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Fuss about a Footnote, or the Struggle for (the) Law in German Legal Theory

Overture: remembrance of times past

When I first started my research in Law and Literature, the then dominant debate was on Shakespeare’s The Merchant of Venice and so I included an overview of the often diametrically opposed interpretations of the play in my 1994 Ph.D. thesis. My reading of Heinrich Heine’s essays on female characters in Shakespeare’s plays¹ with its strong defense of Shylock – in his analysis of Jessica, Heine refers to a Drury Lane performance that he attended, on which occasion a lady in the audience became passionate about the injustice that she perceived done to Shylock² –, combined with Richard Weisberg’s reference, albeit in a note, in Poethics³ to Rudolf von Ihering’s view that Portia uses a foul trick to bring Shylock down, brought me to the fierce and rather odd attack in German legal theory of Rudolf von Ihering by Josef Kohler on the interpretive position taken by Portia.

In Anglo-American as well as European Law and Literature in the 1990s,⁴ however, this debate if at all mentioned was mainly relegated to the footnotes, or used to denote controversies between scholars, and no extensive analyses

1 Heinrich Heine, Shakespeare’s Mädchen und Frauen [1838]. Translated into English as either Shakespeare’s Girls and Women or Shakespeare’s Maidens and Women.

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were offered. Neither was O. Hood Phillips’ earlier Shakespeare and the Lawyers\(^5\) very helpful, because he paid no attention whatsoever to the underlying theories of law espoused by Von Ihering and his critics. In my own thesis, too, I left it at some short paragraphs and then forgot about it. Now with the celebration of Shakespeare 400 I think it fitting to return to the topic, not least because the whole German debate rests upon the different readings of one single footnote in Von Ihering’s The Struggle for Law, so that the question to me at least is: Why the fuss about the footnote? Shakespeare’s use in The Merchant of Venice, consciously or not, of the controversial concept of the laceration of a debtor by his creditor in the Roman Law of the Twelve Tables, as the background for the infamous bond, triggered extensive commentaries that, I suggest, not only prompted discussion about the prolonged, pervasive influence of Roman law on German jurisprudence but also projected a dark light on German law and legal theory in the early twentieth century. There is, therefore, a hiatus to be remedied in this proto-Law and Literature debate. That is why I aim to make a fuss about a footnote, though differently than my predecessors.

1 The modern use of Roman Law

The reception of Roman law throughout continental Europe was a gradual process that started with the rediscovery of the Corpus Iuris Civilis in the eleventh century. Suffice it to say for purposes of this article that in due course Roman law became the *ius commune* that superseded local law in that it became the starting point also for the interpretation of customary law. Its claim for legitimacy was generally accepted and eventually Roman law permeated all (sub)fields of law in that its tripartite conceptual framework of *res*, *persona*, and *actio* formed the basis for subsequent developments.\(^6\)

With the onset of the view of natural law based on human reason, the *recta ratio*, as developed by the legal theorists of the seventeenth- and early eighteenth century such as Hobbes, Grotius, and Pufendorf, things already began to change. The Enlightenment view on rational law in the second half of the eighteenth century further brought the idea of law as a system of codified rules and the concept of democracy under the rule of law. The status and influ-

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ence of Roman law faded into the background in most European countries that embraced the concept of the nation-state and its consequence, the codification of national positive law.

In Prussia, however, the theorists of the Historical School of jurisprudence, Friedrich Carl von Savigny (1779–1861) and Georg Friedrich Puchta (1798–1846), vehemently opposed the very idea of codification. Von Savigny specifically attacked Prussian General Legal Code of 1794, the project initiated by Frederick the Great. The priority of human reason to understand law as advocated by Enlightenment thinkers was rejected because it was ahistorical, the French Revolution was viewed as a dangerous thing as was the codification ideal of the later Napoleonic era. In 1815 Von Savigny warned the German peoples not to follow the example of the French codification in his *Vom Beruf unserer Zeit für Gesetzgebung und Rechtswissenschaft.* Romantic in its cherishing of the ideal of tradition as a source of knowledge, the Historical School aimed to understand law historically, i.e. it sought for the meaning of legal concepts in the context of their origin. To Von Savigny, then, the true legislator is found in the spirit of the people, the *Volksgeist*, a term coined by Johann Gottfried Herder. This thesis that the root of law is to be found in the people builds on Herder’s views on the organic relation between language and culture. Von Savigny then argued that the development of Roman law could be traced throughout the centuries and had therefore developed from the consciousness of the people. Thus German law was the natural synthesis of Roman law. Ironically, Herder himself, who had briefly studied under Kant’s tutelage but of whose Enlightenment stance he was also critical, fulminated against the lack of originality of German literature, the cause of which he took to be precisely the Romanist influence pervasive in German society. It should also at once be noted that the Romanist strand of the Historical School that is usually taken to have started with Von Savigny’s 1803 study *Das Recht des Besitzes*, had a counterpart in the Germanist strand of those, Jacob Grimm among them, who saw the *Volksgeist* exemplified in medieval Germanic law. And, paradoxically, given that Roman law was case-based,

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7 Translated by Abraham Hayward as *Of the Vocation of our Age for Legislation and Jurisprudence* (New York: Argo, 1975).


Von Savigny and his followers of the Historical School used the Roman Digests or Pandectae to build a strict, closed system of legal concepts. They were more interested in the nature of law than in its societal effects or goals. Thus the usus modernus pandectarum or Pandektenwissenschaft while pretending to be the modern legal garb of the Corpus Iuris Civilis,¹⁰ soon became a deductive, formalist jurisprudence of concepts, the Begriffsjurisprudenz, one that was devoid of any ethical or social notion.

It should, however, also at once be noted that Von Savigny’s position within legal theory was and remains pivotal. Not only did Von Savigny reject natural law and was instrumental in getting it removed from German legal curricula,¹¹ his success in building a Roman-law based system was amazing to say the least. If we consider the decline of Roman law in the rest of Europe and the fact that the Holy Roman Empire had collapsed in 1806, Von Savigny’s 1815 Geschichte des römischen Rechts im Mittelalter (Part I) was provocative in a situation in which what we now call Germany was a patchwork of smaller entities with as a result a patchwork of civil law(s).¹² After all, it was not until 1871 that the nation came into being. This makes Von Savigny’s plan to develop one all-encompassing legal theory for the whole of Germany remarkable and explains his aversion to, for example, the plan of Anton Friedrich Justus Thibaut (1772–1840) to construct a general German civil law code against which he also wrote his Vom Beruf unserer Zeit für Gesetzgebung und Rechtswissenschaft. Another reason perhaps for the combination by Von Savigny of a historical method and the legal precision of a highly conceptual level of systematization that culminated in Begriffsjurisprudenz can be found in the fact that Von Savigny had no experience whatsoever of legal practice, and no working knowledge of law in action. He did not incorporate any legal decisions in his theory. His was the scientific study of law, the law of university professors in their ivory towers. Its predominant influence resting on the authority of the system and ordering of concepts, however, was so impressive that as late as 1920 the National-Socialist Party in article 19 of their party manifesto demanded the substitution by truly German law of Roman law because that had too long served the materialistic

world order only. They had failed to notice that Roman law had by then been obsolete in most parts of Germany for quite a few decades.¹³

The Historical School met with fierce criticism, from the inside as well as the outside. To start with the latter, it was the philosopher Georg Wilhelm Friedrich Hegel who led the attack. Hegel had great admiration for the idea of national codification projects. In contrast to the Romanists, he also admired Napoleon whom he had seen riding past after the decisive Battle of Jena in 1806 when Napoleon defeated the Prussian army. To Hegel, the emperor was “the world-spirit on horseback.” Hegel rejected the idea of looking at laws only in their historical context when it comes to understanding their meaning and significance, because to him Roman laws “are positive in so far as their significance and appropriateness are circumstantial and their value is therefore entirely historical; they are accordingly of a transient nature.”¹⁴ In short, it will not do, as Von Savigny and his followers such as Gustav Ritter Von Hugo (1764–1844)¹⁵ suggested, that historical meaning can be transposed to contemporary circumstances. To Hegel, sticking to such historical meaning is a matter of “supplying a good reason for a bad thing.”

