# Introduction

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## I.1 The Premise of this Volume

European and American legal scholarship have tended to function as two self-contained traditions (mediated in some cases by Britain), but globalization renders this separation obsolete and, in fact, dysfunctional. Corporate law scholars find that the firms they study now operate internationally; administrative law scholars deal with regulations that are as often the product of treaties as they are of municipal legislation; environmentalists must be concerned with the damage that modern industry inflicts on the climate, the oceans and the jet stream as well as on their local streams and forests; and scholars focusing on human rights must draw on emerging moral norms that cross national frontiers. At the same time, they must provide answers to threats generated by private exposure carried by the World Wide Web and preserved in the Cloud, and by government surveillance or drone attacks coming from above the clouds.

While legal scholars on both sides of the Atlantic have devoted serious attention to the globalization of legal issues and legal systems, they have done so by relying on their separate methodological approaches.[1] What they have not done is to confront the challenge that globalization poses to these methodologies themselves. European and American scholars are not simply providing different answers to problems that they now inevitably share, but they are asking different questions, for example, with regard to the relationship between theory and practice.[2] Those questions,

[1] R.A.J. van Gestel, H.W. Micklitz and M. Maduro, Methodology in the New Legal World, EUI Working Papers LAW No. 2012/13. (http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2069872).

[2] See for example: Brent E. Newton, Preaching What They Don't Practice: Why Law Faculties' Preoccupation with Impractical Scholarship and Devaluation of Practical Competencies Obstruct Reform in the Legal Academy, 62 *S.C. L. REV*. 105, 154 (2010); versus J.B.M. Vranken, Exciting Times for Legal Scholarship, 2, 2 *Recht en Methode in Onderzoek en Onderwijs* 42–62 (2012).

moreover, are drawn from separate intellectual traditions that have influenced each other at various times but then rebounded to continue along their individual trajectories. The pedagogic programs that these scholars provide have remained equally separate, and that separation, once again, is methodological. Their subject matter overlaps and their students often cross the ocean to extend their education, but the conception of a law school in Europe and America, and the basic approach to law that these institutions feature, remain strikingly distinct.[3]

Hans Kelsen, one of the most influential European legal theorists of the twentieth century, was welcomed by the University of California, Berkeley, when he fled from Nazi Germany. The university, aware of his stature and vaguely associating it with some form of science, named its newly built social science library in his honor. Kelsen, who possessed an active sense of irony, would point it out to friends who visited him at Berkeley: "Just look, an entire library named after me and not a single thing written by me is in it."

The purpose of this book is to bridge the methodological divide between European and American legal scholarship, to reach across the ocean that now truly merits its ironic nickname of the Pond. But the book does not aspire – and perhaps the proper word would be presume – to unify these separate scholarly and pedagogic methodologies. One reason for abjuring so grand, or grandiose, a project is that these two traditions are too well entrenched. A separate and possibly more compelling reason, however, is the converse; European and American scholarship have each become so varied and complex that any imaginable unity could only be achieved by resorting to inherited and counterproductive stereotypes. To put the matter bluntly, Americans often view European legal scholarship as old-fashioned and inward-looking due to its continued engagement with doctrine, whereas many Europeans see American scholarship as amateur social science that has lost contact with the realities of legal practice and judicial institutions. These are precisely the preconceptions that should be avoided in an enterprise of the sort that this book represents. We believe that American and European scholarship share a joint challenge. If legal scholarship becomes too much separated from practice, legal scholars will dig their own grave. If legal scholars, on the other hand, cannot explain to other disciplines what is academic about their research, which methodologies are typical for

[3] See for an overview of some of the differences: M. Reimann, The American Advantage in Global Lawyering, Dreizehnte Ernst-Rabel-Vorlesung 2012, 78 *RabelsZ* 2–36 (2014).

legal research, and what separates proper research from mediocre or poor research, we will probably end up in a similar situation.

