body of rules but of facts," furthermore that legal science is "empirical" rather than "rational." Kantorowicz summarily dismissed both positions as "exaggerations of the truth," calling on the realists to abandon their "radical views" and to confine themselves to their more "moderate doctrines." Kantorowicz's article, demonstratively titled *Some Rationalism About Realism*, reminds us that crucial and intricate differences exist between free law and legal realist ideas—differences that transcend the habitually overblown common law–civil law dichotomy. That said, there are additional explanations for the clear words Kantorowicz found for his transatlantic colleagues. Most importantly, the fact that he was writing for a law-skeptical (American) audience rather than a law-positive (German) audience,

may have moved him to engage with realism more critically than before, exaggerating German-American differences in the process.[21]

Cognizant of those differences as well as of Kantorowicz's own exaggerations, I will use the remainder of this article to underscore the extent to which both German and American alternative jurists were very much responding and reacting to a similar set of impulses and impetuses in order to set the stage for more in-depth explorations of early twentieth-century transatlantic divergences in legal thought. More specifically I will argue that both free law and legal realism can gainfully be reconstructed as instances of a transatlantic "jurisprudence of life" borne out of the experience of crisis. The particular crisis both free lawyers and legal realists were reacting to was no less than that of modernity itself. At this point, a note of caution is necessary. By reference to the term modernity I do not intend to draw on or contribute to the vast literature concerned with concretizing the elusive phenomenon of modernity. Instead, I am taking early twentieth-century reform jurists on both sides of the Atlantic on their own terms and pay due regard to the concepts and categories they themselves employed.

Both free lawyers and legal realists made ample reference to modernity. It is furthermore no rare occurrence for twentieth- and twenty-first-century legal scholars to conceive of modern law and modern legal science as anything produced by or after the free law–legal realist intervention.[22] Viewed from this perspective, it is less important whether the crisis in question was real or, indeed, modern. As long as early twentieth-century reform jurists in Germany and the US believed that it was, or, at least, capitalized on people's suspicion that it might be, the modern/nonmodern binary presents itself as an important and insightful mode of analysis. I will now turn to its iterations in the minds of early twentieth-century reform jurists in Germany and the US.

For one, the perceived crisis of modernity that both free lawyers and legal realists were reacting to was brought about by certain social, political, and economic changes that—though present in the nineteenth century—had been intensifying up until the turn of the twentieth century. These changes confronted national governments with previously unknown regulatory challenges. Phenomena like industrialization, advances in technology, transportation, and communication, population growth, and urbanization as well as the ethnic, cultural, and religious diversification of society all demanded the dynamic intervention of an increasingly proactive legislator. This process alone had forced legal and political theory to engage with questions as to the proper role of the judge in modern democratic society, questions both free lawyers and legal realists took as the starting point of their jurisprudential endeavor.

The perceived crisis of modernity that both free lawyers and legal realists were reacting to was also, and more acutely, the result of fundamental philosophical uncertainty.[23] In Germany, Friedrich Nietzsche's criticism of the category of history and his more general philosophy had cast scholars, artists and activists of many creeds into

an abyss of intellectual vacuity. In the US, the discovery of non-Euclidian geometry and the subsequent fetishization of naturalism, pragmatism, and empiricism had had similar effects. On both sides of the Atlantic, Charles Darwin's *On the Origin of Species* as well as David Friedrich Strauß's *The Life of Christ, Critically Examined* had awakened people's senses to the environmentality of creation, the humanity of the divine as well as the manipulability of things, people, and ideas. If one could no longer turn to history, professional dogma, or morality for intellectual guidance, where was one to turn? Like many of their contemporaries in politics, theology, literature, and the arts, free lawyers and legal realists solved this dilemma in a novel, original, and—some thought—radical way. What they proposed by way of alternative to conventional sources of normative guidance was thus a turn to "authenticity," "contemporaneity," and, ultimately, "life" itself.

It is this keeping with the general early twentieth-century *Zeitgeist* that makes both free law and legal realism analyzable through the prism of the political, intellectual, and artistic avant-garde, that is to say the totality of fin de siècle reactions to the shared feeling that the end of an old and the dawning of a new era was imminent.[24] Common to this avant-garde was the desire of artists, activists, and intellectuals to transcend the feeling of alienation that had arisen as a consequence of the increasing professionalization of their respective areas of interest and expertise in the decades leading up to the turn of the century. Breaking with the professional norms of their disciplines and attempting to reinvent said disciplines from the bottom up resulted in what the intellectual mainstream perceived to be an essentially negative and antagonistic development. What was common to the avant-garde, however, was a strong desire to close the gap between the particular endeavor they considered themselves to be engaged in and the world surrounding them. Adherents of the early twentieth-century avant-garde thus frequently expressed a desire to singularly and holistically reflect, embody, and ultimately dominate reality.