Enter Shakespeare, Enter Shylock. I humbly submit that the example Hegel then gives of such a bad thing may have been precisely the trigger for the later criticism by Joseph Kohler of Rudolf von Ihering’s view on The Merchant of Venice laid down in that famous footnote that I turn to below, namely that of the debate between the Roman jurists Caecilius and Favorinus on the Twelve Tables’ Tabula III, i.e. that “abominable law which, after a specified interval had elapsed, gave the creditor the right to kill the debtor or to sell him into slavery, or even, if there were several creditors, to cut pieces off him and so divide him between them that, if anyone had cut off too much or too little, he should incur no consequent legal disadvantage (a clause which would have benefited Shakespeare’s Shylock in The Merchant of Venice and which he would most gratefully have accepted).”¹⁶

¹³ Koschaker, Europa, 246–248 and 299.


¹⁵ Hugo wrote a textbook entitled Lehrbuch de Geschichte des Römischen Rechts (1790), that enjoyed many editions.

¹⁶ Hegel, Philosophy of Right, 32 [italics in the original].
The other great theorist of the jurisprudence of concepts, Rudolf von Ihering (1818–1892) eventually recognised its dangers. Initially he adhered to the Romanist strand of the Historical School and elaborated upon the ratio scripta of Roman Law and the Historical School’s principles in the first three volumes of his Der Geist des Römischen Rechts auf den verschiedenen Stufen seiner Entwicklung (i.e. The Spirit of Roman Law in the various stages of its development, Part I 1852–Part III 1865), with the concept of the legal transaction as one of its most prominent features: it is the intent, the will of the legal actor to reach a desired result that is leading and that the law should then help carry out. Von Ihering endorsed the ideal of the jurisprudence of concepts, i.e. of refinement of concepts to such a degree of conceptual clarity that at the end of the day each and every legal decision could unquestionably and unambiguously be deduced from the system itself.

The turning point for Von Ihering came with the sequel to the third volume of Der Geist des Römischen Rechts in 1865 when he wrote: “Life does not exist in the service of concepts, but concepts are there to serve life. Not what logic demands but what life, social relations, the feeling what law ought to be postulate, be that logically deducible or not.”¹⁷ From then on Von Ihering began to develop a more sociological jurisprudence, more specifically in his 3-volume Der Zweck im Recht (i.e. literally The Purpose of the Law, 1877–1884, although it should be noted that the English translation of 1913 was Law as a Means to an End).¹⁸ The starting point for this legal theory was found in the interests of individual persons in society, the so-called Interessenjurisprudenz that is comparable to the Benthamite sociological idea of law as a means to an end and is echoed in Oliver Wendell Holmes jr.’s “The life of the law has not been logic: it has been experience.”¹⁹ What is more,

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¹⁷ As cited in Riebschläger, Freirechtsbewegung, 29, my translation of “Das Leben ist nicht die Begriffe, sondern die Begriffe sind des Lebens wegen da. Nicht was die Logik, sondern was das Leben, das Verkehr, das Rechtsgefühl postulieren, hat zu geschehen, mag es logisch deduzierbar sein oder nicht.”


Von Ihering’s criticism also culminated in his satire on the heaven of legal concepts in which he exposes concepts as fictions, i.e. constructs, useful though they may be, that exist only because of the order that law imposes. This heaven’s inhabitants, the first being Puchta, but soon followed by Von Savigny who “based a legal institute purely on the sources or the ideas therein without resorting to any real practical meaning,”²⁰ are taken to task for discussing jurisprudential problems without ever asking after their practical significance, one example being Von Savigny’s analysis in Das Recht des Besitzes of the problem whether possession is a question of law or of fact.²¹

In short, Von Ihering’s scholarly development may be viewed as a mirror of nineteenth-century German legal theory, from a jurisprudence of concepts to sociological views on law and, eventually, to the Free Law Movement. The latter, on the one hand, shared the jurisprudence of interests’ rejection of the technicality of the purely conceptual thought, but, on the other hand, took its leave from the sociological starting point to view law as a whole with its concomitant idea that the judge should take into consideration the principles of justice as well as law including the lawgiver’s intention in the sense of the purpose of a specific piece of legislation, in favour of a discretionary, i.e. free form of judicial interpretation. That is exactly what the German debate on Portia’s interpretive position turns on.²²

2 Equitable justice

To reach one’s Zweck in law, one must be prepared to start one’s Kampf ums Recht, one’s struggle to attain one’s ends, as Von Ihering explains in his book on the subject. Der Kampf ums Recht is Von Ihering’s elaboration of a speech delivered before a Vienna audience of jurists-practitioners. Such was its success that within two months after its publication in 1872 a second edition was necessary, a year later a third and 1874 did not only see the fourth edition but also translations in Hungarian, Russian and Dutch. The fifth edition of 1877 was the expression of the Volksgeist, a view Holmes attacked in The Common Law, but that it is uncertain whether Holmes had read Von Savigny when he started developing The Common Law.


²¹ Von Ihering, Heaven, 820.

²² Riebschlager, Freirechtsbewegung, 17 and 48.
translated into English. For this outstanding contribution to legal theory Ihering was also given a decoration, the Cross of the St. Annen Order, by the Russian emperor.²³

As Von Ihering explains, his aim was not to further the scientific study of law but “the cultivation of the state of mind from which the law must ultimately derive its strength, viz.: the courageous and constant exercise of the feeling of right,” an unfortunate translation of the original German term “Rechtsgefühl” which refers to the idea of law and justice rather than to an individual, subjective right.²⁴ This can be inferred from Von Ihering’s definition of the struggle for law as “Der Kampf ums Recht ist eine Pflicht des Berechtigten gegen sich selbst” which is rather roughly translated as “The struggle for his right is a duty of the person whose rights have been violated, to himself,”²⁵ because what Von Ihering means to emphasize, next to any practical result in law because law and rights can only be said to exist when they are “realized” in the world,²⁶ is the ethical thrust: it is our existential duty to seek law and justice.²⁷ The English translation is therefore a bit ambiguous, no doubt given the civil-law setting of the production of Von Ihering’s text as compared to the American translator’s common-law setting.²⁸


²⁴ Von Ihering, Struggle for Law, vii, Kampf ums Recht, 195 “weniger darauf gerichtet, die wissenschaftliche Erkenntnis des Rechts […] zu fördern […] als diejenige Gesinnung[…] die der mutigen und standhaften Behauptung des Rechtsgefühls.”

²⁵ Von Ihering, Kampf ums Recht, 213, Von Ihering, Struggle for Law, 29.