Therefore, there is room and even a necessity for mutual learning and for interaction. This implies a generalization of US scholarship and European scholarship, as well as a generalization of the United States (a 200-year-old established democracy) and the European Union (EU) (a quasi-state, a laboratory of postnation-state building now for nearly sixty years). These generalizations, however, help us to identify overall trends on both sides of the Atlantic, trends which allow us to identify common denominators for discussion. Leading scholars from both Europe and the United States have been invited to think critically about the methodological premises and possibilities of their own tradition. They were asked to do so in light of the increasing intensity of transnational contacts between scholars due to the forces of globalization, and for the purpose of achieving mutual understanding regarding these premises and possibilities, but not to characterize the other methodology or to attempt a synthesis. The resulting collection of essays, therefore, represents a first step, a foundation on which we hope that both European and American scholars will be able to build a better understanding of each other's work and to develop collaborative research projects. Much more has to happen, though, in order to overcome American/European entrenchment. The contributions, originally written for a conference sponsored by the Global Governance Program of the European University Institute in Florence, Italy, are grouped around three themes: first, an institutionally grounded description of legal scholarship in Europe and the United States; second, a discussion of the role of doctrine in modern legal scholarship, from both the European and the American perspectives; and third, an account of the various interdisciplinary initiatives that are current in American legal scholarship and the way that they relate to pragmatic legal issues.

The contributors to this volume can speak for themselves, of course, and this Introduction will offer only very brief summaries of their essays as nothing more than a convenient guide for the reader. Before providing those summaries, however, the three of us, as editors of this volume, thought it might also be useful to the reader to locate the intensive and often detailed interaction that the contributions provide in the context of some of the general issues that have been raised by legal scholars who have previously addressed the methodological premises of legal scholarship, particularly as they differ in Europe and America. The three issues that unite the US/EU debate on the future of legal scholarship are: should

legal scholarship aspire to the status of a science and gradually adopt more and more of the methods, (quality) standards, and practices of other (social) sciences?; should this scholarship play a pragmatic role in legal practice and legal institutions?; and finally, is legal scholarship undergoing a basic transition that will make it foreign, if not unrecognizable, to those trained in either the European or American traditions?

## I.2 Should Legal Scholarship Be Regarded as a Science?

For a long time, European legal scholars have debated whether legal scholarship should be seen as a science, an art, a craft, or a form of applied theology. The inclination to treat it as a science was greatly enhanced in the early nineteenth century, when it turned out that science could not only explain how the Earth orbited and blood circulated, but could also produce steamboats and railroads. In 1847, Julius von Kirchmann, a German judge, delivered a famous speech to a society of legal scholars in which he accused his audience of doing nothing more than pointing out lacunae in case law and legislation, like the worms and insects that live off rotten wood. A few lines of new legislation would be enough to make entire legal libraries obsolete, he observed.[4] In the years following von Kirchmann's speech, many scholars who had been associated with the Historical School of German legal studies (with its founding father Fritz Karl von Savigny), such as Rudolf von Jhering, distanced themselves from the formalism that characterized this school and initiated the *Freirechtsschule*, or Free Law Movement. They argued that judges should be free to reach just and reasonable results, rather than being bound to the language of the Civil Code by chains of narrowly doctrinal reasoning. Under the influence of scholars such as Eugen Ehrlich and Herman Kantorowicz, the Free Law Movement morphed into the school of sociological jurisprudence (e.g. Roscoe Pound, Eugen Ehrlich, Max Weber), which claimed the mantle of science by attempting to develop decision rules from the systematic study of society.

Despite its willingness to draw on varied sources, the Free Law Movement was allied with the legal positivism that owed its origin to Jeremy Bentham and John Austin, two figures that reflected Britain's intermediate position between continental Europe and America. These positivist inclinations became dominant in Kelsen's jurisprudence, which explicitly

[4] J. von Kirchmann, *Die Wertlosigkeit der Jurisprudenz als Wissenschaft* (Berlin: Julius Springer Verlag, 1848), p. 29.

aspired to turn legal scholarship into a science. Kelsen was quite willing to view law as originating in social processes, but he insisted that the product of these processes, if it was to be considered law, must be a system of commands backed up by sanctions divorced from questions of morality. It might be important to ask whether the law was right or wrong, wise or foolish, but to regard those questions as elements of legal theory would be equivalent, in his view, to treating poems about the sweetness of flowers as botanical science, or accusing Albert Einstein of cultural relativism. Kelsen thus belonged to a long European tradition that associated a science of law with systematic thought based on clearly stated premises, and law's social origins as data for that approach to use, not as a challenge to its doctrinal integrity. That is perhaps the reason why the acquisitions staff of Berkeley's Kelsen Social Science Library could not find any of his works that corresponded to the American idea of social science. Kelsen wanted to underline the uniqueness of law as a discipline and therefore stressed the fundamental difference between *sein* and *sollen* or between normative and empirical questions as we would currently say.

