

# The Foundations of European Private Law

Edited by

Roger Brownsword

Hans-W Micklitz

Leone Niglia

and

Stephen Weatherill



• HART •  
PUBLISHING

OXFORD AND PORTLAND, OREGON

2011

## *A Transnational Genealogy of Proportionality in Private Law*

DUNCAN KENNEDY

### I INTRODUCTION—THE DRAFT CFR AS LEGAL THEORY

**I**N JANUARY, 2008, the ‘Von Bar Group’ published the ‘Interim Draft Common Frame of Reference’ (‘DCFR’),<sup>1</sup> in partial fulfilment of the mandate and grant of the European Commission. The DCFR is supposed to be the basis of the ‘harmonisation’ of the private law rules of the members of the EU, functioning not as a code, but in the mode of the American restatements. The question to what extent the treaties constituting the EU authorise the Commission to impose common private law rules is a vexed one, and the DCFR has intensified conflict on this point. But for our purposes the most striking thing about the document is its affirmation that the selection of the ‘solutions’ that are to compose the body of harmonised European private law must be done on the basis of ‘balancing.’ Here are the relevant parts of the document:

11. Underlying principles. The word ‘principles’ surfaces occasionally in the Commission communications mentioned already, but with the prefix ‘fundamental’ attached. That suggests that it may have been meant to denote essentially abstract basic values. The model rules of course build on such underlying principles in any event, whether they are stated or not. It would be possible to include in the DCFR a separate part which states these basic values and suggests factors that the legislator should bear in mind when seeking to strike a balance between them. ...

It must be conceded, however, that, taken in isolation, such fundamental principles do not advance matters much at a practical level because of their high level of abstraction. Abstract principles tend to contradict one another. They always have to be weighed up against one another more exactly because only then are optimal outcomes assured.

...

18. Function and purpose of ‘fundamental principles’. Private law and in particular contract law is one of those fields of law which are, or at least should be, based on and guided by deep-rooted underlying principles. Any statement of them must, in our view, give some practical guidance on how to read and to interpret the definitions and model

<sup>1</sup> C von Bar, E Clive, H Schulte-Nölke et al (eds), *Principles, Definitions and Model Rules of European Private Law, Draft Common Frame of Reference (DCFR), Interim Outline Edition* (Munich, Sellier, 2008).

rules contained in the CFR, and to reflect its theoretical underpinnings, including its underlying political, economical and social aims and values.

...

23. Balancing conflicting aims and values. It is characteristic for such fundamental aims that they conflict with each other. For example, on occasion, justice in a particular case may have to make way for legal certainty, as happens under the rules of prescription. Freedom, in particular freedom of contract, may be limited for the sake of human rights if, for instance, rules on non-discrimination apply. Therefore the aims can never be pursued in a pure and rigid way. The underlying values of a private law system can only be discerned and described by explaining how such fundamental aims are balanced in the individual model rules.

This interim formulation was sharply critiqued in a paper authored by Eidenmüller, Faust, Grigoleit, Jansen, Wagner and Zimmerman.<sup>2</sup> To an American observer with some long-term familiarity with Western European private law theory, this paper seems easily recognisable as a conservative attack on the DCFR. Thus, it objects to the use of general clauses, reasonableness requirements and the augmentation of the role of business practice as an invitation to judicial law-making excoriated as undemocratic. At the same time, it objects to the generalisation of duties of good faith and cooperation, and the unstructured nature of the list of factors to be balanced, as inviting an unjustifiable erosion of private autonomy for the sake of an imprecise goal of social justice and solidarity.

But what is most striking about the critique is that it accepts the general balancing framework, albeit with two demands: that the DCFR should provide 'decision criteria' for balancing in choosing particular rules and that private autonomy be recognised as the rule, with restrictions in the name of other values clearly relegated to the status of exceptions.

A few months later, Hesselink published a short book, *CFR and Social Justice*,<sup>3</sup> defending the DCFR against left critiques that it provided inadequate protection for weak parties and against the Eidenmüller et al critique that it was too left wing. Without going into detail, the most striking thing about this highly sophisticated defence from the centre-left was that it also accepted the balancing framework,<sup>4</sup> in this respect building on a fascinating series of social justice oriented private law works that had gradually moved to conceptualising social justice as a congeries of policies needing to be balancing among themselves, at the same time that they were collectively balancing against the traditional autonomy and administrability policies favoured by the Right.<sup>5</sup>

<sup>2</sup> H Eidenmüller, F Faust, H Grigoleit, N Jansen, G Wagner and R Zimmermann (eds), 'The Common Frame of Reference for European Private Law—Policy Choices and Codification Problems' (2008) 28 *Oxford Journal of Legal Studies* 659.

<sup>3</sup> MW Hesselink, *CFR and Social Justice: A Short Study for the European Parliament on the Values Underlying the Draft Common Frame of Reference for European Private Law: What Roles for Fairness and Social Justice?* (Munich, Sellier, 2008).

<sup>4</sup> eg, *ibid.*, 22 and *passim*.

<sup>5</sup> See text to n 105 below.

A year later the von Bar group published the final draft of the DCFR, acknowledging various critiques.<sup>6</sup> I would characterise the revision carried out on the list of principles to be balanced as a complex set of direct and indirect concessions to the conservative critique of Eidenmüller et al, to some extent marginalising the principles that might be regarded as having a progressive pedigree, and reasserting the primacy of what in America we would call neo-liberal understandings. Significantly, the principle of social justice and solidarity is demoted—along with linguistic and cultural diversity and protection of human rights—to a secondary role, on the excuse that public law rather than private law should be the main vehicle for its achievement.<sup>7</sup> Nonetheless, there is no retreat at all from the basic balancing framework<sup>8</sup> and, at least to my eye, nothing that could be said even to approach the development of ‘decision rules’ to guide balancing in the fashioning of particular rules.

In this chapter, I will treat the DCFR and the critiques as marking an important moment: the open adoption by prestigious and authoritative European privatists of diverse ideological tendencies of balancing as the basic framework for analysis and evaluation of private law rules. Of course, it is possible that the approach of the DCFR will turn out to have been idiosyncratic, and that more traditional methods, whether classically ‘positivist’ (meaning ‘formalist’ or conceptual), or teleological or based vaguely on the ‘jurisprudence of values’ will regain their dominance. On the other hand, it seems possible that European private law theory has reached a kind of historic turning point and will now find itself merging into the more general debate in administrative, constitutional and European Union law, within which ‘proportionality’ is both omnipresent and highly controversial. In my view, this is the more likely outcome and would represent the continuation and intensification of a global trend in legal thought.<sup>9</sup>

In the general debate, it is often said, and I agree, that the move to proportionality represents the simultaneous de-rationalisation and politicisation of legal technique. This trend, if it exists in private as well as in public law, is open to radically different interpretations. We might understand it, in the mode of Wieacker in his *History of Private Law in Europe*, as devolution, as the tragic loss of the coherence and ethical power that the legal tradition attained in the late-nineteenth century.<sup>10</sup> Or we might, and I think we should, on the contrary, interpret it in a Weberian way, as disenchantment, as the belated attainment of legal maturity.<sup>11</sup>

<sup>6</sup> C von Bar, E Clive, H Schulte-Nölke et al (eds), *Principles, Definitions and Model Rules of European Private Law, Draft Common Frame of Reference (DCFR), Outline Edition* (Munich, Sellier, 2009).

<sup>7</sup> *ibid*, 10–17, 61–62.

<sup>8</sup> *eg, ibid*, 61.

<sup>9</sup> D Kennedy, ‘Three Globalizations of Law and Legal Thought: 1850–2000’ in D Trubek and A Santos (eds), *The New Law and Economic Development. A Critical Appraisal* (Cambridge, Cambridge University Press, 2006).

<sup>10</sup> See text to nn 92–96 below.

<sup>11</sup> M Weber, ‘Politics as a Vocation’ in HH Garth and CW Mills (eds and trans), *From Max Weber: Essays in Sociology* (New York, Macmillan Press, 1946); D Kennedy, ‘The Disenchantment of Logically Formal Legal Rationality, or Max Weber’s Sociology in the Genealogy of the Contemporary Mode of Western Legal Thought’ (2004) 55 *Hastings Law Journal* 1031.

My goal in this chapter is to trace the transnational genealogy of balancing proportionality in private law, with the emphasis on the pattern of exchange between Europe and the United States, beginning with the late-nineteenth and early-twentieth century dominance of German and French private law theory and continuing up to the present. I will proceed as follows:

The second part presents a brief summary of what I mean by balancing proportionality as an ideal type of the dominant mode of legal reasoning in our period. The third and fourth parts make up the bulk of the chapter. They present a narrative tracing ideas about balancing in European and American private law theory over the last 150 years.

Part III traces the origins of private law balancing up to the Second World War. It begins with Bentham and Jhering and then takes up the little known American developments in the first part of the nineteenth century, before the ascendancy—in Europe and also in the US—of the highly conceptual private law approaches commonly called ‘Classical Legal Thought’ (‘CLT’). Around 1900, balancing ideas became an element in the ‘social’ critique of CLT for the ‘abuse of deduction’, but were radicalised by German, French and American thinkers (most notably Demogue, Heck and Holmes) who had little faith in the social project of reconstructing legal theory around teleological reasoning. This part emphasises the extent to which the Americans initially responded to European ideas about balancing that suited their circumstances, but eventually developed their own original version.

Part IV describes the more or less complete marginalisation of balancing ideas in Europe after the Second World War, at the same time that American legal theorists were developing the approach in a newly overt and elaborate way in the United States. Over the last 20 years, a variety of circumstances have reversed this process, bringing balancing/proportionality to the fore in Europe, while a dramatic political shift to the Right along with the rise, first, of civil libertarian and then of neo-liberal neo-formalism have undermined it (without by any means eliminating it) in the United States.

There follows a ‘coda’, brief and sketchy, more a set of hypotheses than a developed position. First, it argues, contrary to a quite widespread European opinion, that private and public law balancing/proportionality are the same in all important respects and that the European version is the same in all important respects as the American version. Secondly, in the US there has been a close historical relationship between private and public law balancing. This suggests two questions for future research. The first concerns the European genealogy of proportionality: should we continue to understand its emergence in public law after 1945 strictly as a product of the influence of some combination of Aristotle and nineteenth-century German administrative law on first the German and then the European public law courts? The second concerns the influence, if any, of the intense and highly publicised American postwar debate about balancing in constitutional law on the German Constitutional Court.

I see this chapter as an essay in a relatively new comparative law genre that might be called ‘transnational genealogy of legal thought,’ or something like that. See

Monateri, 'Black Gaius'<sup>12</sup> and Diego Lopez, *Teoría impura del derecho*.<sup>13</sup> In this genre, we study not 'transplants' of particular legal rules or even of a whole body of law, but the dissemination of the discursive practices of actors who are producing law (lawyers, judges, legislators, academics) or, in the phrase of the Sacco school, the 'circulation of models'. Graziadei's very useful chapter on transplants<sup>14</sup> mentions in passing the study of legal consciousness, but it is a measure of the newness of the approach that he has little to say about how it is done or what its results have been. A warning: this is not legal sociology, so in the case, for example, of balancing, I don't discuss the degree to which changes in models at the very abstract academic level affect concrete rules or particular jurisdictions, nor the kinds of interests that are served or disserved by the transformations, nor, for that matter, the historical causes of change. I am interested in all these topics, but here focus on figuring out what exactly changed in ways needing contextualisation in all the above senses.

## II SUMMARY—THE IDEAL TYPE OF BALANCING IN PRIVATE LAW

This section will lay out in some detail, in the form of a Weberian ideal type, what I take to be the various characteristics of the technique of balancing/proportionality as it is currently practised by lawyers in both private and public law.<sup>15</sup>

1. The first point is that, according to the conventional understanding, balancing is a technique of 'last resort'. We balance when there is a gap, or conflict or ambiguity in the legal materials, so that it is at least arguable that there is neither a definitive 'conceptual' nor a definitive teleological nor a definitive precedential answer to the interpretive question posed. This may be because these 'logical' methods have 'run out' or because in the existing understanding it is permissible to disregard the outcome they require on the ground that the legal decision maker has a responsibility to substantive values as well as to positive law. Of course, it is common to argue that judges and jurists should never balance. Conversely, it is common to argue that particular pieces of legal reasoning 'abuse deduction' or precedent or teleology, and that the only plausible explanation of the outcome is covert balancing. And it is not uncommon to argue that all legal reasoning, whatever its self-presentation, is 'really' balancing. In other words, the role of ideal-typical balancing in legal reasoning is controversial.