²⁶ Von Ihering, Struggle for Law, 12, Kampf ums Recht, 204, “The idea of law is an eternal Becoming”; cf. Benjamin Cardozo’s “Law never is, but is always about to be” (The Nature of the Judicial Process, New Haven: Yale university Press, 1921), 126.

²⁷ Von Ihering, Struggle for Law, 129–130, “It is […] ethics which has to tell us what is in harmony with, and what contradicts, the idea of law.” Kampf ums Recht, 272, “Die Ethik hat uns Aufschluss darüber zu geben, was dem Wesen des Rechts entspricht oder widerspricht.”

²⁸ Cf. Kampf um’s Recht, the introduction by Ermacora, 46, which references the original speech that contains the wonderfully succinct remark on the duty not to be a coward when it comes to struggling for one’s right: “Das Preisgeben eines verletzten Rechtes ist in meinen Augen ein Act der Feigheit, der, wenn er nicht durch die Einrichtungen des Staates zur Nothwendigkeit gemacht wird, der Person zur Unehre und dem Gemeinwesen zum höchsten Schaden gereicht. Der Kampf für das Recht ist ein Act der ethischen Selbsterhaltung, ist eine Pflicht gegen sich
So what matters, also in Shylock’s case, is that one therefore always has to start the *legis actio* as it is called in Roman law, in order to invoke the law, “das Gesetz anrufen,” for “The law itself is called in question; it is the law itself which is under discussion in a particular case [...] There is question not alone of a personal interest [...] but there is a question of the law itself which has been despised, trampled under foot, and which must be defended, if the law itself is not to become a mockery and a word without meaning. When the legal right of the individual is sacrificed, the law is sacrificed likewise.”

This can also be seen in Shylock’s remark “I stand for judgment” (IV.1.103), immediately after he has said “The pound of flesh which I demand of him Is dearly bought. ‘Tis mine, and I will have it. If you deny me, fie upon your law: there is no force in the decrees of Venice (IV.1.98–101).” It is this passage from the play that Von Ihering first cites, without clear references, however, so that we cannot be absolutely sure whether after this he refers to the “I stand for judgment” or to “I stand here for law” (IV.1.141) or the line “I crave the law” (IV.1.201) that follows Portia’s “quality of mercy” speech, which is what the English translator chooses.

Not that it matters much since all citations qualify when it comes to the use Von Ihering makes of Shylock’s standpoint, namely that

It is hatred and revenge that take Shylock before the court to cut his pound of flesh out of Antonio’s body; but the words which the poet puts into his mouth are as true in it as in any other. It is the language which the wounded feeling of legal right will speak, at all times and in all places; the power, the firmness of the conviction, that law must remain law, the lofty feeling and pathos of a man who is conscious that, in what he claims, there is question not only of his person but of the law. [...] ‘I crave the law’. In these four words, the poet has described the relation of law in the subjective to law in the objective sense of the term and the meaning of the struggle for law, in a manner better than any philosopher of the law could have done it. These four words change Shylock’s claim into a question


of the law of Venice [...] it is the law of Venice itself knocking at the door of Justice; for his rights and the law of Venice are one and the same; they both stand or fall together.\textsuperscript{31}

As a result of Portia's interpretive strategy, not only Shylock but the law itself is broken. So when Shylock “finally succumbs under the weight of the judge’s decision, who wipes out his right by a shocking piece of pleasantry,”\textsuperscript{32} [...] “who can help feeling that in him the law of Venice is humbled; that it is not the Jew, Shylock, who moves painfully away, but the typical figure of the Jew in the middle ages, that pariah of society who cried in vain for justice?”\textsuperscript{33} The tragedy, then, to Von Ihering, is not that Shylock’s rights are denied in “the pathological moment” in which he seeks them,\textsuperscript{34} but that his faith in the law as a firm rock is shaken by the judge who dispels the illusion that he has a right and teaches him that he is only “the despised medieval Jew to whom justice is done by defrauding him.”\textsuperscript{35} Onward now to the famous footnote attached to the passage “a shocking piece of pleasantry” which is a rather weak translation, I suggest, of Von Ihering’s “schnöden Witz,” “schnöde” being a far more negative connotation of disgraceful behaviour with the intent to cause harm. It re-

\textsuperscript{31} Von Ihering, \textit{Struggle for Law}, 80–81. It should be noted that language is one of Von Ihering’s metaphors for law, undoubtedly an influence of the Historical School. Cf. \textit{Kampf um’s Recht}, the introduction by Ermacora, 18, referencing the speaker who thanked Von Ihering after his speech, and specifically noted the Herderian idea that law, like the language of a people develops organically throughout the ages, “wie die Sprache eines Volkes, ein auch sich organischer werdendes, ein organisch gewordenes Produkt der Geschichte sei,” my translation “like the language of a people, an organically developing, and organically created product of history.” Cf. \textit{Kampf ums Recht}, 243, for the same passage in German.

\textsuperscript{32} Von Ihering, \textit{Struggle for Law}, 81; \textit{Kampf ums Recht}, 243, “Und wenn er selber dann zusammenbricht unter der Wucht des Richterspruches, der durch schnöden Witz sein Recht vereitelt.”

\textsuperscript{33} Von Ihering, \textit{Struggle for Law}, 82.

\textsuperscript{34} Cf. \textit{Kampf um’s Recht}, the speech version in the introduction by Ermacora, 41, “pathologischen Momentes.”

\textsuperscript{35} Von Ihering, \textit{Struggle for Law}, 82–83, “His fate is eminently tragic, not because his rights are denied him, but because he, a Jew of the middle ages, has faith in the law – we might say as if he were a Christian – a faith in the law firm as a rock which nothing can shake, and which the judge himself feeds until the catastrophe breaks upon him like a thunder clap, dispels the illusion and teaches him that he is only the despised medieval Jew to whom justice is done by defrauding him”; \textit{Kampf ums Recht}, 244, “Die gewaltige Tragik seines Schicksals beruht nicht darauf, dass ihm das Recht versagt wird, sondern darauf, dass er, ein Jude des Mittelalters, den Glauben an das Recht hat – man möchte sagen, gleich als wäre er ein Christ -, einen felsenfesten Glauben an das Recht, den nichts beeinflussen und den der Richter selber nährt; bis dann wie ein Donnerschlag die Katastrophe über ihn hereinbricht, die ihn aus seinem Wahn reißt und ihn belehrt, dass er nichts ist als der geächtete Jude des Mittelalters, dem man sein Recht gibt, indem man ihn darum betrügt.”
turns as “ein elender Winkelzug, ein kläglicher Rabulistenkniff,” rabula being the Latin for “wrangling advocate, pettifogger.”

The eminently tragic interest which we feel in Shylock, I find to have its basis precisely in the fact that justice is not done to him; for this is the conclusion to which the lawyer must come. The poet is, of course, free to build up his own system of jurisprudence, and we have no reason to regret that Shakespeare has done so here; or rather that he has changed the old fable in nothing. But when the jurist submits the question to a critical examination, he can only say that the bond was in itself null and void because its provisions were contrary to good morals. The judge should, therefore, have refused to enforce its terms on this ground from the first. But as he did not do so, as the “wise Daniel” admitted its validity, it was a wretched subterfuge, a miserable piece of pettifoggery, to deny the man whose right he had already admitted, to cut a pound of flesh from the living body, the right to the shedding of blood which necessarily accompanied it. Just as well might the judge deny to the person whose right to an easement he acknowledged, the right to leave footmarks on the land, because this was not expressly stipulated in the grant. One might almost believe that the tragedy of Shylock was enacted in the earliest days of Rome; for the author of the Twelve Tables held it necessary to remark expressly in relation to the laceration of the debtor (in partes secare) by the creditor, that the size of the piece should be left to his free choice. (Si plus minusve secuerint, sine fraude esto!).