The treatment of law as a science in the United States has been distinctly different. When C.C. Langdell, and his mentor, Charles Eliot, first established law as an intellectual discipline in American universities, they insisted that it was to be viewed as science, by which they meant natural science.[5] Like scientists, legal scholars must discern the underlying regularities that determine observed phenomena such as judicial decisions. The record of those decisions was the legal scholar's data and the law library was thus the equivalent of the chemist's laboratory.

As this view was becoming ensconced in American universities, a number of leading German legal scholars, including Kantorowicz and Kelsen, sought refuge in the United States. This produced one of the moments when the two traditions interacted only to rebound. Kantorowicz and other members of the Free Law Movement inspired the founders of American sociological jurisprudence, most notably Roscoe Pound, and the Legal Realists who followed, such as Karl Llewellyn, Jerome Frank, and Felix Cohen, to condemn Langdell and his followers as arid "formalists," whose idea that judges could apply the law "mechanically," without relying on judgment, was both an intellectual delusion and a threadbare apologia for the status quo. This sustained attack

[5] Edward Rubin, What's Wrong with Langdell's Method and What to Do About It, 60 *VAND. L. REV.* 609 (2007).

permanently, although perhaps unfairly,[6] destroyed the intellectual reputation of the so-called formalists and turned their attempt to characterize legal scholarship as science into an object of ridicule. The social basis of law that American scholars had learned from their contact with the European exiles was reinterpreted as politics rather than underlying cultural forces, and spawned the Legal Process movement.[7] Legal Process scholars, who were the dominant force in American legal academia for several decades after World War II, viewed law as a mechanism by which politically determined policies could be translated into governmental action. They also acknowledged the role of courts in enforcing constitutional constraints on the political process, but famously argued that this role being counter majoritarian, should be limited to situations where the political process had broken down due to racial prejudice, structural flaws or similarly delimited circumstances. Legal process scholars emphasized pragmatic judgment and institutional specificity, and did not contemplate any connection with natural science. Even when many American legal scholars turned to more technical, mathematical types of social science, such as economics and game theory, they shunned any claim that this constituted science.

One factor that may contribute to these divergent attitudes regarding the scientific nature of legal theory is the difference between a code law and a common law regime. If a legal system is based on comprehensive codes, the aspiration to draft those codes according to systematic and coherent principles will be strongly felt and sometimes associated with a "legal science" in which law is seen as a coherent system of written and unwritten rules. Common law, in contrast, is developed incrementally by judges, typically without central planning. For law to be a science in this context would mean that the common law displays underlying, comprehensive regularities that can be discerned by inductive reasoning from judicial decisions, which is exactly what Langdell and other formalists asserted. This is actually true at some level – judges are, after all, products

[6] See Brian Tamanaha, *Beyond the Formalist-Realist Divide: The Role of Politics in Judging* (Princeton, NJ: Princeton University Press, 2010).

[7] See Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (Indianapolis, IN: Bobbs-Merrill, 1962); Charles Black, Jr., *The People and the Court: Judicial Review in a Democracy* (New York: Macmillan, 1960); Lon L. Fuller, *The Morality of Law* (New Haven, CT: Yale University Press, 1964); Lon L. Fuller, The Forms and Limits of Adjudication, 90 *Harv. L. Rev* 353 (1978) [written and circulated, but not published, in 1957]; Herbert Wechsler, Toward Neutral Principles of Constitutional Law, 73 *Harv. L. Rev*. 1 (1957).

of their culture – but implausible at the level of specificity that legal rules inhabit. Britain again serves as an intermediate case; it is a common law jurisdiction, but relies on centralized, law-making institutions typical of European nations, and has thus been less resistant than the United States to displace common law by legislation. Significantly, it was two British scholars, Pollack and Maitland, who exploded the myth that the common law ran back into the Anglo-Saxon past, and disclosed its forgotten origins in Angevin royal policy.[8] British scholars took their discovery to heart; American legal scholars, particularly in their role as legal educators, promptly forgot it again.