<sup>12</sup> PG Monateri, 'Black Gaius: A Quest for the Multicultural Origins of the "Western Legal Tradition"' (2000) 51 *Hastings Law Journal* 479.

<sup>13</sup> Diego Lopez, *Teoría impura del derecho: La transformación de la cultura jurídica latinoamericana* (Bogotá, Legis, 2004).

<sup>14</sup> M Graziadei, 'Comparative Law as the Study of Transplants and Receptions' in M Reimann and R Zimmermann (eds), *The Oxford Handbook of Comparative Law* (Oxford, Oxford University Press, 2006).

<sup>15</sup> This summary draws on D Kennedy, 'Freedom and Constraint in Adjudication: A Critical Phenomenology' (1986) 36 *Journal of Legal Education* 518; D Kennedy, *A Critique of Adjudication (fin de siècle)* (Cambridge, Mass, Harvard University Press, 1997); D Kennedy, 'From the Will Theory to the Principle of Private Autonomy: Lon Fuller's Consideration and Form' (2000) 100 *Columbia Law Review* 94; Kennedy, 'The Disenchantment of Logically Formal Legal Rationality', above (n 11); Kennedy, 'Three Globalizations', above (n 9).

2. In balancing, we understand ourselves to be choosing a norm (not choosing a winning party) among a number of permissible alternatives on the ground that it best balances or combines conflicting normative considerations. The considerations vary in strength across an imagined spectrum of fact situations. The norm has a defined scope of application—the set of fact situations for which it represents the ‘best balance’—and a limit, beyond which we enter the domain of an exception, or of another norm.

3. The chosen norm is not derivable from any of the considerations taken in isolation, so the norm is a ‘vector’ or a ‘resultant’ (to use Heck’s word), rather than a conclusion that was always implicit in a general principle or goal. The considerations may be loosely ranked but there are no ontological priorities among them and in private law they include not only the moral considerations often called principles, but also ‘policies,’ goals, values, rights and even precedents conceived as having differential ‘weight.’ These are typically arrayed in formulaic pro/con ‘argument bites’ that are used over and over in legal argument.

4. It is a very important condition of legitimate balancing that the considerations must be derivable from the body of legal materials, as either enacted or as inferable (this is the survival of the classical ‘method of construction’ within the balancing enterprise). And they must also be ‘universalisable’, meaning that they must be at least formally in the interests of ‘everyone’, by contrast with interests understood to be ‘ideological’ or ‘religious’ or ‘partisan’ or ‘sectarian’.

5. An important moment in the history of balancing (to be discussed in more detail below) occurred when the procedure was reformulated to include considerations of administrability and, very significantly, considerations of institutional competence (judge versus legislator versus administrator; regional versus national versus transnational instances, etc). This means that, to the objection that balancing gives the judge too much power, or that it is too uncertain, the advocate responds that judicial usurpation is a danger to be considered, as is the choice, in formulating the new norm, between a rule and a vaguer standard. In short, balancers engulf their critics by incorporating their objections into the calculus.

6. A common (but by no means universal or logically necessary) way to organise the permissible norms among which the balancer chooses is according to the extent to which they are ‘social’—meaning that they internalise costs to actors—or ‘individualist’—permitting actors to externalise. This contrast translates, generally but by no means universally, into a political contrast: in the law of the market, externalising norms are conservative, while internalising norms are progressive. In the law of the family, education, religion and civil society generally, externalising norms are progressive (feminist, libertarian) whereas internalising norms are conservative. (This is a complicated point which I have developed elsewhere,<sup>16</sup> but must leave in this cryptic form here.)

7. Balancing is an intensely controversial procedure, commonly regarded as, at least potentially, a Trojan horse for the invasion of law by ideology. There is no agreement as to whether it is always, or never, or often, or seldom necessary because there is no alternative. There is no agreement as to whether judges should

<sup>16</sup> Kennedy, ‘Three Globalizations’, above (n 9) 64.

use it, always, never, sometimes, etc. I think, on the other hand, that there is general agreement on the main features of the ideal type as I have just described them.

### III BALANCING BEFORE THE SECOND WORLD WAR IN EUROPE AND AMERICA

#### A Balancing in the Emergence of Classical Legal Thought

In the genealogy of balancing before Classical Legal Thought (CLT),<sup>17</sup> Bentham clearly has an important place, but it is not easy to define that place. As against the attitude of Kant, and then of Savigny and Hegel, Bentham demands that we see law as a 'means to an end'.<sup>18</sup> Jhering, who coined that phrase, recognised Bentham as his forefather, merely substituting social ends for the happiness of individuals.<sup>19</sup> Bentham's critique of Blackstone<sup>20</sup> is the first canonical work of *legal* critique in English. It is important first because he mocked Blackstone precisely for claiming repeatedly that there was an immanent rationality to the common law of his time. He recognised and critiqued the law making role of judicial law interpreters and appliers and argued for reform by choosing and then codifying rules that would produce the most possible human happiness. All through the nineteenth century and into the twentieth, similar internal critiques of conventional doctrinal writers undermined faith in conceptual and teleological forms of legal reasoning, clearing the ground for the acknowledgment of legal indeterminacy and the consequent necessity of balancing as a last resort. (As, for example, Jhering's 'Heaven of Legal Concepts'.<sup>21</sup>)

But when it came to choosing the rule, Bentham is better described as an advocate of an additive method than of a balancing method. He recognised that the interests of individuals conflict, and that law regulates the conflicts, with the goal of producing the largest sum of happiness. He argued that law should sanction in order to align the interests of the actor with those of others, but abstain from intervention where intervention would not increase the sum of individual happiness.<sup>22</sup> This is quite different from the idea that the group has common goals that conflict among themselves, so that whatever rule we choose will be a compromise.

In the United States, Bentham was influential and controversial, mainly because of his advocacy of codification. American judges and doctrinal writers developed a conventional way to explain legal rules, one that fell into none of the camps of

<sup>17</sup> On the general category of classical legal thought, see D Kennedy, *The Rise and Fall of Classical Legal Thought* (Washington, Beard Books, 1975) ch 3; Kennedy, 'Three Globalizations', above (n 9).

<sup>18</sup> 'The general object which all laws have, or ought to have, in common, is to augment the total happiness of the community': J Bentham, *An Introduction to the Principles of Morals and Legislation* (Oxford, The Clarendon Press, 1879) 170.

<sup>19</sup> R von Jhering in I Husik (trans), *Law as a Means to an End*, The Modern Legal Philosophy Series 5 (New York, Macmillan, 1921).

<sup>20</sup> J Bentham, *A Fragment on Government* (Dublin, J Sheppard et al, 1776).

<sup>21</sup> R von Jhering, 'In the Heaven of Legal Concepts' in MR Cohen and FS Cohen (eds), *Readings in Jurisprudence and Legal Philosophy* (Boston, Little Brown, 1951).

<sup>22</sup> Bentham, *An Introduction to the Principles of Morals and Legislation*, above (n 18) chs 13 and 17.



European legal philosophy (natural rights, natural law, utilitarianism, positivism, the historical school). They were particularly conscious of the possibilities for choice in law making, perhaps because in their post-colonial situation they had constantly to decide how much of their colonial English law to retain and then how much of contemporary English legal development to import. Their formula was that legal choice involved tempering the demands of 'morality' (sometimes also called 'God's law' or 'justice' or 'natural right' or 'the law of nature') in the interest of what they called 'policy', meaning the common, usually material interests of the community.<sup>23</sup>

The common law was less than fully moral, but for good reasons. A famous canonical statement of this point of view, worth extensive quotation, is Theophilus Parson's explanation of the limitations of the law of fraud, distinguishing between,

that kind and measure of craft and cunning which the law deems it impossible or inexpedient to detect and punish, and therefore leaves unrecognized, and that worse kind and higher degree of craft and cunning which the law prohibits, and of which it takes away all the advantage from him by whom it is practised. The law of morality, which is the law of God, acknowledges but one principle, and that is the duty of doing to others as we would that others should do to us, and this principle absolutely excludes and prohibits all cunning; if we mean by this word any astuteness practised by any one for his own exclusive benefit. But this would be perfection; and the law of God requires it because it requires perfection; that is, it sets up a perfect standard, and requires a constant and continual effort to approach it. But human law, or municipal law, is the rule which men require each other to obey; and it is of its essence that it should have an effectual sanction, by itself providing that a certain punishment should be administered by men, or certain adverse consequences take place, as the direct effect of a breach of this law. If therefore the municipal law were identical with the law of God, or adopted all its requirements, one of three consequences must flow therefrom; either the law would become confessedly, and by a common understanding, powerless and dead as to a part of it; or society would be constantly employed in visiting all its members with punishment; or, if the law annulled whatever violated its principles, a very great part of human transactions would be rendered void. Therefore the municipal law leaves a vast proportion of unquestionable duty to motives, sanctions, and requirements very different from those which it supplies. And no man has any right to say, that whatever human law does not prohibit, that he has a right to do; for that only is right which violates no law, and there is another law besides human law. Nor, on the other hand, can any one reasonably insist, that whatever one should do or should abstain from doing, this may properly be made a part of the municipal law, for this law must necessarily fail to do all the great good that it can do and therefore should, if it attempts to do that which, while society and human nature remain what they are it cannot possibly accomplish.<sup>24</sup>

Pre-classical American legal thinkers were able to assimilate a surprisingly large number of legal doctrines to this model, including, for example, the doctrines of caveat emptor, negotiability, limit shareholder liability, bankruptcy and consideration.<sup>25</sup> As with Bentham, we are speaking of a precursor of balancing and in the United States it may be that this is the prototype of the idea of conflicting

<sup>23</sup> For an extended discussion, see Kennedy, *The Rise and Fall*, above (n 17) ch 3.

<sup>24</sup> T Parsons, *The Law of Contracts* vol 2 (Boston, Little Brown, 1853-55) 265.

<sup>25</sup> Kennedy, *The Rise and Fall*, above (n 17) 111-13.

considerations leading to the choice of a norm well understood as a compromise. But it is only a prototype, still missing most of the attributes that I listed above in describing the ideal type.

A second American legal idea also plays a role in the pre-history of balancing. The systematisation of contract, tort and property law at the end of the nineteenth century around the will theory was a gradual affair. There were a number of doctrinal areas that were outliers in relation to the core areas of private law. Anna di Robilant has usefully gathered these together, and shown that in each one common law judges and doctrinal writers recognised a large conflict of interests between right holders, going beyond the narrow material interests of the particular litigants and the need to choose outcomes that took the conflict of interests into account.<sup>26</sup> Some important examples include water rights, nuisance law, interference with contractual relations and the law governing labour union activities, such as strikes and boycotts.

Beginning in the 1840s and continuing into the early twentieth century, one characteristic American solution was a 'reasonableness' test (the other was a 'malice' test). The courts took up on a case-by-case basis, guided by earlier precedents, the assessment of the quantity and legitimacy of the interests of the litigants. In deciding whether what the defendant had done was 'reasonable', the courts took into account the economic consequences for the community of facilitating or obstructing the activity in question. These decisions could have a great deal of precedential value, in spite of their formulation as applications of a standard and amounted to important judicial legislation.

Reasonableness tests were characteristic of CLT in both public and private law, as for example in the emerging law of negligence and in antitrust law. They were not categorically inconsistent with the classical drive to rationalise and unify law around the will theory, since it was easy to conceptualise an actor's unreasonableness as fault, a defect of the will. The methodology of balancing/proportionality that characterises modern law is quite different from deciding a particular case by applying a reasonableness standard balancing the costs and benefits of the defendant's conduct against costs and benefits to the plaintiff, in light of larger community interests. In the former, the jurist chooses a norm by balancing; in the latter, it is the norm itself whose application requires balancing.