Von Ihering compares Shylock’s broken resistance after Portia’s decision to the figure of Michael Kohlhaas in Heinrich von Kleist’s eponymous novel. Kohlhaas is given a comparable treatment but he stays firm in his insistence on, and devotion to the law. In the end he accepts the consequence of his position with dignity: after his rights are honored he accepts the death penalty for his own violent acts. What matters to me here is that Von Ihering qualifies this decision as “Judicial murder is the deadly sin of the law” and this is, I suggest, also Von Ihering’s verdict of Portia’s act.

How, then, did it come about that Von Ihering was so severely criticized for his footnote? From a point of law it is well-balanced, both as far as the outcome of the case as authored by Shakespeare is concerned, for Von Ihering respects Shakespeare’s authorial liberty and from his approving remark that “we have no reason to regret that Shakespeare has done so here,” i.e. that the outcome in the sense of the denial of the validity of the bond is as such correct, and from

37 Von Ihering, Struggle for Law, 81 note 1; Kampf ums Recht, 244 note.*
38 Von Ihering, Struggle for Law, 86, Kampf ums Recht, 247, “Justizmord ist die wahre Todsünde des Rechts.”
39 Already after Kampf ums Recht was published in the speech version, Von Ihering was criticized, see Cf. Kampf um’s Recht, the introduction by Ermacora, 28.
40 Von Ihering, Struggle for Law, 81 note 1.
a point of view of interpretation, i.e. his remark that if one pays careful attention to the legal aspects, the verdict would have been that the bond was void, is in no way out of the order with his legal theory. Von Ihering’s view that the bond was null and void to start with fits with his jurisprudence of interests that takes into consideration principles of law when ascertaining what the lawgiver intended with a specific piece of legislation as noted above in paragraph 2. That would include, I suggest, equity in its original Aristotelian meaning of equitable justice as found in the *Nicomachean Ethics*, not least because in *Das Zweck im Recht* Von Ihering thinks in terms of mercy as justice in the individual case.\(^{41}\)

In other words, this resembles the Aristotelian argument that “all law is universal but about some things it is not possible to make a universal statement which shall be correct.” Thus, the error that arises from the universality of the law, is an omission to be corrected by saying, “what the legislator himself would have said had he been present, and would have put into his law if he had known,” hence Aristotle’s conclusion that, “this is the nature of the equitable, a correction of law where it is defective owing to its universality.”\(^{42}\) The equitable is therefore just not because it is legally correct; it is just because it is a correction of the justice provided by the system of law itself. It is here that Portia fails as the judge who interprets the lawgiver’s texts: she has the technical acuity to understand that according to Venetian law the bond must be honored if she sticks to the letter of the law, but her solution to save Antonio’s life is lacking in the practical wisdom necessary to apply the equitable correction of the law that the bond’s content is contrary to the principle of good morals under-

\(^{41}\) See also the twentieth-century editor of Von Ihering’s *Der Zweck im Recht*, Arthur Kaufmann’s view that to Von Ihering mercy was the “Selbstkorrektur der Gerechtigkeit” (as noted in *Der Zweck im Recht*, vol.1, 6th and 8th German edition, 1923, 331) in “Recht und Gnade in der Literatur,” in Arthur Kaufmann, *Beiträge zur Juristischen Hermeneutik* (Köl: Carl Heymanns Verlag, 1984), 227–245, 228. But see the different view of Gustav Radbruch, *Rechtsphilosophie* [1950] eds Erik Wolf and Hans-Peter Schneider (Stuttgart: K.F. Köhler Verlag, 1973), Besonderer Teil, par. 24 “Die Gnade,” 275, i.e. “Mercy,” “Die Gnade erschöpft sich also nicht darin, nach Iherings Wort “Sicherheitsventil des Rechtes” zu sein. Sie ist ein Symbol, dass es in der Welt Werte gibt, die aus tieferen Quellen gespeist werden und zu höheren Höhen aufgipfeln, als das Recht.” To Radbruch, mercy is not the safety valve but a symbol of a universal value that is superior to positive law. From a point of view of legal theory, however, Von Ihering’s view and Radbruch’s are not essentially different; they differ in degree rather than kind since both agree on the function of mercy to bring about justice, and both agree that mercy is part and parcel of law as an ordering system, since as “Selbstkorrektur,” it is self-correction of law. Cf. Gustav Radbruch, *Kleines Rechts-Brevier* [1941] (Göttingen: Vandenhoeck & Ruprecht, 1954), nr. 59, referencing the “quality of mercy”-speech.

lying all law, that it is unconscionable. I find support for this view also in Von Ihering’s remarks in the Preface to the 5th edition where he says that those who disagree with him have to answer the question, “What should a man do when his rights are trampled under foot?” and continues by saying that “The person who can give a tenable answer to the question, that is an answer compatible with the existence of law and order and with the dignity of personality has refuted me,”⁴³ the inclusion of the principle of human dignity and legal personhood being indicative of the inclusion of principles in the quidditas or “whatness” of law.⁴⁴ And then he concludes,

One word more, on a point which has been contested even by those with whom I otherwise agree. I refer to my claim that injustice was done to Shylock. I have not contended that the judge should have recognized Shylock’s bond to be valid; but that, once he had recognized its validity he should not, subsequently, have invalidated it by base cunning. The judge had the choice of deciding the bond valid or invalid. He should have declared the latter, but he declared it to be the former. Shakespeare represents the matter as if his decision was the only possible one; no one in Venice doubted the validity of the bond; Antonio's friends, Antonio himself, the court, all were agreed that the bond gave the Jew a legal right. And confiding in his right thus universally acknowledged, Shylock calls for the aid of the court, and the “wise Daniel,” after he had vainly endeavored to induce the revenge-thirsty creditor to surrender his right, recognizes it. And now, after the judge’s decision has been