As part of my brief overview of the German free lawyers, I characterized as time-symptomatic, their quasi-situationist focus on individual cases, their veneration of will-based judicial decision making as well as their borderline-nihilistic critique of the possibility of conventional legal normativity. I will now illustrate and elaborate on these characteristics by reference to the views held by Kantorowicz and his intellectual allies. In order to underscore the transatlantic nature of the legal avant-gardism phenomenon that is the subject of this paper, I will also make reference to the views of Llewellyn and other self-identified realists.

Quasi-situationist Focus on the Individual Case

Free lawyers and legal realists perceived their focus on individual cases as decidedly modern in that it detached a particular situation from both its past and its future in order to situate it more firmly in the present. For early twentieth-century realistic

reform jurists on both sides of the Atlantic, the relevant unit of analysis was thus the facts of a case, lying before the judge like data points before a statistician. While free lawyers and legal realists recognized that law acted as a stimulus on both judges and nonjudges, it had to share the spotlight with the myriad of other stimuli manipulating human consciousness at any given second. While "future" mattered to free lawyers and legal realists in that they both cared about the broader societal impact of judicial decisions, it was adventitious to that moment in time when a particular legal rule, idea, or concept left the lofty heights of abstraction to become tangible concreteness, that moment in time when the theoretical relationship between law and life, rule and reality materialized.

Free law and legal realist obsessions with the facts of an individual case mirror the situationism observable in various strands of avant-gardist politics, philosophy, literature and, especially, the arts. Free lawyers and legal realists could thus be said to have adopted, adjusted, and refined the turn-of-the-century emphasis of scholars, artists, and activists on external over internal circumstance as well as, to some extent, their fascination with spectacle as a means of sociocritical intervention. More generally, the sentiment early twentieth-century reform jurists on both sides of the Atlantic shared with their nonjuristic contemporaries was the following: human decisions—the decisions of regular men, women, and children as well as those of distinguished artists, philosophers, politicians, and jurists—were not so much influenced by the individual rules or underlying principles of an elaborately constructed intellectual system. Instead, they were prisoners of context, narrowly defined. This held true especially in times of social fragmentation and resulting normative pluralism. As a consequence, the German free lawyers, and later the American legal realists, called on early twentieth-century judges and other legal professionals to reconstruct this context for the purpose of determining law's role in and response to the challenges of life in modern society.

Free lawyers' and legal realists' invocation of radical situationality can be seen as a precursor to contemporary modes of judicial contextualization. At the same time, twenty-first-century judges' willingness to take the perspective of a particular party before them, to momentarily "walk in their shoes," is different in one fundamental way. Contemporary judges' mandate to "feel themselves into" the external and internal circumstances of a party before them is generally supposed to occur within the narrow confines of the law and its categories. Instead of "reexperiencing" a particular situation for the purpose of determining what kind of normative response would most aptly reflect the demands of a particular "life context," contemporary judges "reexperience" events on the basis of a juridified reality, that is to say a jurisprudential geography made up of social facts that have already been cartographed according to legal terms, concepts, rules, precedents, and ideas.

Early twentieth-century realistic reform jurists largely opposed the priority treat-

ment afforded to any kind of juridified reality due to the fact that it obscured the self-legislating abilities of society as well as the particular kind of normativity that naturally inhered facticity—a kind of normativity that could at times be informal and pluralistic rather than authoritative and one-dimensional. In so doing, they nonchalantly negated the sense- and order-creating efforts of conventional German and Anglo-American legal science. They also echoed the call of their nonjuristic contemporaries to let life and experience, or better "life experience," triumph over insights gleaned from more formal means of legal education. And yet, there was supposed to be room for legal experts—for judges, jurists, and justicial reformers.

Celebrating the Will-Based Nature of Judicial Decision Making

Both free lawyers and legal realists ascribed almost Herculean powers to the abilities of professional, state-authorized decision makers as well as themselves as the men tasked with ensuring their legal and moral training. The free lawyers in particular criticized the Imperial German judiciary's alleged *Konstruktions-* or *Begriffsjurisprudenz*, because they feared that it enabled judges to covertly impose their subjective value judgments on the unsuspecting parties before them. They also feared that it alienated those parties as well as the population at large by obscuring both the person and the personality of the judge. Finally, the free lawyers criticized that conventional German jurisprudence did away with the ideal of individual judicial responsibility, that is to say the notion that judges routinely put their own moral convictions up for scrutiny whenever they entered a judgment in favor of one or the other party.