American jurists, before and also during the Classical period, never, to my knowledge, justify the choice of a reasonableness test (requiring balancing in application) by balancing the conflicting principles, rights, welfare, administrability and institutional competence considerations that seem relevant to the choice. The choice of reasonableness was, at the rhetorical level, just the opposite of a compromise of conflicting considerations, since reason was a universal and also a legal value.

Nonetheless, it is a relatively small step from deciding a case by a reasonableness test, thereby setting a precedent, to deciding on a norm by a similarly structured method of balancing. American jurists such as Oliver Wendell Holmes and Learned

<sup>26</sup> A di Robilant, 'Abuse of Rights: The Continental Drug and the Common Law' (2010) 61 *Hastings Law Journal* 687.

Hand seemed to clearly grasp this analogy, as they developed balancing methodology as an anti-Classical, critically informed practice in the early twentieth century.

## B Balancing and the Critique of Classical Legal Thought

The most important figure by far in the critique of CLT was Rudolph von Jhering, the founder of what I will call Social Legal Thought (SLT). The two dimensions of SLT were the insistence on 'law as a means to an end' and the internal critique of what Francois Geny famously called the 'abuse of deduction' in CLT.<sup>27</sup> While it is common to treat Jhering's 'Spirit of Roman Law'<sup>28</sup> as emblematic of his early 'formalist' phase, it is worth noting that the thesis of this masterpiece is that the spirit of Roman law was transformed (for the worse, according to him) by the rise of good faith, so that conflicting ideals are present at the heart of the work. But for our purposes, it is more important that a few pages out of the massive whole were preserved and referred to over and over again by all the critics of CLT. In the discussion of 'formal realisability' versus 'material realisability' Jhering asserts that the interest in administrability will often force departure from the norm formulation that would best suit the underlying substantive purpose of the law. His famous example was the choice of a rule of majority at 21, distorting the substantive goal of majority for those of mature judgment.<sup>29</sup>

It is striking that in 'Law as a Means to an End',<sup>30</sup> the manifesto of legal teleology, there are few if any examples of Jhering presenting legal choice as compromise. There are many legal ends and it is clear that they may conflict. But the conflict is resolved not by compromise, but by the choice of a dominant end. For example, the law of property serves private autonomy only so long as private actors behave in a way that promotes the good of society. When there is a conflict, the good of society forces the landowner to grant an easement to the landlocked parcel, prohibits destruction of a valuable house built in a mistake of title and so forth.<sup>31</sup> Over and over, the later critics of CLT working in Jhering's shadow refer only to the necessity of compromising form and substance when looking for an example of the necessity of balancing in private law. (See, for example, Heck,<sup>32</sup> and the DCFR as quoted in the introduction to this chapter.)

In the critique of the abuse of deduction, both Jhering and Geny proceed by demonstrating flaws in dogmatic presentations. They then argue, vaguely, that in the presence of open texture the jurist should choose a rule according to the social ends or interests in presence. They are persistently blind to the obvious problem of the conflict of social ends. When they recognise it, they simply choose a dominant

<sup>27</sup> F Gény, *Méthode d'interprétation et sources en droit privé positif: essai critique* 2nd edn (Paris, F Pichon et Durand-Auzias, 1919).

<sup>28</sup> R von Jhering, in O de Meulenaere (trans), *L'esprit du droit romain dans les diverses phases de son développement* (Paris, A Marescq, 1877), originally published as R von Jhering, *Geist des römischen Rechts auf den verschiedenen Stufen seiner Entwicklung* (Leipzig, Breitkopf und Härtel, 1852).

<sup>29</sup> *ibid.*, 51–56.

<sup>30</sup> von Jhering in Husik (trans), *Law as a Means to an End*, above (n 19).

<sup>31</sup> *ibid.*, 384–97.

<sup>32</sup> See text at part III.C.2 and accompanying notes.

end and then reason from it, without explaining how they chose, or applying their critique of the abuse of deduction to their own derivation of a rule from an end.<sup>33</sup>

### C Balancing as a New Kind of Legal Theory<sup>34</sup>

We have come, according to my genealogy, to a moment of rupture, occurring in the late 1890s and early 1900s, in parallel with modernist intellectual and artistic developments across Western culture. There are three important figures: Oliver Wendell Holmes, in the United States, an assiduous student of European legal thought, and on the other side of the Atlantic, slightly later, Phillip Heck and Rene Demogue, neither of whom had any knowledge of Holmes. (It is worth noting that the Free Law School played, in this development, the role of the rejected extreme position, rather than that of intellectual trendsetter.) I have written elsewhere, in perhaps excessive detail, about how each of these contributed to the modern form of balancing.<sup>35</sup> I will restrict myself here to a bare bones summary, sometimes simply transposing earlier texts. It seems worthwhile to put some emphasis on Holmes, since my European readers may not be familiar with this aspect of his work and his followers have had more influence on private law theory and practice in the United States than either Demogue or Heck in their countries.

#### *i René Demogue*

Demogue's all but forgotten masterpiece, *Les notions fondamentales du droit privé: essai critique*,<sup>36</sup> published in 1911 and partially translated into English soon thereafter as 'Analysis of Fundamental Notions',<sup>37</sup> initiated a particular type of legal theoretical project, which he describes in the first sentences of the preface:

This book is not a study of positive law ... I have adopted mainly a critical point of view, in order to show, without seeking to disguise anything, the conflicts and contradictions which will no doubt always agitate private law, and my object will be attained if I may suggest to students already through with elementary studies reflections which will help them to penetrate the basis of institutions.<sup>38</sup>

His title is in itself a claim: that there is a limited set of basic ideas that animate the design of private law rules. They are static and dynamic security, economy of time

<sup>33</sup> K Llewellyn, 'A Realistic Jurisprudence: The Next Step' in *Jurisprudence: Realism in Theory and Practice* (Chicago, University of Chicago Press, 1962) 14–16.

<sup>34</sup> The discussion of Demogue and Heck in this section reproduces paragraphs from Kennedy, 'From the Will Theory', above (n 15) and from D Kennedy and MC Belleau, 'La place de René Demogue dans la généalogie de la pensée juridique contemporaine' (2006) 56 *Revue interdisciplinaire d'études juridiques* 163, 180–89.

<sup>35</sup> Kennedy, *A Critique of Adjudication*, above (n 15); Kennedy, 'From the Will Theory', above (n 15); Kennedy and Belleau, 'La place de René Demogue', *ibid*, 180–89; Kennedy, 'The Disenchantment of Logically Formal Legal Rationality', above (n 11).

<sup>36</sup> R Demogue, *Les notions fondamentales du droit privé: essai critique pour servir d'introduction à l'étude des obligations* (Paris, Rosseau, 1911).

<sup>37</sup> R Demogue, 'Analysis of Fundamental Notions' in FW Scott and JP Chamberlain (trans), *Modern French Legal Philosophy*, The Modern Legal Philosophy Series vol 7 (Boston, Boston Book Company, 1916).

<sup>38</sup> *ibid*, 349.

and activity, justice, equality, liberty, solidarity and the principle of the spreading of losses, the notion of the general welfare or public interest, protection of future as opposed to present interests and protection of emotional as opposed to material interests. Along with these 'bases', Demogue presents a catalogue of what he calls technical applications, meaning basic legal concepts such as freedom of contract.

His book has some of the qualities of a Borges list. It includes what we would call policies, which we can see as goals that legal decision makers have or ought to have. But it also includes in a relatively unstructured list what we might call legal concepts, institutional descriptions, abstract 'values', concepts like evolution and what we might call images or stereotypes about social life. But in the conclusion of the first part of the book—the only part that was translated—he clearly states his position about what it all means. I will let him speak for himself:

The Tendency to Oversimplification: Fictions of Unity and Opposition

This rapid examination of the principal ideas that come into play in the theory of private law makes it now possible to express conclusions with greater force. The simplicity which our minds require does not appear to be the law of the exterior world ... The simplist [sic] theories—such as those of a world steadily advancing, of a world of infinite perfectibility, of solidarity and fraternity unfolding themselves ever more and more—seem just as exaggerated as the dualistic [sic] theories, if I may be permitted to coin a word, which see everywhere in life a struggle between two opposite principles— individualism and socialism, authority and liberty, progress and reaction, State and individual. Correct as approximations, as methods of instruction, these duels, if closely examined, are really battles between masses, certain parts of which support or oppose just as well one as the other of the two combatants.<sup>39</sup>

The striking accomplishment of Demogue is to present the 'notions' simply as 'there' in the legal consciousness of his time, as what people actually think is important, without forcing them into his own meta-theory. After summarily critiquing the various modes of reconstruction of his time—particularly the various metrics and evolutionisms—and pointing out that practice is contradictory when looked at in terms of any one value, Demogue makes a characteristic conflicting considerations observation:

Compromise, Not Logical Synthesis, the Goal of Juridical Effort

May we hope that the human brain will one day be strong enough to unite in one harmonious synthesis the elements on which law depends? I do not believe that it is possible. We can make fortunate reconciliations—an effort which is even facilitated by the shut-in character of every society; but we must be conscious of their imperfection ...

...

... [L]aw can perfect its technic, that is to say its methods of perfectly attaining an end, or even several ends simultaneously. This is the only side on which it is certain that progress is possible.<sup>40</sup>

<sup>39</sup> *ibid*, 564–65 (fns omitted).

<sup>40</sup> *ibid*, 569–72 (fns omitted).

Demogue's contribution to the genealogy of conflicting considerations was the distinction between 'static and dynamic security'. His position is that 'security' is one of the most important of all the animating ideas of private law. He distinguishes between two types: 'static security' means that when you have rights, you know what they are and expect to be able to defend them; 'dynamic security', or 'security of transaction', means that you know when you and your transactional partner will be bound, and to what.<sup>41</sup>

What makes Demogue a founder of balancing analysis is that he, like Jhering, identified a trade-off that is built into the law-making process: when one thing goes up (security of transaction), something else must go down (static security). This means that it *never* makes sense, when justifying a rule, to say that it is good because it promotes security of transaction. To make sense, one must add: at an acceptable cost to static security. Likewise for Jhering, it *never* makes sense to justify a rule by appeal to its administrability—one must always add: and its acceptable cost in over or under-inclusiveness. This is the basic difference between the conflicting considerations model and the rival approach to policy analysis that identifies one policy per rule.

There are two elements of modern policy analysis that are quite clearly missing from his presentation, and these are the two elements, interestingly, that it is easiest to trace in the legal theoretical developments of the 'United Statesean' post Second World War period. The first of these was the firm incorporation of the considerations as strictly legal, in spite of the fact that they are not rules but only general notions (this was the contribution of Dworkin and his school, against English legal positivism).<sup>42</sup> For Demogue, the notions are all rooted in social life, rather than in any notion of enactment or legal as opposed to social positivity. For Demogue, evolution is a crucial aspect of the reality of social life. The reality of social evolution generates social needs, or demands, to which law responds. In all these respects, he is a typical representative of Social Legal Thought.

Where he departs, decisively, is with respect to the possibility of a truly 'scientific' translation, by the jurist, whether judge, legislator or professor, of these needs, demands, interests or whatever, into positive law. He believes in the transformation of 'is' into 'ought', but he does not believe that a coherent socialised law can be derived from the undoubted evolutionary process of the socialisation of life in modern society. The second striking absence was of any development of what we now call 'institutional competence arguments', that is of the 'policy' or 'notion' or 'consideration' that Demogue occasionally designated simply 'the separation of powers' (this was the contribution of the Hart and Sacks-Legal Process materials).<sup>43</sup>

## *ii Demogue contrasted with Philipp Heck*

Heck seems, on the one hand, to be recognised in Germany not just as the founder of what we are calling conflicting considerations rationality, but as an important influence on juristic method (both judicial and professorial) today. He made his first

<sup>41</sup> *ibid.*, 427–29.

<sup>42</sup> See text at part IV.A.1 below.