⁴³ Von Ihering, Struggle for Law, xiii.
⁴⁴ Von Ihering’s views were praised by German legal theorist Georg Jellinek in his 1879 speech “Die Idee des Rechts im Drama in ihrer historischen Entwicklung,” in Georg Jellinek, Ausgewählte Schriften und Reden, Band I, part II, Zur schönen Literatur, essay nr. 9 (Berlin: O. Häring Verlag, 1911), 208–233. Jellinek is Kantian in his own approach: only the rational wills of human beings together can form the law, i.e. laws are the boundaries that human beings impose on themselves, so that law in the objective sense draws the boundaries of human action and law in the subjective sense of the rights of the individual is the legal freedom to act. It is in the tension between the two aspects of law that the struggle for law originates. Significantly, Jellinek uses the term “Kampf ums Recht” when he writes that in ancient Greek drama, Sophocles’ Antigone being the prime example, the struggle is for the legitimacy and ultimate predominance of the legal norms of the case, whereas in modernity, the first writer announcing that era being Shakespeare (220), the struggle focuses on the legitimacy of the legal claim (subjective law) versus the order of the legal system (objective law). Viewed this way, one would have to denote Portia as belonging to the ancient order or cosmos because her solution is to bend the law in the direction of the kind of mercy she imposes by introducing another legal norm, the one that helps destroy Shylock. Jellinek does not specifically address this issue but he explicitly refers to Von Ihering when he writes, “Da wird durch einen rabulistischen Kunstgriff, wie ein bedeutender Jurist der Urteil der Porzia treffend nennt das starre Recht geknickt zugunsten der Forderung der Gnade” (225, note 1), my translation “The strict law is there bent in favour of mercy, through an artificial act of petitifoggery, as one important jurist aptly calls it.” Jellinek sees Shakespeare as one of the first playwrights who no longer portray the legal order as absolute and indisputable, as one who clearly shows that law is the work of men.
given, after all doubt as to the legal right of the Jew has been removed by the judge himself, and not a word can be said against it; after the whole assembly, the doge included, have accommodated themselves to the inevitable decree of the law – now that the victor, entirely sure of his case, intends to do what the judgment of the court authorized him to do, the same judge who had solemnly recognized his rights, renders those rights nugatory by an objection, a stratagem so contemptible, that it is worthy of no serious attention. Is there any flesh without blood? The judge who accorded Shylock the right to cut a pound of flesh out of Antonio’s body accorded him, at the same time, the right to Antonio’s blood, without which flesh cannot be. Both are refused to the Jew. He must take the flesh without the blood, and cut only an exact pound of flesh, no more and no less. Do I say too much when I assert that here the Jew is cheated out of his legal right? True it is done in the interest of humanity, but does chicanery cease to be chicanery because practiced in the name of humanity?45

The latter rhetorical question enraged critics even more and the neo-Hegelians were in the majority to lead the attack.

3 Chicanery in the name of humanity?

3.1 Prioritizing the state

One of them, the sitting judge August Pietscher as early as 1881 devoted a study to Von Ihering’s view on Portia. While granting that law in its actual appearance does not always reflect the underlying idea and ideal of law, the “Rechtsidee,” Pietscher initially praises Von Ihering for having drawn the attention to the urge of the human soul to struggle to get his right in Der Kampf um’s Recht that Pietscher calls “A study equally excellent in content and form.”46 However, Von Ihering’s “appellate review” of the lower-court judge Shakespeare does not meet with Pietscher’s approval.47 Already foreboding Josef Kohler’s attack on Von Ihering, Pietscher claims that while the essence of law is to have universally applicable rules and norms, there may come a moment when the development of societal relations and new demands of human commerce can no longer be subsumed under the existing rules, i.e. when there is an antithesis between law and

45 Von Ihering, Struggle for Law, xiv-xvi.
46 August Pietscher, Jurist und Dichter, Versuch einer Studie über Ihering’s ‘Kampf um’s Recht’ und Shakespeare’s ‘Kaufmann von Venedig’ (Dessau: Emil Barth Verlag, 1881), 5, my translation of “Eine Schrift gleich vortrefflich nach Inhalt wie nach Form.”
47 Pietscher, Jurist und Dichter, 6, “einer oberrichtlichen Revision, die ein für den Dichter nicht eben günstiges Ergebnis liefert,” my translation “a review by a higher judge that does not lead to a favourable result for the poet.”
Unlike Von Ihering whose Historical-School view that law in the objective sense of the legal norm has developed through the ages in a way comparable to law in practice, i.e. in the discursive courtroom situation of the struggle for meaning with a debate on meaning in legal use and a constant tension between *de lege lata* (what the law is) and *de lege ferenda* (what the law should be), Pietscher favours the idea that if the laws of Venice were of such poor quality that they suffered the good merchant Antonio to be destroyed by Shylock, the judge is indeed allowed to use “a chicanery” to respond to such villainy.⁴⁹

In all fairness it should at once be noted that Pietscher has a keen eye for both the Shakespearean text and the demands of trial practice. He draws the attention to the fact that so far legal theorists have not noticed some crucial aspects of Shylock’s character. For example, he refers to Shylock’s remark to Tubal to bespeak him an officer of the court in a fortnight at the end of scene 3.1, “I will have the heart of him if he forfeit, for were he out of Venice I can make what merchandise I will” (3.1.105–107) as the sure indication of Shylock’s motive of commercial competition; he also questions the validity of Shylock’s remark “An oath, an oath, I have an oath in heaven. Shall I lay perjury on my soul?” (4.1.223–224) because it has not been mentioned so far; and as a true legal practitioner he asks why Shylock did not take the precaution of adding a clause to the contract to justify the spilling of blood, for we all know, don’t we that what is not laid down in legal documents does not exist, any lawyer could have told Shylock that.⁵⁰

But “our jurist” Von Ihering, as Pietscher condescendingly calls him, only has the defense for his client Shylock that the bond was *contra bonas mores* to start with and that is an insufficient argument, a *turpis causa* in Portia’s legal theory, one that is bound to make Shylock lose the case.⁵¹ While Pietscher is willing to acknowledge that in interpreting the trial scene we must take for granted that the laws of Shakespeare’s Venice did not contain the rule that there can be no unconscionable contract, he contends that even if any legal system would contain such a rule, and that could only be a highly sophisticated

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⁴⁸ Pietscher, *Jurist und Dichter*, 4, “Widerspruch zwischen Leben und Recht, der Streit des lebendigen Menschen mit der abgezogenen Regel,” my translation “Discrepancy between life and law, the struggle of the living being with the abstract legal rule.”


⁵⁰ Pietscher, *Jurist und Dichter*, 19, “Und was nicht in dem Akten isst, isst nicht in der Welt,” my translation “What is not in the legal documents, does not exist in the world.”

legal system,\textsuperscript{52} this does not guarantee its correct interpretation, for after all much of what we now consider immoral laws were once generally accepted, with the acceptance of slavery until recently in the U.S. as a good example. So Von Ihering’s argument is a failure since poetic justice is the prerogative of the playwright and while Shakespeare’s Portia may not have been able to give good reasons for her decision, she intuitively felt that Shylock should be hoist with his own petard by sticking to the literal words of the bond. In truly neo-Hegelian vein, Pietscher then contends “Here rises the injured majesty of the idea of law, able to mete out punishment, destructive against the one who viciously dares to use the law to bring about injustice. The injured individual disappears behind the [...] state of Venice.”\textsuperscript{53} That is why to Pietscher Portia’s presumably legal ruse, “Tarry, Jew. The law hath yet another hold on you” (4.1.241–242) is totally acceptable, because while the idea of law may well originate from the struggle for law as both Von Ihering and Shakespeare understand so admirably, nevertheless “Law must remain law,”\textsuperscript{54} i.e. positive law prevails because in the Hegelian view it originates from the state and serves to guarantee its existence. Pietscher’s view did not augur well for the reception of Von Ihering’s view but worse was yet to come.

3.2 The judge’s discretionary power: over Shylock’s dead body?

Significantly, Josef Kohler opens his analysis of The Merchant of Venice, the first chapter of Shakespeare vor dem Forum der Jurisprudenz with the name “Ihering.” And while in the Foreword to the first edition he claims that he had long wanted to take up the subject of Shakespeare’s plays in relation to law, it is clear from the start that Von Ihering’s footnote is the trigger to Kohler who calls Ihering’s views as internally contradictory as they are forcefully argued.\textsuperscript{55} Although Kohler

\textsuperscript{52} Pietscher, Jurist und Dichter, 20, “seine Anerkennung im Rechte gehört immer nur den höchsten Kulturstufen,” my translation “its acknowledgement in law always goes together with the highest level of culture.”