Notably, Ernst Fuchs's above-mentioned criticism of early twentieth-century conventional judicial approaches as "crypto-sociological" forms part of only a small number of polarizing comments that even his more reform-oriented colleagues did not dismiss offhandedly. This goes to show that it was the "cryptic" element of conventional judicial law-finding that irked the free lawyers, and, later, the legal realists, rather than the fact that decisions were infused with judges' subjective values in the first place. Both the free lawyers and, later, a majority of the legal realists celebrated judicial lawmaking on the condition that judges treated every case on its individual merits, laid their considerations bare and had recourse to what they deemed to be the hidden normativity of "life" itself—that is to say a kind of reality that preceded juridification. Furthermore, there was widespread agreement among early twentieth-century realistic reform jurists on both sides of the Atlantic that the way to get at "life" was not through law but through new fields of inquiry such as, in particular, sociology and psychology.

However, neither free lawyers nor legal realists went into much detail about how sociological and psychological insights were supposed to find their way into the law. Instead, they seemingly placed all their hopes into a strategically reformed judiciary whose members would, almost intuitively, be able to bring such insights to fruition.

The recruits of this institutional bulwark against jurisprudential backwardness and inauthenticity were supposed to ensure the in-sync-ness of rules and reality by breathing life into the law. For law, after all, was viewed as a mélange of rules that were by definition obsolete the very moment they entered into force.

Free lawyers called for free judicial law-finding, which—while not wholly unconstrained—was supposed to give German judges an unprecedented degree of jurisgenerative power. In turn, the legal realists and their affiliates, with no small intellectual debt owed to their forebears across the Atlantic, came to be obsessed with judicial policymaking and the insight that judges engaged in something akin to legislating. As a consequence, early twentieth-century American reform jurists began an intense search for the particular social scientific discipline or approach that would yield the best result—to the extent that their pragmatist value-neutrality left room for such language. Conversely, realist legal scholarship came to be principally concerned with the study and prediction of judicial behavior rather than doctrinal analysis and itself moved closer to the empirical social sciences.

Free lawyers' and legal realists' veneration of insights from fields like sociology and psychology seems to go against the grain of supposedly antidisciplinary avant-gardism. Why renounce legal formalism one minute only to extol the virtues of formalized social science the next? One explanation for this seemingly contradictory move might be that the social sciences had spurred the modernist anxieties to which early twentieth-century reform jurists on both sides of the Atlantic had undeniably succumbed in the first place. Free lawyers and legal realists thus viewed it as their responsibility to integrate the insights produced by its various subdisciplines lest law and legal scholarship be left behind. Another explanation might be that free lawyers' and legal realists' affinity for the social sciences reflected their time-symptomatic desire to get at a "life-world" they paradoxically viewed as both precondition and result of the law.

In crossing, and thus inadvertently reaffirming, the disciplinary boundaries that separated their own field of inquiry from others, early twentieth-century reform jurists on both sides of the Atlantic ultimately espoused what was, in their eyes, an essentially modern version of law. At its heart was an almost mystical philosopher-judge who, having moved beyond the strict confines of religion, morality, history, reason, and professional dogma, had nothing but his own free will to achieve a kind of modern justice. This modern justice, then, was a kind of justice that was neither absolute nor universal but situationist, relative, and relational, a kind of justice that derived its "just-ness" from compliance with modern reality made tangible through the tools and insights of the social sciences.

The perceived volatility of justice in modern society was far from unproblematic and, in fact, constituted perhaps the most excoriated aspect of early twentieth-century realistic reform projects. Critics began pressing for answers to the question how the will-based nature of judicial decision making could be reconciled with increasingly

important constitutional and democratic ideals like separation of powers, the rule of law as well as procedural and substantive due process rights.