<sup>43</sup> See text at part IV.A.2 below.

major contributions between 1905 and 1912 (*Der Problem der Rechtsgewinnung*),<sup>44</sup> and continued writing through the 1930s. Some initial contrasts with Demogue are in order. Of course, the first is that Demogue was virtually forgotten in France, while Heck is remembered in Germany. A second is that Demogue was translated in 1916, a mere five years after the publication of *Notions* in France and was recognised as an important contributor for years thereafter. Heck was not translated until 1948<sup>45</sup> and exercised no discernible influence in the United States (Heck was never translated into French, unlike Jhering, Gierke and Ehrlich, the German progenitors of the social—at least as far as one can tell from the holdings of the Harvard Law School Library, which, though astonishingly complete, could still have lacunae.)

*a Heck as a Founder of Conflicting Considerations* Heck makes a very sharp distinction between the notion of the purpose of a law and the interests for whose conflict the law is a solution (he refers to laws frequently simply as ‘conflict solutions’):

The fundamental truth from which we must proceed is that each command of the law determines a conflict of interests; it originates from a struggle between opposing interests, and represents as it were the resultant [vector] of these opposing forces. Protection of interests through law never occurs in a vacuum. It operates in a world full of competing interests, and, therefore, always works at the expense of some interests. This holds true without exception. If we confine ourselves to an examination of the purpose of a law we see only the interest which has prevailed. But the concrete content of the legal rule, the degree in which its purpose is achieved, depends upon the weight of those interests which were vanquished ... Therefore the teleological jurisprudence of Jhering is not sufficient.<sup>46</sup>

*Der Problem der Rechtsgewinnung* (1912) seems to be the main basis of this 1932 work. It seems to contain his basic ideas (but query does it contain the notion that the norm is a ‘resultant’ or ‘vector’?)

Heck’s formulation of the contrast between conceptualising a norm as the product of a single purpose and conceptualising it as the ‘resultant’ [vector] of a conflict of interests (including ‘ideal interests’) is clearer than anything in Demogue. Since he was developing this sharp distinction at just the same time Demogue was writing *Notions*, Heck has a clear claim to be one of the most important progenitors of the contemporary mode of conflicting considerations.

*b Limitations of Heck’s Approach* Heck (as translated) was, however, even in his culminating work of 1932, a less sophisticated practitioner of the method he helped to invent. In the whole book (as translated), there are very few actual enumerations of interests and indeed precious few examples. Nothing could be further from the amazing doctrinal density of Demogue’s treatment. On the one occasion when Heck enumerates types of interest conflicts, in a footnote no less, he

<sup>44</sup> P Heck, *Das Problem der Rechtsgewinnung* (Tübingen, JCB Mohr, 1912).

<sup>45</sup> M Schoch (ed and trans), *The Jurisprudence of Interests: Selected Writings of Max Rümelin, Philipp Heck, Paul Oertmann, Heinrich Stoll, Julius Binder, Hermann Isay* (Cambridge, Mass, Harvard University Press, 1948).

<sup>46</sup> P Heck, ‘The Formation of Concepts and the Jurisprudence of Interests’ in Schoch (ed and trans), *The Jurisprudence of Interests*, *ibid*, 35–36.

simply categorises them into: private versus private, public versus public and public versus private. At a more concrete level, he refers quite frequently when he needs an example to Jhering's conflict between the substantive desirability and the legal administrability of a solution as conflicting influences in legislation. At least as received in translation in the United States, there is nothing at all like Demogue's static/dynamic analysis—that is, no contribution to conceptualising just how it could be true that a norm is inevitably a vector.

A second flaw is that although interest jurisprudence uses the word 'interest' to cover everything that legislators and judges balance (or perhaps ought to balance, a serious ambiguity) the term is, in English, French and German, tied to some notion of subjective wants or needs. This is so much the case that Heck had repeatedly to point out that 'ideal interests' were just as important as 'material interests' in law making and interpretation (probably following Weber's elaboration of this distinction).

Modern conflicting considerations is sharply different from Heck's version of interest jurisprudence because of the lack of even this limited commitment to grounding law making in any conception of wants or needs. Conflicting considerations include conflicting moral axioms: *pacta sunt servanda, sed rebus sic stantibus*. They include, perhaps most prominently, subjective rights in conflict, without any suggestion that the rights are reducible to interests.

Moreover, in contemporary conflicting considerations, all the considerations have to be universalisable, so that all utilitarian considerations have to be 'social interests'. Whereas Heck prides himself on adding ideal to material interests, the modern approach considers only the ideal.<sup>47</sup>

Even more striking is that Heck operates firmly within the framework of interpretation on the basis of a hierarchy of sources:

- Gaps and conflicts are necessary before there is a problem.
- When there is a gap or conflict, the task of the judge is simply to replicate the balance of 'interests' represented by the legislation to be interpreted.
- The role of the jurist is (at least nominally) to assist the judge in this task.

To the extent this formulation is plausible, the 'jurisprudence of interests' becomes less threatening, to say the least, than Demogue's critique of 'contradictions that will no doubt always agitate private law'. The reason for this is that Heck's proposal purports simultaneously to radically reduce the problem of judicial subjectivism and to subordinate the judge to the legislator and the jurist to the judge, eliminating separation of powers problems.

<sup>47</sup> A striking defect of Heck's treatment (as translated) is that he fails to distinguish clearly between interests thought of as firmly attached to particular social actors (say debtors and creditors), and interests plausibly attributed, though with different degrees of force, to everyone (eg, security of transaction). Hermann Isay, a late representative of the Free Law School, or perhaps an intuitionist in the mold of the American Hutcheson, effectively critiques Heck as follows:

It is completely obscure what Heck means by the 'standards of evaluation' which the Jurisprudence of Interests is expected to attain. Are they meant to be standards for measuring the importance of the 'values' or the importance of the concrete interests, ie, the 'value holders'?

Schoch, *The Jurisprudence of Interests*, above (n 45) 321.



However, to a modern 'United Statesean' immersed in conventional 'United Statesean' conflicting considerations analysis, this proposal, which is central to everything Heck says in the translated pieces, seems close to incoherent. According to Heck, a given statute is a 'conflict-solution' understood as a 'vector' or 'resultant' of the opposed considerations and the solution is the solution to a particular imagined real life situation of conflict.

Then the problem is that if there is a gap or doctrinal conflict in applying the norm to a new situation not contemplated by the drafters of the original solution, it would seem that there would have to be a new evaluation of the interests as they play out in the new circumstances. Since the interests are perennial, appearing again and again, as in Demogue's metaphor of 'living to fight another day', it would seem possible that an interest that was weak in the underlying conflict situation would be strong in the gap situation.

We can ask 'how would the legislator have resolved the conflict in this situation?' but this is hardly the same thing as simply 'applying' the balance that determined the outcome in the first case. In short, we can apply the same policies, but we can't apply their 'weights' because the weights depended on the particular typical fact situation for which the previous law maker was seeking an appropriate balance.<sup>48</sup>

Far from seeing this as a problem, Heck thinks the application will generally be easy. For example, he objects to the proposed term 'evaluating jurisprudence' to describe his method on the ground that 'it is only in exceptional cases that the jurist who follows the teleological method is called upon to make an evaluation. As a rule, all he has to do is to ascertain the value judgments of the legislator'. He manages to maintain the plausibility of this view only by periodically blurring the distinction between the purpose of a norm and the interests for which it is a 'conflict-solution'. This passage, for example, is striking in light of Heck's equally frequent rejection of an interest-purpose equation:

Of course some cases will be difficult. But such hard cases are counterbalanced by very simple ones. After all, it must not be forgotten that the question as to what interests are involved in a statute is none other than the old inquiry into the ratio legis, the practical motive, the purpose of a statute. ... certainly no one has contended that our modern statutes are as a rule enigmatic and incomprehensible as regards their practical purpose. ... The purpose which a statute is meant to serve as a whole is a known fact, so obvious that normally the question simply does not arise.<sup>49</sup>

### iii *Oliver Wendell Holmes and his Followers*

The American counterpart to Demogue and Heck was Oliver Wendell Holmes. Holmes was, to begin with, immersed in the American development of multi-factor reasonableness tests I described in the last section and he was also a student of European legal theory. He published his most important contribution to the theory

<sup>48</sup> Max Rheinstein's review of *The Jurisprudence of Interests* sees that there is a problem but I think misses the specific point in the text above. See M Rheinstein, 'Review: The Jurisprudence of Interests' (1948-49) 1 *Journal of Legal Education* 470.

<sup>49</sup> Heck, 'The Formation of Concepts', above (n 46) 170.

of balancing in 1894, well before the 1899 publication of Geny's *Methode*,<sup>50</sup> which generalised for Europeans the critique of the abuse of deduction in Classical Legal Thought (CLT). It is important that Holmes was a harsh critic of Geny, much to the apparent distress of Roscoe Pound, on the grounds that Social Legal Thought (SLT) was merely a modern variant of natural law.<sup>51</sup> (Compare Weber's<sup>52</sup> and Kelsen's<sup>53</sup> similar critiques of sociological jurisprudence.)

In his article 'Privilege, Malice and Intent' in the *Harvard Law Review*, Holmes claimed that '[t]he law of tort as now administered has worked itself into substantial agreement with a general theory'.<sup>54</sup> The general theory was that actors are liable for actions that a reasonable man would foresee are likely to cause material damage, *unless* they are 'privileged'. Holmes's innovation was to argue that,

[W]hether, and how far, a privilege shall be allowed is a question of policy. Questions of policy are legislative questions, and judges are shy of reasoning from such grounds. Therefore decisions for or against the privilege, which really can stand only upon such grounds, often are presented as hollow deductions from empty general propositions.<sup>55</sup>

Perhaps one of the reasons why judges do not like to discuss questions of policy, or to put a decision in terms upon their views as law-makers, is that the moment you leave the path of merely logical deduction, you lose the illusion of certainty which makes legal reasoning seem like mathematics. Views of policy are taught by experience of the interests of life. Those interests are fields of battle. Whatever decisions are made must be against the wishes and opinion of one party, and the distinctions on which they go will be matters of degree. Even the economic postulate of the benefit of free competition is denied by an important school.<sup>56</sup>

Holmes insisted that the judge had to 'measure' somehow 'the very serious legislative considerations that have to be weighed' and should do this 'work' 'with express recognition of its nature' rather than through 'unconscious prejudice or half-conscious inclination'.

Holmes's writing in this period has, to my ear, a quite astonishingly modern ring (but no more so than the slightly later writing of Demogue, who for example cites Nietzsche with approval). But even when he ascended to the US Supreme Court, he was capable of writing (in 1909) that:

All rights tend to declare themselves absolute to their logical extreme. Yet all in fact are limited by the neighborhood of principles of policy, which are other than those on which

<sup>50</sup> Geny, *Methode d'interpretation*, above (n 27).

<sup>51</sup> OW Holmes, 'Natural Law' (1918) 32 *Harvard Law Review* 40; see also D Kennedy and MC Belleau, 'François Geny aux États-Unis' in C Thomasset, J Vanderlinden and P Jestaz (eds), *François Geny, mythe et réalités 1899-1999, Centenaire de Méthode d'interpretation et sources en droit privé positif—essai critique* (Montreal, Les Éditions Yvon Blais, 2000) 306.

<sup>52</sup> M Rheinstein (ed), *Max Weber on Law in Economy and Society* 2nd edn 20th Century Legal Philosophy Series vol 6 (Cambridge, Mass., Harvard University Press, 1954) 308-09.

<sup>53</sup> H Kelsen in BL Paulson, and SL Paulson (trans), *Introduction to the Problems of Legal Theory* (Oxford, Clarendon Press, 1992), s. 22.

<sup>54</sup> OW Holmes, 'Privilege, Malice, and Intent' in *Collected Legal Papers* (New York, Harcourt, Brace and Company, 1921).

<sup>55</sup> *ibid.*, 120.

<sup>56</sup> *ibid.*, 126-27.

the particular right is founded, and which become strong enough to hold on their own when a certain point is reached. The limits set to property by other public interests present themselves as a branch of what is called the police power of the state.<sup>57</sup>

It is notable that this case, and the famous passage just quoted, concerned the circumstances in which the state had to compensate for interfering with the exercise of a private right. Holmes from the beginning deployed his balancing test in both the private law and the public law context.<sup>58</sup>

Learned Hand,<sup>59</sup> who saw himself as Holmes's devoted follower, proposed balancing tests in a series of contexts, including the law of antitrust, the definition of negligence and the definition of free speech rights threatening to national security.<sup>60</sup> For Hand, as for Holmes, the move to balancing was initially part of the progressive critical project, because he saw overt judicial balancing as formal acknowledgment that judges decide questions of policy without any methodology that distinguishes them from legislators.