\textsuperscript{53} Pietscher, Jurist und Dichter, 24, “Da erhebt sich also die verletzte Majestät der Rechtsidee, selbst strafend, vernichtend gegen den, der sich frech vermass, das Recht zum Unrecht zu ge- brauchen. Der verletzte Privatmann tritt zurück hinter den [...] Staat Venedig.”

\textsuperscript{54} Pietscher, Jurist und Dichter, 23 and 24, “Recht muss doch Recht bleiben.”

\textsuperscript{55} Josef Kohler, Shakespeare vor dem Forum der Jurisprudenz (Würzburg: Verlag der Stahel’schen Universitäts Buch- und Kunsthandlung, 1883), 6 and iii, ‘die ebenso kräftig durchgeführte, als innerlich unrichtige Auffassung Ihering’s.” The copy of Forum 1883 I used for this article is the li-
claims that he aims to distil the legal thoughts from the plays and that he will not look at the law in Shakespeare’s days, but contribute to the universal study of law,\textsuperscript{56} ironically, throughout the book his approach is specifically historical-comparative and geographically situated,\textsuperscript{57} also in its attack on Von Ihering and his footnote on Portia’s pettifoggery that bent the law of Venice. Kohler notes that no performance of the play that he attended was sympathetic to the character of Shylock, and that \textit{although} he is a jurist, he has always watched the scene in which “the wise Daniel” curbed Shylock’s revenge breathlessly.\textsuperscript{58}

To Kohler, the trial scene offers an example of the development of law in all ages, a deeper form of jurisprudence than the one we find in \textit{Pandectist} textbooks or the one offered in all the works of Von Savigny and Von Ihering taken together, an obvious sneer at the Historical School.\textsuperscript{59} After such opening

\textsuperscript{56} Kohler, \textit{Forum} 1883, iii-iv, “Mein Zweck, war es, die innern juristischen Gedanken, welche der grösste Dichter im Gewande der Poesie zum Ausdrucke gebracht hatte, in der Sprache der Jurisprudenz zu entwickeln und in ihrem universalgeschichtlichen Sein und Werden zu beleuchten,” my translation “It has been my purpose to develop in the language of jurisprudence the intrinsically legal thoughts, that the greatest poet has expressed in the garb of poetry, and to throw a light on their universal-historical existence and values.”; Kohler, \textit{Forum} 1883, v, on the aim of the book, “Ich wollte einen Beitrag zur Universalgeschichte des Rechts geben,” my translation “I wanted to contribute to the universal history of law.”


\textsuperscript{58} Kohler, \textit{Forum} 1883, 5, “habe ich, \textit{obgleich} Jurist, immer und immer mit angehaltenem Atem dem weisen Daniel gelauscht […] und der Kläger, der die heilge Stätte des Rechts beschmutzen wollte mit dem Schmutze seiner elenden Seele, der das Recht selbst in die Tiefe gemeiner Rachgier herunterziehen wollte, mit Schimpf und Schande von den Schranken des Gerichtes weggejagt wird.”; my translation “have I, \textit{although} [my italics] I am a jurist, on all occasions while holding my breath listened to the wise Daniel […] and [how] the complainant, who dared stain the holy places of the law with the soil of his wretched soul, who himself wanted to pull down the law in the very depths of his mean revengeful state of mind, is chased away from the courtroom showed with scorn and disgrace.”

\textsuperscript{59} Kohler, \textit{Forum} 1883, 6, “ein typisches Bild der Rechtswentwicklung aller Zeiten […] sie enthält die Quintessenz vom Wesen und Werden des Rechtes in ihrem Schoosse, sie enthält eine tiefere Jurisprudenz, als 10 Pandektenlehrbücher und eröffnet uns einen tiefern Blick in die Geschichte des Rechts, als alle rechtshistorischen Werke von Savigny bis auf Ihering.” Cf. Ziolkowski, \textit{Mirror}, 173, “the trial scene […] is a typical image of the legal development of all times: it contains the quintessence of the nature and progress of law; it contains a more profound jurisprudence than ten vol-
lines, the reader would expect Kohler to delve into the contentious issue without further ado. However, it takes him some seventy odd pages of legal-historical and anthropological descriptions and explanations, with incredibly detailed comparative analyses of the topic of the laceration of a defaulting debtor by his creditor ranging from the law in Padua to that in Avignon and even that in the Dutch town of Zutphen, before he arrives at the point he need to make to save the day for Portia. And that point is that in all legal cultures a development takes place from the literal taking of flesh to what Kohler later on in the book calls “a world-historical necessity” to deny creditors like Shylock their rights. So what matters is to ascertain the level of development in the historical period in which Shakespeare situates his play, as if that would be a simple task to start with. This view is odd to say the least, not least because it presumes a referential view on literature as the mirror of a specific era, one that finds its counterpart in the jurisprudence of concepts’ ideal of the referential power of a language of concepts, i.e. once the system of concepts has reached its zenith, the solution to each and every legal problem will perfectly follow from it. And it is precisely the jurisprudence of concepts that Kohler despises. What is more, in hermeneutics viewed as the science of interpretation, the idea of referentiality was also already in decline, so we may consider this literalness as a sign of Kohler’s positivist world view. It does fit in, however, with John Wigmore’s later idea of reading literature as an historical source for legal professionals.

Kohler emphasizes that this development is a gradual one, because before a legal order starts rejecting a contract of the kind that Shylock has had Antonio sign, i.e. on the ground that such contract needs to be annulled, the legal con-

umes of Pandects and opens up a deeper view into the history of law than all works of legal history from Savigny down to Ihering.”

60 Kohler, Forum 1883, 45, 51.
61 Kohler, Forum 1883, 94, “eine welthistorische Notwendigkeit.”
62 Kohler, Forum 1883, 71, “Wie weit diese Entwicklung in der rechtsgeschichtlichen Periode, in welche der Dichter das Stück verlegt, sich bereits vollendet hat, das ist der juristische Springpunkt in der Beurtheilung des Kaufmann von Venedig,” my translation “To which degree this development has been completed in the period of legal history in which the poet situates the play, is precisely the legal point that stands out in our view on The Merchant of Venice.” Cf. Paul Huvelin, “Le Procès de Shylock dans Le Marchand de Venise de Shakespeare,” Bulletin de la Société des Amis de l’Université de Lyon (1902): 173–198, 182 and 186, for the view that we should doubt that Shakespeare specifically intended the audience to understand that it was sixteenth-century Venetian law that was applicable, especially since Portia applies common law reasoning. Huvelin is one of the few critics of the Von Ihering- Kohler controversy who specifically mentions this common law orientation.
sciousness of its people will have anticipated the necessity to do so. This, I sug-
gest, already forebodes Kohler’s adherence and contribution to the Free Law
Movement, though differently than he himself later claimed when in the Fore-
word to the second edition he wrote, in a rather self-congratulatory vein,