Borderline-Nihilistic Critique of Conventional Legal Normativity

Early twentieth-century adherents of more conventional German jurisprudence frequently criticized the free lawyers for their alleged nihilism, anti-intellectualism, and indifference to moral and ideological perniciousness. Post–World War II German legal-historical scholarship furthermore lumped Kantorowicz, Ehrlich, and Fuchs together with Carl Schmitt and his theory of concrete and institutional order, blaming all equally for the perceived defenselessness of German jurists during the Third Reich.[25] These allegations, though ideologically unsound, should not be dismissed offhandedly. Notably, "life itself" went on to be a central slogan and preoccupation of the National Socialists.[26] That said, Kantorowicz, Ehrlich, and Fuchs held very strong convictions about right and wrong, despite challenging the notion of prejuridified reality. They also cared deeply about legal certainty, thwarting judicial arbitrariness, and achieving legal results that were "in sync" with the demands of reality. Unlike Schmitt's, their vision of society, reality, and "life" was deeply democratic.[27]

When Kantorowicz, in his anonymously published 1906 manifesto, referred to free law as "natural law of the twentieth century," however, it was more than just a rhetorical device.[28] Unlike natural law systems of earlier times, his argument went, free law did not revolve around some sort of Archimedean point that lay outside life and human consciousness. Unlike its divine, morality- or reason-based precursors, this new twentieth-century natural law derived from man and his experience in the world alone. And yet the realization dawned on many, including the free lawyers themselves, that judges—these new, modern, *human* gods—whose calling was to breathe new life into the law, were not so different from more conventional deities after all: they could do either good or evil.

The simultaneous horror and exhilaration this newly discovered sense of human possibility produced is aptly captured by a particular flavor of judicial realism sometimes referred to as the "gastronomical school of jurisprudence," the view that "law is what the judge had for breakfast."[29] While often taken as a malicious caricature of the realist contribution to legal scholarship and practice, its truth value is difficult to ignore. Many legal realists really did believe that judicial decisions were at least codetermined by judges' subjective attitudes and consequently studied how to predict or "manipulate" judicial behavior. What is more, scientific studies have shown time and again that hunches, intuition, and mood actually do impact judicial decision-making processes, just like they impact decision-making processes in any other context.[30] But if legal rules are just one of many stimuli that affect judges when making their decisions, how can law ever legitimately guide anyone's behavior? Why have an elaborately constructed legal system, why have law at all?

Legal realism, as a concrete movement, waned in the US with the rise of totalitarian regimes in Europe. Not least due to Pound's less than covert admiration for Hitler, Llewellyn, and his followers were increasingly attacked by adherents of catholic social thought for their perceived moral relativism as well as their alleged support for fascism and National Socialism.[31] This ultimately led them to either embrace natural law thinking or to turn towards the empirical study of law in society. That said, post–World War II American legal movements almost invariably fall within one of two polythetic categories: those that try to salvage conventional legal normativity by reference to more traditional sources of normative guidance or the legal process; and those that take the impossibility of conventional legal normativity as their starting point, replacing realistic value-neutrality with thick notions of social justice or economic efficiency.

Brian Leiter's claim that the legal realist movement constituted "the major intellectual event in twentieth century American legal practice and scholarship," needs little, if any, relativization. At the same time, however, it confirms the suspicion that a realistic jurisprudence really is no jurisprudence at all. How to make sense of free lawyers' and legal realists' almost ostentatious indifference to the various moral and intellectual quandaries that troubled their respective theories?

Free Law and Legal Realism as Law-Specific Expressions of More General Tendencies in Early Twentieth-Century Transatlantic Social, Moral, and Political Thought

It does indeed seem questionable whether a robust legal theory based on free law or legal realist precepts could ever successfully be formulated. For all their militant vociferousness, early twentieth-century realistic reform jurists on both sides of the Atlantic could not drown out the fact that they had failed to successfully derive an "ought" from an "is," that they had failed to ensure the value-compliance of judicial decisions through supposedly value-free means. It was one thing to ask the German and American public to accept that judges should pay heed to trade usages, folkways, and customs in matters pertaining to contract, tort, or family law. It was quite another to expect them to have no objection to the judicial reflection of majoritarian popular beliefs—however scientifically obtained—after the Holocaust. Free law and legal realism, at least in their original *Gestalt*, came to be viewed as anathema after 1945, especially, but not exclusively, in Germany.

In addition, allegations of anti-intellectualism and self-destructivism further undermined the credibility of free lawyers and legal realists, and continue to do so to the present day. Reform jurists on both sides of the Atlantic availed themselves liberally of the writings of earlier authors without consistently acknowledging the paternity of their ideas. They openly prioritized the antagonistic overthrow of established knowledge over the formulation of fully fledged alternatives. The idea of legal formalism

they posited themselves against was no more than a strategically constructed straw man.[32] In turn, they sanctimoniously lionized the highly formalized insights of the social sciences, threatening to destroy autonomous legal science in the process. Maybe most deleterious of all, free law and legal realism left judges with little guidance given that law was supposed to be what the judge said it was.