If that is what judges do, then there is less basis than there would otherwise be for judges to overrule legislatures. Indeed, if judges can't decide constitutional questions without balancing, one can ask why their balance, their views of policy, should prevail over those of the elected representatives of the people. If balancing means looking in detail at the consequences of drawing the line in one place rather than another, then it would seem that judges are less 'institutionally competent' to the task than legislators.<sup>61</sup>

In his 'Introduction to the Philosophy of Law' (lectures delivered at Yale Law School in 1921-22),<sup>62</sup> Roscoe Pound,<sup>63</sup> also a follower of Holmes, although far more sympathetic than he to SLT, made a striking move beyond his earlier treatment of the question of the ideal element in law (Demogue appears in his references along with the European canonical authors) and formulates what he clearly sees as a new position.

He begins his discussion of the contemporary philosophy of law by noting that:

[a]t the end of the last and the beginning of the present century, a new way of thinking grew up. Jurists began to think in terms of human wants or desires rather than of human wills. ... They began to think of the end of law not as a maximum of self-assertion, but as a maximum satisfaction of wants. ... Having inventoried the wants or claims or interests which are asserted and for which legal security is sought, we were to value them, select

<sup>57</sup> *Hudson County Water v McCarter* 209 US 349 (1909) 355.

<sup>58</sup> For an extended discussion of Holmes's position and its current status in the American constitutional law of regulatory takings, see W Treanor, 'Jam for Justice Holmes' (1998) 86 *Georgetown Law Journal* 813.

<sup>59</sup> The paragraphs on Hand are taken from Kennedy, *A Critique of Adjudication*, above (n 15) 322-23.

<sup>60</sup> *US v Aluminum Co of America* 148 F 2d 416 (2d Cir 1945); *US v Carroll Towing Co* 159 F 2d 169 (2d Cir 1947); *Dennis v US* 182 F 2d 201 (2d Cir 1950).

<sup>61</sup> L Hand, *The Bill of Rights* (Cambridge, Mass, Harvard University Press, 1958).

<sup>62</sup> R Pound, 'The Scope and Purpose of Sociological Jurisprudence' (1911) 24 *Harvard Law Review* 592 and (1912) 25 *Harvard Law Review* 140, 162.

<sup>63</sup> These paragraphs on Pound are taken from Kennedy and Belleau, 'La place de Rene Demogue', above (n 34) 192-94.

those to be recognized, determine the limits within which they were to be given effect in view of other recognized interests.<sup>64</sup>

Pound goes on to criticise the first generation of 'social utilitarians' for underestimating the difficulty of the task, but points out that one of their major virtues was that they 'made clear how much the task of the lawmaker is one of compromise'.<sup>65</sup> He takes the compromise position in a direction that is very close to Demogue's:

Philosophers have devoted much ingenuity to the discovery of some method of getting at the intrinsic importance of various interests, so that an absolute formula may be reached in accordance wherewith it may be assumed that the weightier interests intrinsically may prevail. But I am skeptical as to the possibility of an absolute judgment.<sup>66</sup>

He goes on to argue for the possibility of 'improved tools', echoing Demogue on *la technique*. He reviews the various approaches and concludes, 'In these formulas do we really get away from the problem of a balance compatible with maintaining all the interests, with responding to all the wants and claims, which are involved in civilized social existence?'.<sup>67</sup>

Pound's version of interest jurisprudence was merely a step along the road to modern conflicting considerations, for several reasons. He was no better than Heck in dealing with the ambiguities of material versus ideal interests and with the problem of the heterogeneity of notions. And like Heck, he fluctuated between insisting on interest conflict and affirming single purposes or functions for rules (with marginal exceptions) in the mode sometimes called 'social conceptualism'. Nonetheless, the Pound version of sociological jurisprudence was open to development into conflicting considerations analysis simply because of its self-conscious renunciation of the hope for a meta-criterion or 'formula' that would make purely situational compromise unnecessary. In other words, Pound renounced the aspiration to 'scientificity' in the strong sense that, according to him, had characterised the European philosophy of law since Plato.<sup>68</sup>

In Lon Fuller's casebook, published in 1947, he includes many excerpts from European sources on form and on the substantive bases of liability. His most striking American excerpt is called simply 'Observations on the Course in Contracts, 1934', an unpublished fragment by George Gardner. It is the first pure example of a balancing model of substantive conflicting considerations that I know of, although not without ambiguity or even mystery:

The ethical problems involved in the law of contracts result as I see them from four elementary ideas:

(1) *The Tort Idea*, ie, that one ought to pay for the injuries he does to another. As applied to promises this means that one ought to pay for losses which others suffer in reliance on his promises.

<sup>64</sup> R Pound, *An Introduction to the Philosophy of Law* (New Haven, Yale University Press, 1922) 75-76.

<sup>65</sup> *ibid.*, 81-82.

<sup>66</sup> *ibid.*, 75-76.

<sup>67</sup> *ibid.*, 84.

<sup>68</sup> *ibid.*, 1-6.

(2) *The Bargain Idea*, ie, that one who gets anything of value by promising to pay an agreed price for it ought to pay the seller the price he agreed.

(3) *The Promissory Idea*, ie, that promises are binding in their own nature and ought to be kept in all cases.

(4) *The Quasi-Contractual Idea*, ie, that one who receives anything of value from another ought to pay for it unless it came to him as a voluntary gift.

These ideas, which at first seem trite and wholly harmonious, are in fact profoundly in conflict. The first and fourth proceed from the premise that justice is to be known after the event, and that it is the business of the court to correct whatever consequences of voluntary intercourse between men may be found to have turned out unjustly. The second and third proceed from the premise that justice is to be known before the event in transactions voluntarily entered into, and that it is the parties' business to settle the justice and injustice of their voluntary transactions at the start. The conflict between these two standpoints is perennial; it can be traced throughout the history of the law of contracts and noted in nearly every debatable contracts question; there is no reason to think that it can ever be gotten rid of or to suppose that the present compromises of the issue will be any more permanent than the other compromises that have gone before.<sup>69</sup>

The particular balancing model that emerges in Fuller's own work, most notably in 'Consideration and Form',<sup>70</sup> holds that even within the domains of social life where private contract, rather than state ownership or administrative regulation, is the appropriate ordering idea, the principle of private autonomy must concur and possibly contend in every case of rule definition with tort and restitution principles; also with the Jhering-derived purposes of formality (the evidentiary, cautionary and channelling functions).

What is striking about his thesis, in spite of the various ways in which he ignores or minimises conflict among considerations, and ignores altogether the 'socialisation' of contract going on while he was writing, is that private autonomy is merely the first among equals. The specific rules of contract law implement six distinct policies, rather than flowing analytically or conceptually from the will theory. This internal pluralisation of the bases of contract paved the way for balancing, by directly assaulting the notion of univocal coherence in private law.

#### *iv Hohfeld versus Josserand*

There are many reasons for the peculiarly extensive development of balancing methodology in the United States over the twentieth century, including the nineteenth century precursors (the problem of 'reception', morality versus policy and reasonableness tests in torts cases) and in retrospect there seems to be a kind of continuity to the sequence that lead eventually to the public law balancing debate of the 1950s. I would suggest that an important difference between the US and the Continent was the divergence discussed by di Robilant between the civilian abuse of right concept and the

<sup>69</sup> GK Gardner, 'Observations on the Course in Contracts' (1934), unpublished fragment quoted in LL Fuller, *Basic Contract Law* (St Paul, West Publishing Company, 1947) 297-98.

<sup>70</sup> LL Fuller, 'Consideration and Form' (1941) 41 *Columbia Law Review* 799; D Kennedy, 'From the Will Theory', above (n 15).

American refusal to generate an abstract concept, combined with overt balancing. This difference is clearest if we contrast Hohfeld and Josserand.<sup>71</sup>

Hohfeld published his famous article, 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning' in 1913.<sup>72</sup> What counts for us is his assertion that the word 'right' was used in legal reasoning equivocally, sometimes meaning legal protection for a victim against harm from another and sometimes meaning the freedom of action correlative to the absence of legal protection for the victim of harm from another. Both legal protection and *the absence of legal protection* were commonly rationalised as implied in a particular right, as when a property owner asserted his property 'right' simultaneously as the basis of a trespass action for a physical invasion and as a defence to a nuisance action based on the idea that the defendant owner is free to do whatever he wants on his own land.

The effect of Hohfeld's move was to undermine the rights rationales for a large number of private law rules, requiring that they be reconceptualised as products of particular calculuses of 'justice and policy' (in his phraseology) rather than as conceptual derivations. The notion that property is a 'bundle' of distinct entitlements without a common conceptual core flowed from the Hohfeldian analysis (although it was not logically entailed) and achieved mainstream acceptance in the restatements of property and restitution. It led to a radical 'materialisation' of doctrinal discussion, so that, as in the 'reasonableness' tests we have already discussed, a relatively small number of arguments were deployed to justify an infinite variety of normative lines drawn across objective and subjective factors in an indefinite number of legal situations.

It is interesting that the formulation of a general doctrine of abuse of right was a response to the same set of problems addressed by the American reasonableness test in its late nineteenth century stage. Like its American counterpart, abuse of right was closely related to the critique of the abuse of deduction alleged against CLT; but the differences are equally striking. First, as di Robilant points out in the article referenced above:

In France and in Italy, I suggest, the shaping of an overarching concept of 'abuse of rights' was part of the jurists' struggle to preserve the conceptual coherence of private law at a moment when, under the pressure of social and economic change, new fields of law were being carved out of 'droit prive'. These new legal disciplines, zoning law, labor law, welfare law, were deemed to be more apt to govern social and economic change. Private lawyers stood up as the staunch defenders of the systematic unity of private law as well as of their own professional power as the 'legal architects of modern society.' Conversely, in the United States, where pretensions to law's conceptual coherence were increasingly coming under attack, rationalization of these non-integrated reasonableness tests and malice rules was achieved by means of a unitary style of reasoning rather than by means of conceptual integration. This instrumentalist style of reasoning, featuring 'balancing,' cost-benefit analysis and policy arguments, differed significantly from orthodox late nineteenth century American legal reasoning.<sup>73</sup>

<sup>71</sup> L. Josserand, *De l'esprit des droits et de leur relatif: theorie dite de l'abus des droits* 2nd edn (Paris, Dalloz, 1939).

<sup>72</sup> WN Hohfeld, 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1913) 23 *Yale Law Journal* 16.

<sup>73</sup> A di Robilant, 'Abuse of Rights: the Continental Drug and the Common Law', (unpublished) Expresso O available at [bepress.com/annadirobilant/1](http://bepress.com/annadirobilant/1).

Another way to put the difference would be to say that abuse of right in Europe remained conceptually squarely within the rubric of Social Legal Thought. In this approach, the basic idea was that classical private law had been coherently individualist. It was to be displaced by an equally coherent social law, whose premise was that individualist law, although generally desirable, must give way whenever its consequences were inconsistent with social purposes.

This was an extension of Jhering's idea, mentioned above, about the subordination of absolute property rights when they conflicted with social goals, as in the example of the easement of access to an isolated parcel. As Josserand put it:

In any case, individual prerogatives, even the most egotistic, are social products in form and in substance; it would be inconceivable that they could be exercised at the rights holder's convenience, diverted from their original purpose and employed for any goal; it would be contrary to their origin as well as to the most urgent need of the social community which confers them'.<sup>74</sup>

The opposition to this approach, as di Robilant points out, came from traditionalists. Demogue, with his critique of 'duellisms' and his insistence on compromise of multiple factors, was an exception and soon marginalised.

By contrast, in the United States, the pretensions to anti-individualist coherence of the social approach found critics on the political and methodological left and these developed from sociological jurisprudence in the radicalising direction of legal realism. As already noted, the critique of coherence in law was associated with the progressive demand for judicial deference, in constitutional law, to legislative reform of tort and contract rules in the interest of weak parties. Hohfeld's famous article is part of the critique of conservative anti-union interpretations in the British common law, interpretations that at the time were being turned into constitutional dogma by the US Supreme Court. The de-rationalising and politicising element in balancing suited the agenda of progressives, rather than contradicting it in the mode suggested, for Western Europe, by di Robilant.