What are my explanations of Portia’s decision other than the dawn of the Free Law Move-
ment, that is brought to light here and in my essay on the interpretation of the laws? That
through daring interpretations a law already obsolete is pushed back and a judicial custom-
ary law is created, as the as yet unconscious judicial feeling of right [...] breaks though [...] and
that, next to the laws, the judge’s [own] view comes to the fore as a factor of developing
the law, these are the principles of my thought, that my work has introduced to jurispru-
dence for more than three decades, principles that today have not merely gained solid
ground, but have become the foundations of the whole of our legal science.⁶⁴

What matters to me here is that Kohler prioritizes the legal consciousness of a
people, a society, as the starting point for a judicial decision. To Kohler, then,
because Shylock is devoid of any ethical feeling and deaf to the plea for
mercy, his insistance on his legal right and subsequent downfall is not tragic.
Shylock himself is a pettifogger, a “rabulististic plaintiff”⁶⁵ and therefore his
downfall is a signal that “the malignant bubonic growth is erased.”⁶⁶ It’s good
riddance to bad rubbish, and we are glad to be rid of one who recklessly dam-
aged our law. In other words, Shylock is the pariah that is excluded because he

⁶⁴ Josef Kohler, Shakespeare vor dem Forum der Jurisprudenz, (Berlin: Rothschild, 1919), 2nd ed-
ition, iii, my translation of “Was sind meine Ausführungen über den Spruch der Porzia anders als
die Morgenröte der Freirechtsbewegung, welche hier und in meinem Aufsatz über die Interpretation
der Gesetze zuerst zu Tage getreten ist? Dass durch gewagte Auslegungen verlates Recht zurückge-
drängt und ein gerichtliches Gewohnheitsrecht geschaffen wird, indem das unbewusste Rechtsge-
fühl des Richters [...] hindurchbricht [...], und dass neben dem Gesetze das richterliche Urteil als
Faktor der Rechtsbildung hervortritt, das sind Grundgedanken, welche mein Werk vor mehr als
drei Jahrzehnte in die Jurisprudenz hineingetragen hat, Grundgedanken die heutzutage nicht
nur festen Fuss gefasst haben, sondern zu den Stützen unserer ganzen Wissenschaft geworden
sind.” See also Kohler, Forum 1919, i, for Kohler’s view that the topic of law in literature was
new when he wrote Forum in 1883, but that now it is good to see jurists paying attention to Goethe
and Ibsen, because literature offers a piece of world history that any jurist would do well to rec-
ognize is its depiction of the progress of law, “Ein Stück Weltgeschichte ist es, was der Dichter bie-
tet, und wehe dem Juristen, der in der Weltgeschichte den Rechtsfortschritt nicht zu erkennen ver-
mag,” my translation “It is a piece of world history that the poet offers and woe to the jurist who
fails to recognize in world history the progress of law.”

⁶⁵ Kohler, Forum 1883, 79, my translation of “rabulistischen Kläger.”

⁶⁶ Kohler, Forum 1883, 76 – 77, my translation of “die wuchernde Pestbeule ausgeätzt ist.” Note
that the German “wucherend” contains the idea of Shylock being a usurer (“Wucherer”) and the
idea that, unless stopped, his point of view will grow rampant.
prioritizes his own legal and financial interest above the morals and values of the community. Immoral use of the law cannot be tolerated. The tragic character of the play is not Shylock but the judge who is the instrument in the hands of this scoundrel and who on the basis of the laws of Venice that she has to apply, does not know how to avoid the undesirable, bad solution that the law suggests.

To Kohler, this does not mean that Von Ihering was right when he wrote that cutting a pound of flesh implies the shedding of blood. On the contrary, this would mean sticking to the letter of the law, and ignoring, “the legal consciousness of the judge, the legal instinct that lives in him, that has not yet developed itself into a complete and clear insight and therefore hides itself behind the mock argument of the wise Daniel.” It is her legal consciousness that makes the judge aware of the fact that now is the time to set aside the old law. Obviously, the lawgiver should be aware of the instincts of the people and preferably change the law accordingly. But since this is not always possible, the judge should act as the intermediary between the lawgiver and the people. She should grasp the straw that she can use to legitimize her decision, i.e. her instinctive legal consciousness as the foundation of her decision, that she then clothes in the legal garb of interpretation, as Portia does. The judge is allowed to do so once the word of the law is too rigid. What Kohler does not tell us, however, is how the judge is at all able to sense that the law is rigid. Criteria for this decision are lacking so that the risk of arbitrary decisions, nourished by sentiments other than those of law’s progress, looms large. What is more, Kohler’s argument contains a shocking, and, I suggest, distinctively discriminatory remark to brush aside any comments that critics might voice. The answer he gives to his own rhetorical question whether or not at the end of the play we should take pity on Shylock whose very existence is threatened, is this: “every great advancement of society lets no one or nothing stand in its way, in the same way each healthy walk causes the death of a great amount of innocent animals.” The metaphor is as anti-semitic as it is false – the purpose of the walker, after all, is not to go out to kill -, with Shylock as an insect to be trampled, which is nothing to be worried


68 Kohler, Forum 1883, 95, my translation of “jeder grosse Fortschritt der Gesellschaft schreitet über Leichen hinweg, ebenso wie jeder heilbringende Spaziergang einer Menge unschuldiger Thiere den Tod bereitet.” Cf. Kohler, Forum 1883, 74, for a disparaging remark on Heinrich Heine’s view that Shylock is the most respectable character of the play, which is odd if you read Heine who, while calling both Portia and Shylock brilliant figures, nevertheless calls Shylock “the terrible, unpitying Jew” (Heine, Maidens and Women, 394).
about, for, as Kohler insists, the devil Shylock, this enemy of law and justice, "has forfeited life." 69

In his Afterword Kohler explicitly points to the two premises of his argument, once more by way of reaction to Von Ihering who in the seventh edition of Der Kampf ums Recht had referred to Kohler’s view on Shylock, but, again, had not understood a thing. The first principle of Kohler’s legal theory indeed heralds in the Free Law Movement: the decisive importance of judicial legal consciousness; the second is the explicit acceptance of (individual) injustice in the course of inevitable progress in and of law. 70 The “Shylock Problem” as Kohler later calls it remains central stage in his thought, and while in his Afterword he emphasizes that Von Ihering incorrectly presumed that he invited him to a debate, 71 his opposition to Von Ihering is what I would call a “pathological moment” in legal theory. Kohler, while admitting that Portia’s legalistic turn is unacceptable from a point of view of the law “as it is,” 72 claims that it is acceptable because Portia understands that the law is about to change, and insists that his historical explanation shows how the judge with her discretionary power has the duty to annihilate “the bearer of the by now defeated level of civilization” that is Shylock. 73 This idea of the necessary annihilation of a “defeated level of civiliza-


71 Kohler, Nachwort, 3.

72 Cf. Theodore Niemeyer who disagrees with the interpretations of Von Ihering, Kohler and Huelin. Niemeyer dismisses Kohler’s view that Portia’s decision was correct: neither the result nor the arguments are sound law. While he agrees with Von Ihering about the pettifoggish character of Portia’s ruse to save Antonio, he does not follow Von Ihering’s argument that the contract was void because contra bonas mores, but calls Shylock’s fate “the tragedy of a man who is made a sacrifice in a typical conflict, a conflict that lies not only in his own person, not only in the dissentent views of his own generation, but also in the discordant nature of all law.” What it means that law’s nature is discordant, Niemeyer does not disclose, and, comparable to Kohler, he loses himself in a description of contemporary German law. Theodore Niemeyer, “The Judgment against Shylock in The Merchant of Venice,” Michigan Law Review, vol.14 nr.1 (1915): 20–36, 36, trans. Wandell Herbruck of Der Rechtsspruch gegen Shylock im ‘Kaufmann von Venedig’: ein Beitrag zur Würdigung Shakespeares (Munich and Leipzig: Duncker & Humbolt, 1912).