A second factor that separates Europe and America is a basic difference between the institutional contexts of legal scholarship. In both cases, legal scholars are primarily employed by universities, and teach as well as write. But European universities have existed for eight hundred years and law was regarded as an important element of their curricula from their inception.[9] Law-trained graduates played a crucial role in the process of state building and in the institutional consolidation of the Catholic Church. In contrast, there were virtually no law schools in the United States until after the Civil War. Lawyers were trained on the same apprenticeship model as shoemakers or blacksmiths, or through lectures provided by a practicing lawyer who, at most, rented space from a university in the same way that a university swimming pool might today be rented by a scuba diving school. Thus, when Langdell and Eliot decided to establish law as a degree program at Harvard – and indeed as an advanced degree for college graduates – they needed to demonstrate that legal studies possessed the intellectual content that would justify such a radical departure. The claim that law was a form of natural science served this purpose. It did so, however, in an instrumentalized and exaggerated way that could not be sustained or justified, and, for Americans, forever branded legal scholarship's claim to science as a chimera.

## I.3 Should Legal Scholarship Serve Pragmatic Purposes?

Another ongoing issue is the extent to which legal scholarship should serve pragmatic purposes, that is, whether it should be addressed to

[8] Frederick Pollock and Frederic Maitland, *A History of English Law Before the Time of Edward I* (Cambridge: Cambridge University Press, 1968 [1895]).
[9] R.C van Caenegem, *Judges, Legislators and Professors: Chapters in European Legal History* (Cambridge: Cambridge University Press, 1992).

judges, legislators, and practicing lawyers. A scientific approach tends to see itself as studying these legal actors, rather than addressing them. But scientific investigation, even according to the strictest definition of the term, varies greatly in the extent of its pragmatic applications. It stands for itself and it is for the democratic powers to make use of legal science. Researching the origins of the universe and the topography of Pluto clearly count as science, but so does research on the tensile properties of steel or the effects of climate change. In other words, whether one adopts the view that legal scholarship should be scientific or not, the question of whether it should serve immediate, identifiable purposes will remain.

This issue has been intensely debated in the United States over the course of the past several decades.[10] One position, which recapitulates von Kirchmann's recommendation more than a century earlier, is that legal scholarship should move away from its close focus on what comes out of the courts or legislatures, an approach that Pierre Schlag has labeled as "case law journalism."[11] In the context of American scholarship, this move began by critiquing what it saw as the rotten wood of the then-dominant Legal Process School, combined with a political critique of the liberal consensus that this School was seen to both reflect and support. The Critical Legal Studies Movement, which drew heavily on European critical theory and deconstruction – in another momentary interaction between the two traditions – came from the political left. It argued that the common law's claim to be based upon neutral and enduring principles served as a means by which the governing elite could retain their power.[12] The Law and Economics movement was partially inspired by the Austrian School of Economics but was largely an American creation. It came from the political right, and argued that common law was efficient, and that regulatory statutes that displaced it were counter-productive efforts by overly intrusive interest groups and policy entrepreneurs. Despite this clear opposition of the two movements to each other, both agreed that the worms and insects of the Legal Process School misunderstood the essential nature of the legal system.

[10] See R. Feldman, *The Role of Science in Law* (Oxford: Oxford University Press, 2009).
[11] Pierre Schlag, Spam Jurisprudence, Air Law, and the Rank Anxiety of Nothing Happening (A Report on the State of the Art), 97 *Geo. L. J.* 803 (2009), p. 821ff.
[12] For a dialogue between leftist US and leftist German scholars, see Ch. Joerges, D. Trubek (ed.), *Critical Legal Thought: An American-German Debate* (Baden-Baden: Nomos, 1989).

These journeys into philosophy and microeconomics succeeded in detaching American legal scholarship from legal doctrine and in forging connections with the humanities and social sciences. For those who demanded a more theoretical approach, they represented a great advance, or perhaps a maturation, of the research that American law schools were producing. But many scholars and members of the legal profession generally remained committed to doctrinal scholarship. One of the best-known condemnations of the turn toward theory was an article by Judge Harry Edwards that declared: "While the schools are moving toward pure theory, the (law) firms are moving toward pure commerce, and the middle ground – ethical practice – has been deserted by both."[13]

Edwards' article signaled a growing bifurcation in American legal scholarship. The Critical Legal Studies Movement has faltered, perhaps because class consciousness in the academy, legal practice, and society at large is so much weaker in the United States than in Europe. But it has been succeeded by allied movements that possess more staying power in the American context, such as feminist and critical race theory. Law and economics has flourished, and while its claim to be the golden key that unlocks every legal issue is now widely disparaged, it has become the dominant methodology in many areas of business and commercial law. At the same time, other fields of social science, most notably political science, but also sociology and anthropology, have become important elements of America's academic landscape.