#### IV BALANCING AFTER THE SECOND WORLD WAR—THE UNITED STATES AND WESTERN EUROPE CONVERGE AND DIVERGE

In this section, I discuss the completion of the ideal type of balancing in private law in the United States after the Second World War, the postwar effacement of the concept in European private law, the subsequent rise of balancing in Europe and its effacement in the United States.

##### A The Completion of the Ideal Type in the United States

As already mentioned, the main postwar development of balancing methodology occurred in the United States and involved, first, the critique of classical positivism

<sup>74</sup> L. Josserand, *De l'esprit des droits*, above (n 71).

for failing to understand the legal character of principles and secondly, the generalisation and systematisation of arguments concerning the respective competences of legal institutional actors. By the end of the 1970s, the most prestigious, progressively-oriented state courts had adopted the methodology and reduced it to a virtual set of formulae, as I will illustrate through a close reading of a famous case in the California Supreme Court.

*i The Legal Pedigree of Policy Considerations—Fuller and Dworkin*

Kelsen and Hart often appear in the popular jurisprudential imagination as ‘positivists’ both in the sense of defining law as an officially generated ‘fact’ within a sharp fact/value distinction and in a second sense as believers that there are right and wrong answers to legal questions, a usage of the word positivist that is close to what Americans often call ‘formalism’. Kelsen puts forward the idea of the interpretive ‘frame’, outside which a legal interpretation is wrong as a matter of ‘cognition’. Hart’s image is of ‘core and penumbra’, with judgements in the core being a determinate matter of application of norm to fact. But for the genealogy of balancing, their importance derives from the flip side of their positivism. Each was insistent on the significance of the domain of discretion or indeterminacy in the system of legal rules, each was a critic of the idea that social purposes or any other teleological conception could settle interpretation within that area and each described what judges must do, ‘willy nilly’, in that area, as ‘balancing’.<sup>75</sup>

The jurisprudential reaction against the Hart/Kelsen formulation was American. Both Fuller and Dworkin argued, against that version of positivism, that the sharp contrast between rule and discretion was inaccurate.<sup>76</sup> For Fuller against Hart, the point was simultaneously that interpretation in the core required judgement and that in the penumbra there were implicit or immanent principles of legality that made judgement more than arbitrary.<sup>77</sup>

For Dworkin, sharply critical of Fuller in some respects, a principal vice of positivism was its failure to recognise that principles as well as rules are legitimately part of the legal materials that ground interpretation. This is true, although the principles are not ‘enacted’ in any usual sense and they differ from rules in that they can be decisive in one case, and then rejected in another, without losing their legal status. Principles have ‘weight’ and relative weight is an appropriate determinant of

<sup>75</sup> See D Kennedy, ‘A Left/Phenomenological Alternative to the Hart/Kelsen Theory of Legal Interpretation’ in *Legal Reasoning: Collected Essays* (Aurora Colorado, Davies Group, 2008) 155–56. This essay was also published in English at (2007) 40 *Kritische Justiz* 296.

<sup>76</sup> For the contribution of Josef Esser, see the chapter by Norbert Reich in this volume, and the review of Esser for an American audience by M Rheinstein, ‘Esser: Grundsatz und Norm’ (1956) 24 *University of Chicago Law Review* 597.

<sup>77</sup> LL Fuller, ‘Positivism and Fidelity to Law—A Reply to Professor Hart’ (1957) 71 *Harvard Law Review* 630.



correct interpretation.<sup>78</sup> Jurists produce legal 'right answers' not by 'mechanical' rule application, but through an open-ended interpretive process that engages a wide variety of sources, while eschewing the collective goals he calls 'policies', whose pursuit is reserved to the legislature.<sup>79</sup> Dworkin denounced the 'hole in the doughnut' theory of discretion, meaning the Kelsenian 'frame' notion and the Hartian 'penumbra' on the ground that judgement was never discretionary, but always to be in some sense controlled by principles.

For American jurists, I think the upshot of these encounters has been a new background picture of how a legal order works. First, there are many situations with high stakes where the correct legal interpretation is open to debate. Secondly, when that is the case, a wide range of legal materials is available for the generation of pro and con arguments, a range going well beyond the notion of enactment or formal adoption. It may be useful to see this as the American version of the classical continental 'method of construction', within which the jurist looks beyond the code to principles that must have been immanent in it if we are to understand it as coherent. Thirdly, there is no jurisprudential consensus either about how judges actually decide, or should decide, when interpretation is controversial.

For our purposes, an important aspect of this situation is that balancing is one option, with a quite distinguished jurisprudential basis, although there are numerous others. A second is that the requirement that the considerations to be balanced have a legal pedigree is not a tight constraint linked, for example, to enactment, or even to explicit mention in case law. A third is that principles can be balanced along with (or in the case of Dworkin, instead of) interests.

## *ii The Argument from Institutional Competence—The Hart and Sacks Legal Process Materials*

The final element in the ideal type as I have been presenting it is the incorporation into the balancing calculus of the dimension of institutional competence. As we saw in the introduction to this chapter, writers like Eidenmüller et al argue their interpretations of balancing strongly committed to the opposition between judicial and legislative method, even though judicial balancing seems on the surface to be a serious threat to that distinction. The Hart and Sacks 'Legal Process' materials, distributed without formal publication through the 1950s and 1960s and widely used in law school classes all over the United States, treated considerations of institutional competence as determinative of many questions of private and public law.<sup>80</sup> The materials presented formulaic arguments about the judicial role, but also the choice between judge and jury, federal and state courts, national and international instances. The message was that the choice of an appropriate decision maker,

<sup>78</sup> R Dworkin, 'The Model of Rules' in *Taking Rights Seriously* (Cambridge, Mass, Harvard University Press, 1977).

<sup>79</sup> R Dworkin, *Law's Empire* (Cambridge, Mass, Harvard University Press, 1986). On Dworkin's theory of legal reasoning, see Kennedy, *A Critique of Adjudication*, above (n 15) 119-30.

<sup>80</sup> H Hart and A Sacks, 'An Introduction to the Nature and Function of Law' in WN Eskridge and PP Frickey (eds), *The Legal Process: Basic Problems in the Making and Application of Law* (Westbury, Foundation Press, 1994).

rather than of a correct solution, was often the correct way for a judge to decide a legal question. (Similar to Wietholter's conception of 'proceduralisation' from the 1980s.)<sup>81</sup>

It is somewhat paradoxical that Hart and Sacks were committed to the idea that what made a question appropriate for judicial as opposed to legislative resolution was that it permitted 'reasoned elaboration' (as opposed to political discretion) which was for them the hallmark of the judicial role. The addition of considerations of institutional competence to the substantive considerations (policies, principles, interests, powers, rights) and considerations of administrability—rules versus standards—permitted the 'closure' so to speak of the balancing procedure.

The objections that balancing was uncertain and undemocratic were answered, albeit by confession and avoidance. The procedure was a last resort, to be used as a general matter only when the law (viewed conceptually or teleologically or as precedent) 'ran out'. When that was the case, there was no escape from judicial creativity. In choosing a norm (not a winning party, but a new norm to answer an interpretive indeterminacy) there was no alternative to balancing. But, the balance should include consideration of the dangers of judicial usurpation, particularly in fashioning the norm as more like a rule or like a standard.

To my mind, the writer who came closest to fully stating this type was Stewart Macaulay, in a series of articles on contract law published in the 1960s. His typology of goals, strongly influenced by Weber's sociology of law, was cast in a somewhat obscure lingo, which I won't reproduce here, limiting myself to saying that his article on the regulation of credit cards, written in 1967, contains all the elements whose emergence we have laboriously traced. It begins the discussion of what to do about issuer disclaimers of liability for lost cards as follows: '[w]hen, then, should there be a duty to read? The problem is one of balancing the capabilities of and the values we hold about the legal system against our substantive goals'.<sup>82</sup>

### *iii An Example of Fully Developed Private Law Balancing—Tarasoff v Regents of the University of California (1976)*

In order to illustrate the American development during the postwar decades, I present a discussion of the case of *Tarasoff v Regents of the University of California*,<sup>83</sup> decided by the California Supreme Court in 1976. In this period, the California court was perhaps the leading actor in the development of progressive doctrine in property, contracts, torts and family law, and also, under the leadership of Justice Roger Traynor, the leader in the development of private law theory. (The courts of New Jersey, Massachusetts and New Hampshire and the federal court of appeals for the District of Columbia, were also leaders.) This case instantiates most, if not all of the traits of balancing analysis that I outlined in part II, above. It was

<sup>81</sup> See D Kennedy, 'Comment on Rudolf Wietholter's "Materialization and Proceduralization in Modern Law," and "Proceduralization of the Category of Law"' in C Joerges and D Trubek (eds) *Critical Legal Thought: An American-German Debate* (Baden-Baden, Nomos Verlagsgesellschaft, 1988).

<sup>82</sup> S Macaulay, 'Private Legislation and the Duty to Read—Business by IBM Machine, the Law of Contracts and Credit Cards' (1966) 19 *Vanderbilt Law Review* 1051.

<sup>83</sup> *Tarasoff v Regents of the University of California* 551 P 2d 334 (1976).

decided at the very end of a period of aggressive doctrinal and theoretical development (a trend reversed through a direct political attack by the governor of California, Ronald Reagan). For this reason, the court can cite ample precedent for its innovations.

The question in the case was whether the parents of Tatiana Tarasoff, who had been murdered by Prosenjit Poddar, a mentally disturbed acquaintance, could recover damages from the University of California to compensate for the failure of the university psychiatrists who were treating him to warn her that in their opinion there was a very serious risk that he would kill her. The legal question was whether there was a duty to warn in the absence of any kind of direct relationship between the therapists and the victim. There was no California precedent closely on point.

Justice Tobriner began the doctrinal discussion in a fashion characteristic of the period: 'In analyzing this issue, we bear in mind that legal duties are not discoverable facts of nature, but merely conclusory expressions that, in cases of a particular type, liability should be imposed for damage done'.<sup>84</sup> He then quotes a leading case on the theory of legal duty, decided in 1968, in a passage that ends with an interior quote from William Prosser, author of the leading torts treatise of the time and the Reporter for the Second Restatement of Torts:

The assertion that liability must ... be denied because defendant bears no 'duty' to plaintiff 'begs the essential question—whether the plaintiff's interests are entitled to legal protection against the defendant's conduct. ... [D]uty is not sacrosanct in itself, but only an expression of the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection. Prosser, *Law of Torts* 3rd edn (1964) 332–33.<sup>85</sup>

He then quotes another famous California case to the effect that the court departs from the general principle of 'no duty act to absent relationship' only upon 'the balancing of a number of considerations' with the major ones being

the foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, the policy of preventing future harm, the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost and prevalence of insurance for the risk involved.<sup>86</sup>

The Court thus framed all the relevant considerations as universalisable common values or goals and rooted them in its prior case law, as well as in academic authority (Prosser). The substantive discussion engages most of the considerations listed. For example:

We recognize the public interest in supporting effective treatment of mental illness and in protecting the rights of patients to privacy, and the consequent public importance of safeguarding the confidential character of psychotherapeutic communication. Against this interest, however, we must weigh the public interest in safety from assault.<sup>87</sup>

<sup>84</sup> *ibid.*, 342.

<sup>85</sup> *ibid.*

<sup>86</sup> *ibid.*

<sup>87</sup> *ibid.*, 346.