Both in Germany and US, the role of education in creating uniform judicial presuppositions, and by proxy legal certainty, has so far not received the attention that it merits. Both free lawyers and legal realists thus advanced the proposition that if only their respective reform ideas were to become part of law school curricula throughout Germany and the US some sort of judicially maintained "life" justice would follow. At the same time, this explanation fails to account for some of the more obvious theoretical shortcomings of free law and legal realist proposals. It also applies a purely jurisprudential perspective to an intellectual phenomenon that is not purely jurisprudential in nature. It would thus be gravely mistaken to look at early twentieth-century realistic jurisprudential reform movements exclusively through the lens of law.

What is necessary instead is to start appreciating both free law and legal realism as law-specific expressions of more general trends in early twentieth-century moral, social, and political thought, and to apply to the two movements those tools of analysis that are commonly applied to other intellectual currents during the relevant time period. Only then can what looks like nihilism, anti-intellectualism, and indifference to moral perniciousness—dangerous jurisprudential nonsense in short—be seen for what it truly was: a genuine response to the theoretical and practical challenges of modernity advanced by individuals who had one foot each in the legal establishment and the avant-garde antiestablishmentarianism that surrounded them. In light of this, free lawyers' and legal realists' respective responses needed to comply with what they perceived to be the rules of early twentieth-century reform discourse, characterized as it was by clamorous ideology-, policy-, and methods-wars between various societal and institutional actors as well as the various professional and decidedly antiprofessional subgroups they encompassed.

Both free lawyers and legal realists turned to "life" as a new, modern, and in a way exciting source of normative guidance to bring sense and order to a reality that seemed all but entropic. In order to facilitate maximum in-sync-ness between law and life, free lawyers and legal realists prioritized avant-gardist grandstanding over adherence to strict scholarly etiquette. Somewhat dramatically, they perceived their opponents—all those who still looked to religion, morality, history, rationality, or professional dogma for normative guidance—as being "full of passionate intensity." The alleged boisterousness with which these opponents proclaimed their convictions seemed to them even more galling given the perceived backwardness of these ideas. Inspired by avant-garde scholars, artists, and activists from other disciplines, free

lawyers and legal realists realized they had to make at least an equal amount of noise in order to hit the *Ton der Zeit*. They knew that for contemporaneity, authenticity, and "life" to win over conventional jurisgenerative forces, they would have to make their "lack of conviction" known with equal fervency, vigor, zeal. And, jurisprudential avant-gardists that they were, they gave it their best shot.

Concluding Remarks

Why was German and American alternative jurists' time-symptomatic realism met with disapprobation on one side of the Atlantic, and plaudit on the other? For any research on this question to get off the ground, it is first necessary to establish why one would assume early twentieth-century German and American alternative jurists to have gone down similar paths in the first place. In this paper, I have shown that German free lawyers and American legal realists were not coincidentally part of the same intellectual tradition, but instead very much reacting and responding to similar impulses and impetuses; that they constituted instances of a transatlantic "jurisprudence of life." The question now is how we can ever truly understand the reasons behind persisting divergences in German-American legal thought. While this paper cannot provide more than an introduction to the relatively novel field of inquiry I would preliminarily caption "global perspectives on early twentieth-century alternative jurisprudence," some preliminary comments seem apposite.

By way of a tentative answer, I would argue that the reasons for the transatlantic divergence in legal thought that is at the heart of this paper can only be understood if we apply the tools and insights of transnational history to the realm of legal theory and philosophy.[33] Comparative history only gets us so far. It can help us identify intriguing instances of disparity and divergence but ultimately depends on outside help to shed light on the reasons behind them. Given early twentieth-century realistic reform jurists' avant-gardist mindset, transnational history in this context must furthermore mean more than to simply trace the genealogy of realistic ideas about law through textual detective work. Most importantly, it must mean paying attention to how German and American jurists themselves thought of the cultural and institutional factors that facilitated or impeded their respective endeavors, and how they conceived of and understood the conditions under which their colleagues across the Atlantic were operating.

By way of conclusion, I would now encourage contemporary (legal) historians as well as scholars from other fields to look to the way in which free lawyers and legal realists imagined their transatlantic jurisprudential other as well as to the way they alternated between employing said other as either foil or inspiration; in addition to applying to free law and legal realism those nonjurisprudential modes of analysis I have made a case for in this paper.

Notes

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