Doctrinal scholarship, despite Judge Edwards' lament, has displayed considerable continuity. In part, this is because it is so familiar to American academics, but also because this scholarship continues to find an audience among legal practitioners and judges. These institutional bases for doctrinal scholarship, moreover, find strong support from reflective scholars who feel that the essence of legal scholarship – its distinction from other disciplines – lies in its contact with the profession. Even one of the strongest defenders of multidisciplinarity in legal scholarship, Richard Posner, now argues that legal doctrine needs to remain dominant. In his book, *How Judges Think*, he insists that doctrinal research is vital for an understanding of American law, even in areas where common law has been replaced by statute.[14] Although he had

[13] H.T. Edwards, The Growing Disjunction Between Legal Education and the Legal Profession, 34 *Mich. L. Rev*. 34 (1992–1993).

[14] Richard Posner, *How Judges Think* (Cambridge, MA: Harvard University Press, 2008), p. 211.

previously called for the establishment of legal theory programs in US law schools to counterbalance the dominance of doctrinal scholarship, he is now arguing that doctrinal law should be emphasized as a counterweight to the dominance of legal theory.[15]

This challenge to interdisciplinary legal scholarship – the so-called "law and . . ." movement – is itself subject to challenge, however. Edwards and his allies have been charged with narrow-mindedness and a misplaced nostalgia for the value of doctrinal research.[16] Certainly, interdisciplinary scholarship in the US has continued to advance, particularly in first-tier law schools that provide extensive incentives and support for faculty research. It is quite possible that a majority of the new faculty being hired by these schools have, in addition to their law degree, an advanced degree in another field, most often in economics or political science, but also in philosophy, history, psychology, sociology, or anthropology. Empirical research, at a technical level that would qualify as valid scholarship in the non-legal discipline as well as in law, is becoming common in American law schools, and those who produce it garner increasing institutional support.

In Europe, the ups and downs of scholarship are less dynamic.[17] There is more continuity in the overall stable position of doctrinal legal scholarship. Just like in the United States, there was and is a challenge from leftist legal scholarship against dominant black letter law scholarship and there is a growing challenge from the rightist legal scholarship through

[15] Richard Posner, The State of Legal Scholarship Today: A Comment on Schlag, 97 *Geo. L.J.* 854–855 (2009).

[16] P.D. Reingold, Harry Edwards' Nostalgia, 91 *Mich. L. Rev.* 1998–2009 (1993); R.A. Posner, The Deprofessionalization of Legal Teaching and Scholarship, 91 *Mich. L. Rev.* 1921 (1993); J.M. Balkin and Sanford Levinson, Legal Historicism and Legal Academics: The Roles of Law Professors in the Wake of Bush v. Gore, 90 *Geo. L.J.* 173, 176–177 (2001). For Judge Edwards' surrebuttal, see H.T. Edwards, Another 'Postscript' to 'The Growing Disjunction Between Legal Education and the Legal Profession, 69 *Wash. L. Rev.* 561, 567 (1994). Later on the debate shifted to the use of empirical methods in assessing judicial decision making. See H.T. Edwards, Collegiality and Decision Making on the D.C. Circuit, 84 *Va. L. Rev.* 1335 (1998); v. R.L. Revez, Ideology, Collegiality, and the D.C. Circuit: A Reply to Chief Judge Harry T. Edwards, 85 *Va. L. Rev.* 805 (1999); K.M. Clermont and T. Eisenberg, Judge Harry Edwards: A case In Point, 80 *Wash. U. L.Q.* 1275 (2002), responding to Harry T. Edwards and L. Elliott, Beware of Numbers (and Unsupported Claims) of Judicial Bias, 80 *Wash. U. L.Q.* 723 (2002); H.T. Edwards and M.A. Livermore, Pitfalls of Empirical Studies that Attempt to Understand the Factors Affecting Appellate Decision-Making, 58 *Duke L.J.* 1895 (2009).

[17] For a helpful European reader: D. Kennedy, The Paradox of American Critical Legalism, 3 *Eur. L.J.* 359 (1997).