...  
We conclude that the public policy of favoring protection of the confidential character of patient-physician communications must yield to the extent to which disclosure is essential to avert danger to others.<sup>88</sup>

There follows one of the characteristic tropes of social legal thought with regard to internalisation of costs:

Our current crowded and computerized society compels the interdependence of its members. In this risk-infested society, we can hardly tolerate the further exposure to danger that would result from a concealed knowledge of the therapist that his patient was lethal.<sup>89</sup>

The dissenting opinion is in the same rhetorical mode, but deploys the well known set of matching argumentative tropes (very much in the mode described by Perelman and the Ecole de Bruxelles):

The issue whether effective treatment for the mentally ill should be sacrificed to a system of warnings is, in my opinion, one for the Legislature, and we are bound by its judgment [as expressed in a regulatory statute that does not include a duty to warn]. Moreover, even in the absence of clear legislative direction, we must reach the same conclusion because imposing the majority's new duty is certain to result in a net increase in violence [by reducing the effectiveness of treatment].<sup>90</sup>

This case marks, I think it fair to say, the high water mark of balancing theory in private law in the United States. Before we examine the causes of the retreat of the waters, it seems appropriate to cast a glance across the Atlantic.

## B Disappearance and Re-emergence of Balancing/Proportionality in Europe

For several generations, it has been a matter of curiosity, with variable animus, why legal theoretical developments in Europe after the Second World War were so different from those in the United States. My generalisations would be the following: legal theory in Northern Europe, Britain, France and Italy was preoccupied with trying to draw appropriate contrasts between legality in liberal democratic societies and 'legality' under Nazism and Stalinism. Both legal indeterminacy and positivism were a threat to this self-understanding. The so-called 'revival of natural law' symbolised by the difference between Radbruch as a prewar social jurist and as the postwar author of a 'proviso' on judicial disobedience to unjust laws,<sup>91</sup> the 'jurisprudence of values', the notion of a kind of common liberal

<sup>88</sup> *ibid.*, 347.

<sup>89</sup> *ibid.*

<sup>90</sup> *ibid.*, 355.

<sup>91</sup> The text of the proviso:

The conflict between justice and legal certainty may well be resolved in this way: The positive law, secured by legislation and power, takes precedence even when its content is unjust and fails to benefit the people, unless the conflict between statute and justice reaches such an intolerable degree that the statute, as 'flawed law', must yield to justice. It is impossible to draw a sharper line between cases of statutory lawlessness and statutes that are valid despite their flaws. One line of distinction,

horizon orienting all the Western systems, 'ordo-liberalism', all were incompatible with the Demoguan strand, which as we've seen already was notably weak from the beginning.

European scepticism took a quite different form, well represented by Franz Wieacker's *History of Private Law in Europe with Special Reference to Germany*.<sup>92</sup> The reader may be interested to contrast Wieacker's disillusioned version of social legal thought with Gardner's 'Fragment on the Course in Contracts' quoted above, or Fuller's list of six policies animating contract law rules. During the nineteenth century, according to the post-Second World War European version, the principle of ordering according to the will theory in general, and freedom of contract in particular, had governed labour law, landlord/tenant, urban land use, environmental law, insurance, transport etc. The new 'social' principle of regulation, in the interest of weak parties or third parties or the public interest, made 'incursions into the classical territory of private law'<sup>93</sup> in one of two ways: wholesale, displacing free contract altogether, or ad hoc. In either case, the incursions led to the 'disintegration of private law'<sup>94</sup> and 'not only destroyed the internal coherence of private law but also undermined the distinction between private and public law, which our legal system still took for granted at the end of last century'.<sup>95</sup>

To make things even more problematic, the reformers failed (perhaps tragically, or miserably, or heroically) to state the social principle in a way that had 'proper system and conceptual clarity' as a guide to adjudication or even to legislation. The result was that where the social fully displaced contract, we either returned to status or to some half-baked version of collectivism. In the areas where contract survived as remnants of its once coherent self, it was displaced by a hotchpotch rather than by something that could guide elaboration and development: '[T]he disintegration of the coherent private law of the nineteenth century remains the crucial problem in the relationship between legal scholarship and the outside world'.<sup>96</sup>

I think it fair to say that although this attitude is still present in some circles of private law scholarship in Europe, it is no longer even close to dominant. Indeed, as I argued at the beginning of this chapter, it seems more plausible to say that private law theory in Europe has entered a phase of balancing/proportionality and has transcended the earlier version that confronted the coherent but outdated classical

however, can be drawn with utmost clarity: Where there is not even an attempt at justice, where equality, the core of justice, is deliberately betrayed in the issuance of positive law, then the statute is not merely 'flawed law', it lacks completely the very nature of law.

G Radbruch in B Paulson and SL Paulson (trans), 'Statutory Lawlessness and Supra-Statutory Law (1946)' (2006) 26 *Oxford Journal of Legal Studies* 1, 7.

<sup>92</sup> F Wieacker in T Weir (trans), *A History of Private Law in Europe (with Particular Reference to Germany)* (Oxford, Clarendon Press, 1995). These paragraphs about Wieacker are taken from Kennedy, 'From the Will Theory', above (n 15) 162-63.

<sup>93</sup> Wieacker, *A History of Private Law*, *ibid*, 434.

<sup>94</sup> *ibid*, 438.

<sup>95</sup> *ibid*, 438-39.

<sup>96</sup> *ibid*, 441.

tradition with the ethically attractive but incoherent and unworkable aspiration of 'solidarity' put into effect by subtracting one domain after another from private law.

The first element in this evolution is undoubtedly the 'socialisation of private law', well described in this extended quotation from Hesselink's *CFR and Social Justice*:

### 3.1 The Socialisation of Private Law in the Member States

In the course of the 20th Century social justice concerns have profoundly transformed private law. In all Member States private law underwent a gradual transformation from classical to modern private law where a formal notion of freedom of contract and party autonomy gave way to the recognition that in reality many individuals in many situations are not so free and autonomous (*Materialisierung*). In contract law this meant that, on the one hand, the freedom of contract and its binding force were limited whereas, on the other, duties to inform, duties to co-operate and duties of care were introduced, in order to avoid unfairness and to protect weaker parties. In property law the absolute character of property rights was limited and its social function was recognised, often with the help of the concept of abuse of right. In tort law fault liability was replaced in many instances (such as product, traffic and environmental liability) by strict liability for creating risks to others. This socialisation took place by legislation (especially for the protection of weaker parties: workers, tenants, consumers, patients), be it in or outside the civil code, but often also by the courts based on general clauses such as good faith or (in the common law) through so-called implied terms. In several Member States the process of socialisation had a constitutional dimension as well. The Sozialstaatsklausel in the German constitution (Art 14) and the obligation of *solidarieta sociale* in the Italian Constitution have been instrumental in the socialisation of private law, while the constitutions of Ireland, Germany, Italy, Greece, Spain and Portugal recognise the social character of property. Moreover, the socialisation of private law has gone hand and hand with a gradual blurring of the dividing line between private law and public law and private law and 'regulation': By the end of the twentieth century in Europe, private law had begun to construct a new synthesis between the distributive instrumental concerns of regulatory measures and its traditional corrective justice orientation based on systematised general principles.<sup>97</sup>

But what is the connection between the 'socialisation' of private law and the rise of balancing? An important factor seems to have been the emergence of the doctrine of horizontal effect in the context of a new German constitution that simultaneously guaranteed private property rights and subjected them to a requirement of 'social justice'. The first horizontal effect case, paradoxically, involved a free speech challenge to the codified private right to protection from private economic boycotts, a right that at least formally involved the internalisation of social costs. In horizontal effect cases, constitutional courts sometimes confront this kind of challenge, in which a constitutionalised Hohfeldian privilege, such as free speech, influences a more 'social' private right and sometimes the opposite, when a constitutional 'social function of property' argument for protection of a weak party confronts a classical liberal Hohfeldian privilege in the civil code. Balancing seems the only workable solution, even if it is a solution of last resort.<sup>98</sup>

<sup>97</sup> Hesselink, *CFR and Social Justice*, above (n 3) 13–14.

<sup>98</sup> R Alexy, 'On Balancing and Subsumption: A Structural Comparison' (2003) 16 *Ratio Juris* 433.

It might appear that this is a public law problem, without relevance to the 'internal' evolution of private law. But as Matthias Kumm points out in a strong article on horizontal effect, it is a commonplace, after the socialisation of private law described above, that private law itself contains all the values the social people once thought had to be imposed from above through constitutionalisation.<sup>99</sup> The notion of interpreting a code through constitutional values leads eventually to the open acknowledgment of the potentially contradictory structure of private law.

I think a second, equally speculative factor may well have been the slowly growing realisation of the diversity of solutions to elementary questions of civil law within the continental tradition. This is an accomplishment of the discipline of comparative law, and particularly of the school of Rodolfo Sacco. Sacco's version of comparative law cruelly and persistently points to cases where identical code provisions produce contradictory case law, and where divergent code provisions produce identical case law.<sup>100</sup> The strong impression left by the studies of this school is of the under-rationalised character of many private law rules in the civilian tradition. The impression has been reinforced by the impressive studies of the Common Core project, which might also be called the 'Contradiction within the Core' project.<sup>101</sup> To my mind what is most striking about these studies is that the divergences between national systems, especially those where Britain and Germany are polar cases, seem to reflect sharply divergent balancings of a common list of policies.

This might be a matter of merely academic interest were it not for the existence of the European Union and of a Commission with imperial impulses towards 'harmonisation' of private law. Confronted with the Commission's initiatives, privatists initially found themselves divided along national lines, each defending familiar code solutions as aspects of national identity.<sup>102</sup> But quite abruptly, the field reconfigured itself, dividing into what we might loosely call 'neo-liberal' and 'social justice' camps that cross national lines.<sup>103</sup> Politicised debate in private law occurs in the context of legalism: both sides on a given issue argue that they are correct in their interpretation of the acknowledged sources, which will now include the wide variety of contradictory solutions in the different European legal systems. Balancing is an obviously attractive method for any institution or, for that matter,

<sup>99</sup> M Kumm, 'Who is Afraid of the Total Constitution? Constitutional Rights as Principles and the Constitutionalization of Private Law' (2006) 7 *German Law Journal* 341.

<sup>100</sup> R Sacco, 'Legal Formants: A Dynamic Approach to Comparative Law' (1991) 39 *American Journal of Comparative Law* 1 and 343.

<sup>101</sup> See, eg, R Sefton-Green (ed), *Mistake, Fraud and Duties to Inform in European Contract Law, The Common Core of European Private Law* (Cambridge, Cambridge University Press, 2005); M Bussani (ed), *Pure Economic Loss in Europe, The Common Core of European Private Law* (Cambridge, Cambridge University Press, 2003); R Zimmerman and S Whittaker (eds), *Good Faith in European Contract Law, The Common Core of European Private Law* (Cambridge, Cambridge University Press, 2000).

<sup>102</sup> D Caruso, 'The Missing View of the Cathedral: The Private Law Paradigm of European Legal Integration' (1997) 3 *European Law Journal* 3.

<sup>103</sup> Study Group on Social Justice in European Private Law, 'Social Justice in European Contract Law: A Manifesto' (2004) 10 *European Law Journal* 653; see also H Collins, *The European Civil Code: The Way Forward* (Cambridge, Cambridge University Press, 2008).

any academic research team that is responsible for making proposals that have a chance of broad acceptance.<sup>104</sup>

The final impulsion toward balancing comes from the internal fragmentation of both the neo-liberal and social justice camps, a development reminiscent of Fuller's pluralisation of the policy bases of contract rules. I hope the reader will permit me to quote again a 1911 passage from Demogue that is highly relevant to today's debate over harmonisation:

The simplest [sic] theories—such as those of a world steadily advancing, of a world of infinite perfectibility, of solidarity and fraternity unfolding themselves ever more and more—seem just as exaggerated as the dualistic [sic] theories, if I may be permitted to coin a word, which see everywhere in life a struggle between two opposite principles—individualism and socialism, authority and liberty, progress and reaction, State and individual. Correct as approximations, as methods of instruction, these duels, if closely examined, are really battles between masses, certain parts of which support or oppose just as well one as the other of the two combatants.

In our context, the neo-liberals, as in Eidenmüller et al, have to find a way to maintain coherence in the face of division between classical doctrinalists and proponents of efficiency analysis, who share preferences for conservative solutions, in spite of sharply antagonistic normative premises. Within the social justice camp, Thomas Wilhelmsson's article, 'Varieties of Welfarism'<sup>105</sup> begins a similar process of internal disintegration.

So long as there seems to be a confrontation of two arguably internally coherent views—neo-liberalism versus social justice, for example—it is at least conceivable that one is right, or that one will win out, so that balancing will, at least ultimately, prove to be unnecessary. But once the process of internal disintegration is underway, this comes to seem an impossibility. It is no longer clear what it would mean for one camp or the other to triumph, given that each is subject to myriad inconsistent interpretations, each representing a compromise of the potentially conflicting elements that compose it.

A final factor in the re-emergence of balancing in Europe must certainly be the rise of proportionality tests in European public law, including both the European Court of Justice (ECJ) and the European Court of Human Rights (ECHR). On the other hand, I suppose it is conceivable that privatist disdain for public law proportionality actually delayed the acceptance of the inevitable represented by the DCFR.

<sup>104</sup> For two 'outsider' observations of this discussion, see D Kennedy, 'The Political Stakes in "Merely Technical" Issues of Contract Law' (2001) 1 *European Review of Private Law* 7; D Kennedy, 'Thoughts on Coherence, Social Values and National Tradition in Private Law' in MW Hesselink (ed), *The Politics of a European Civil Code* (The Hague, Kluwer, 2006).

<sup>105</sup> T Wilhelmsson, 'Varieties of Welfarism in European Contract Law' (2004) 10 *European Law Journal* 712.



## C Balancing in Retreat in the United States after 1980

The American developers of balancing in private and public law began as very careful and earnest students of German and French legal ideas. Some time around 1945, they seem to have concluded that they had little left to learn. For them, it was now the American century in law as in so many other areas of endeavour. They stopped reading, and they stopped being preoccupied with their European origins. As teachers, they no longer tried to interest their students in the work that had defined their own youth. Inasmuch as there was a history of how American legal theory had reached this stage, it became a purely American history. No more translations. It was assumed not just that American legal theory was American, but that it had always been American.

Paradoxically, just as they turned inwards, they began to influence legal thought in other parts of the world, for many reasons, some creditable and some discreditable and to influence it both for good and for ill. It was during this period of isolation that the Americans completed the balancing model, taking it to a point far beyond what their European predecessors had achieved.<sup>106</sup>

Then the period of creativity came quite abruptly to an end. Beginning around 1980, judges and doctrinal writers pulled back from the various theoretical controversies about how to conceptualise private law. There were many reasons for this, but I will mention only one, which may or may not have been the most important. Starting soon after the Second World War, American contract, tort and property law went through a protracted period of substantive change closely corresponding to the 'socialisation' described by Hesselink in the long quotation above. The judges and doctrinal writers who brought about these changes used variants of the social methodology and balancing, as illustrated by the case of *Tarasoff v Regents of the University of California*, discussed above. These developments, always presented as a matter of mere social rationality, came little by little to be understood as an aspect of the general progressive dominance of the courts, the dominance of the left, most visible in the public law work of the Warren Court, but also strongly present in the development of a law of gender that was both more protective of women's interests in conflict with male interests and radically individualist in its attitude toward women's freedom of choice.

The programme of the American right wing, beginning in the 1960s with Richard Nixon but culminating with the election of Reagan in 1980, included as an important element an attack on 'judicial activism'. Although in public law balancing had initially seemed a conservative technique, by the 1980s it was associated with activism, and the very sharp shift in the political affiliations of American judges brought about by Republican electoral dominance after 1968 led also to stalemate and then to some rollback of the mass of 'socialising' reforms of the post-Second World War period.<sup>107</sup> It led also to the adoption, by both Left and

<sup>106</sup> The preceding paragraphs are taken from Kennedy, 'From the Will Theory', above (n 15).

<sup>107</sup> On this development, see D Caruso, 'Contract Law and Distribution in the Age of Welfare Reform' (2007) 49 *Arizona Law Review* 665; J Feinman, 'Unmaking Law: The Classical Revival in the Common Law' (2004) 28 *Seattle University Law Review* 1; C Knapp, 'Rescuing Reliance: The Perils of Promissory Estoppel' (1998) 49 *Hastings Law Journal* 1191.

Right, of modes of legal reasoning that disguised to the extent possible the element of judicial creativity. In legal academia—after the blaze of theoretical controversy brought about by the simultaneous rise of law and economics and critical legal studies—the mainstream more or less abandoned theory. For those who persisted, on the Right, there was a conservative, highly conceptual version of law and economics and neo-formalist versions of libertarianism and commutative justice; on the Left, an often equally conceptual or neo-formalist version of progressive civil liberties and rights talk, often ‘identity’ based.

Balancing has not disappeared from American discursive practice, nor has it been superseded by a convincing alternative for dealing with gaps, conflicts and ambiguities. But it has passed from being a highly theorised, controversial practice to a persistent unacknowledged, often only half-conscious, underground activity. I think it not an exaggeration to say that for the last 15 years or so the European harmonisation discussion has been more interesting, from the point of view of private law theory, than anything happening among American privatists.

#### V CODA

#### QUESTIONS ABOUT THE RELATIONSHIP BETWEEN PRIVATE LAW BALANCING AND PUBLIC LAW PROPORTIONALITY

In this chapter, I have treated private law balancing more or less in isolation from the issue of proportionality in public law. The relationship between the two is a subject of great interest, and one that I intend to pursue in the future. For the moment, it seems worthwhile to try to present the four quite broad questions that concern me, and then to suggest in a tentative way my initial hypotheses, very much subject to confirmation or disconfirmation through further study. The questions are: (1) Are the private and public law procedures analogous, identical, or quite distinct? (2) Did the developments in public and private law influence one another? (3) Is the American version of balancing in constitutional law analogous to, identical to, or quite distinct from European proportionality analysis? (4) Did the American development of balancing in constitutional law influence the development of proportionality in Germany after the Second World War?

#### A Are the Private and Public Law Procedures Analogous or Identical?

It is an interesting and important question in what respects the balancing approach that characterises American and European sophisticated private law theory is the same as or different from the proportionality approach that characterises a very large part of European Union law, whether in the ECJ or in the ECHR, as well as the constitutional law of several Member States and particularly of Germany.

The most limited definition of public law proportionality is tied closely to administrative law and has several parts. The situation is conceived as one in which the holder of a public power proposes an action that is formally within the scope of the power and that will impinge significantly on a private right. The prefect wants to build a road. After establishing the conflict between legitimate power and

substantial legally protected interest, we first ask whether the action was both necessary and then chosen in such a way as to minimise gratuitous injury to the right. This is the first proportionality question. If the state action is proportional in this limited sense of means-ends rationality, then we move to the final stage of 'true balancing', in which the adjudicator has to decide whether the power trumps the right or vice versa, on the basis of a calculation whether the injury to the right was 'proportional' to the gain from the exercise of the power. Disproportion means illegitimacy.<sup>108</sup>

The basic private law balancing situation is one in which the plaintiff argues for the adoption of or interpretation of a rule of contract, property or tort law that restricts the defendant's legal authorisation to injure him. The conflict may be cast in terms of interests or rights, or both, with the plaintiff typically alleging a Hohfeldian 'claim right' to protection and the defendant a Hohfeldian 'privilege', or 'right to freedom of action'. The idea is that the adjudicator should assess the effects of adopting a more or less restricted view of the defendant's authorisation to harm the plaintiff in terms of the relative weight of principles involved, of rights in conflict and of social (not individual) interests in the outcome, while keeping in mind the conflict between rules and standards and between judicial activism and judicial passivism.

In a manner analogous to what Teubner argues has happened in the emergence of 'societal constitutionalism' as a general characteristic of global legal normativity,<sup>109</sup> jurists have abstracted and then re-specified public law proportionality so that it now reaches far beyond the administrative law formulation. The term describes the procedure used in:

- Judicial review of national legislation under national constitutions that both guarantee rights and distribute powers.
- Judicial review of provisions of national civil codes whose application arguably infringes constitutionally guaranteed individual rights.
- European judicial review of national legislation under the European conventions guaranteeing human rights.
- Judicial review of norms adopted by the European legislative institutions or national legislatures under the provisions of the treaties allocating powers between the centre and the Member States.

Once abstracted and re-specified in these ways, my hypothesis is that there is a single evolving template, organised around conflict between rights and powers, between powers, or between rights, involving in each case the same three questions: (a) Have the parties acted within, or been injured with respect to, their legally recognised powers or rights? (b) Has the injurer acted in a way that avoids unnecessary injury to the victims legally protected interest? (c) If so, is the injury acceptable given the relative importance of the rights or powers asserted by the injurer and the victim? While there are, of course, dramatic practical institutional

<sup>108</sup> J Schwarze, *European Administrative Law*, rev 1st edn (London, Sweet & Maxwell, 2006).

<sup>109</sup> G Teubner, 'Societal Constitutionalism: Alternatives to State-Centred Constitutional Theory?' in C Joerges, IJ Sand and G Teubner (eds), *Constitutionalism and Transnational Governance* (Oxford, Hart Publishing, 2004).

differences between balancing in private and public law, it is not clear to me that there are any differences at this more abstract analytic level.

**B Did the Developments in Public and Private Law Influence One Another?**

In the American case, there is no question that there is a very close connection between the development of balancing in the two contexts. As the discussion has already indicated, the American private law balancing theorists of the period from 1900 to 1937 were intensely concerned with the implications of their private law theory for US constitutional law. They argued that, because private law rules were intelligible only as the product of the balancing of conflicting policies, the choice of rules was inherently 'legislative'. Consequently, vigorous judicial review of legislative choices to reform the rules in a progressive direction would constitute anti-democratic judicial usurpation. It seems to me that the connection in Europe is completely obscure, but a matter of considerable interest.

**C Is the American Version of Balancing in Constitutional Law Analogous to, Identical to, or quite Distinct from European Proportionality Analysis?**

My impression is that the European view on this question is that American public law balancing is quite different from European public law proportionality. My hypothesis, again subject to disconfirmation, is that contrary to the typical European view, American constitutional law balancing has all the elements of European proportionality. These include the preliminary tests of whether the legislation is within the general powers of the state and whether it adopts the 'least restrictive means' to achieve its objective. Given the abstraction and re-specification of proportionality just described, it is hard for me to see that the original restricted administrative law definition is of any use in describing the European practice. The abstracted and re-specified practice seems to be identical to American constitutional law balancing, although there will obviously be many differences of style, presentation and detail between the systems.<sup>110</sup>

**D Did American Private and Public Law Balancing Discussions Influence European Public Law Proportionality?**

My impression is that the typical European view is that the European practice of proportionality in public law has its origins in some combination of Aristotle's definition of commutative justice and German, or rather Prussian, nineteenth-century administrative law, under the definition that I gave above.

My tentative hypothesis on this question is again contrary to this European view. The reason for my scepticism is simple: during the period immediately preceding

<sup>110</sup> A useful preliminary treatment is J Bombhoff, 'Balancing, the Global and the Local: Judicial Balancing as a Problematic Topic in Comparative (Constitutional) Law' (2008) 31 *Hastings International & Comparative Law Review* 555.

the German constitutional cases establishing proportionality via the doctrine of indirect horizontal effect, the US Supreme Court, beginning with the *Dennis* case on the criminalisation of the American Communist Party, decided a series of First Amendment cases on the basis of balancing.<sup>111</sup> These were the most politically salient decisions of the whole Cold War period and they stimulated an intense academic debate, including dozens of articles and books by well known and prestigious constitutional scholars and political scientists about the meaning and legitimacy of balancing, as opposed to the alternatives. The positions later associated with Alexy and Habermas in their German debate were quite thoroughly previewed in the American controversy.

It is inconceivable to me that the new judges of the German Constitutional Court, working under American occupation with a brand new constitution that departed in many respects from earlier German constitutional models, were ignorant of the American balancing debate. Because the balancing debate is now largely forgotten in the United States, and proportionality is understood in Europe as a particular product of European circumstances, there seems to have been no attention paid at all to the question of the influence *vel non* of the Americans on the Germans at the crucial moment of judicial innovation. My initial hypothesis, again subject to disconfirmation, is that the American development influenced the German one.

<sup>111</sup> For the standard reference on the history of public law balancing in the US, including a discussion of its origins in the late 1930s and early 1940s and its roots in the private law discussions that are summarised in the first parts of this chapter, see A. Aleinikoff, 'Constitutional Law in the Age of Balancing' (1987) 96 *Yale Law Journal* 943.