73 Josef Kohler, “Das Shylock-Problem,” Der Zeitgeist, Beiblatt zum Berliner Tageblatt, 8 September 1902, nr. 36, 1, mt translation of “[D]er Träger einer überwundenen Kulturstufe.” Again Kohler fulminates against Von Ihering whose interpretation was devoid of any historical insight and who keeps calling the way Shylock is treated as an injustice. To Kohler it is obvious that “whoever resists the Wheel of Progress, will be crushed by it,” my translation of “Wer sich
tion” and the role of the judge in bringing this about (apart from the legal social Darwinism it seems to adhere to) sits uneasily with accepted principles such as the concept of the separation of powers and the idea(l) of fair trial. What is more, it augurs ill for the idea that law should be a bulwark to protect citizens against unjust intrusions by the state in whatever form.

In the second edition of *Shakespeare vor dem Forum der Jurisprudenz* in 1919 Kohler forcefully repeats his view that Shylock’s downfall is anything but tragic. It cannot be tragic for that would mean that we would take his legal argument seriously and interpret it in a positive way as a contribution to legal discourse. This “cannot be; his downfall must itself portray the deliverance from a heavy epidemic that threatened to torture the world.”74 In short, it is “the dreadful struggle of the repressed Jewry, that wants to use the law.”75 And so we must indeed wonder what it means to Kohler that Shylock “stands on the boundary between two worlds,” and that Kohler insists that Shylock knew from the very start that his case and his cause were unjust, that what he did was an intentional abuse of law.76

4 Gute Juristen, böse Christen?

So where’s the rub? What moved Kohler whose long and distinguished career spans decades, whose list of publications is one hundred and fifty pages
gegen das Rad der Entwicklung aufbäumt, wird von ihm zermalmt.” Cf. Josef Kohler, “Phantasie im Recht,” *Westermanns illustrierte deutsche Monatshefte*, Band 97 (1906): 239–242, 242, that throughout the ages poets have given legal issues a literary form, the example Kohler gives is, once more, Shakespeare’s *The Merchant of Venice* with its “subtile Rechtsfrage,” its subtle *questio iuris.*

74 Kohler, *Forum* 1919, 6, “Das darf nicht sein: sein Untergang muss selbst die Erlösung bilden von einer schweren Epidemie, welche die Welt zu bedrängen drohte.” It should be noted that the first and the second edition of Forum are actually two quite different books. The second edition has an enormous excursion on debtor’s law in a comparative context; the second edition lacks the Introduction that the first has; Von Ihering who remains the culprit in the second edition, is nevertheless not mentioned in the name register. In the second edition Kohler also takes Julius Hirschfeld (“Portia’s Judgement”) and Frederick Pollock (“A Note on Shylock v. Antonio,” *The Law Quarterly Review* (1914): 175–177) to task for their views on Portia’s verdict.

75 Kohler, *Forum* 1919, 6, my translation of “der furchtbare Kampf des unterdrückten Judentums, der sich des Rechts bedienen will.”

76 Kohler, *Forum* 1919, 10, my translation of “steht an der Grenzscheide zweier Welten,” and 45, my paraphrase and interpretation of “er war sich eben von jeher in seinem Innern bewusst, das sein Bestreben ein materiell unrechtes war.”
long, who co-founded the *International Association for the Philosophy of Law and Social Philosophy*, to engage in such an extended discussion on a single footnote in an equally distinguished scholar’s work? Why is his interpretation of *The Merchant of Venice* driven by an aversion to the theoretical views of his contemporaries or predecessors? Why the many antagonisms? In line with what Richard Weisberg in his *Poethics* has ingeniously denoted as the ressentiment of the jurist-verbalizer, I suggest that Kohler with his one-sided emphasis on legal history, albeit in a geo-comparative context, favours a literal reading and a scholastic hermeneutics of referentiality that is informed by professional jealousy of Von Ihering combined with a not too subtle form of anti-semitism. Kohler’s interpretation of both Portia’s decision-making-process and his treatment of his colleagues is a good example of Martin Luther’s saying “Gute Juristen, Böse Christen,” good jurists, bad, i.e. malicious Christians.

To start with the first point, throughout his works Kohler contrasts his supposedly superior neo-Hegelian view with Von Ihering’s legal amateurism. That is strange, not only because Von Ihering and Kohler share the view that the study of law should be practical, and they share an aversion to Von Savigny’s emphasis on a jurisprudence of concepts and both emphasize the purpose of the law so that


80 See also Kohler’s reaction against Paul Huvelin’s view, like Pietscher’s, that Shylock should have added a clause on the spilling of blood, Kohler, “Shylock Problem,” 1.

81 That we also see in other authors, cf. O. Hood Phillips, *Shakespeare and the Lawyers*, 93, “Ihering, himself a Jew,” [my italics].

82 Josef Kohler, *Philosophy of Law* [New York: Augustus M. Kelley, 1914] (New Jersey: Rothman, 1969), 11 and 26, “A phenomenal work like Hegel’s *Rechtsphilosophie* was followed by amateurish platitudes like Ihering’s *Zweck im Recht* in which Ihering only stammers a bit about law,” and “Ihering’s whole attempt came to grief on the rocks of a deplorable dilettantism; only an unphilosophical mind like that of Ihering himself could find satisfaction in it.”

83 Gängel and Schaumberg, “Josef Kohler,” 294, note 20, citing Josef Kohler, “Rechtsgeschichte und Culturgechichte,” *Grünhuts Zeitschrift* 12 (1885), 588, “Die Rechtswissenschaft soll praktisch sein, weil das praktische Recht das richtige Recht ist, weil ein Recht, das zu ungesunden praktische Resultaten führt, sich damit von selbst als ein falsches Recht, als ein Himgespenst erweist,” my translation “The science of law should be practical, because practical law is the right [form of] law, because an individual right that leads to unwelcome results proves itself to be incorrect law, a chimera.”
it seems unlikely that Kohler begrudged Von Ihering his “turn” in legal theory, but also in view of the fact that Von Ihering’s scholarship was impressive and his interpretation of Roman law renowned. Calling Von Ihering an amateur is therefore blatantly ridiculous. Yet, while Kohler may have had no reason to complain about scholarly respect during his long career, one thing is obvious, namely that Von Ihering is still a household-name in legal theory, while Kohler is hardly ever mentioned, for, other than Von Ihering, Kohler had no pupils in academia, no successors who helped continue attention to his intellectual legacy.

What is insightful is that Kohler has Nietzsche’s eponymous concept of the *Wille zur Macht* as an epigraph to his textbook on legal philosophy. In his more or less characteristic self-congratulatory way, Kohler compares Nietzsche’s views to his own, “It is striking that Nietzsche is often in agreement here [i.e. in *Wille zur Macht*] with the ideas that I have expressed since my *Shakespeare vor der Forum der Jurisprudenz.*” Kohler’s view on the progress of a world-historical consciousness and the progress of nations and their levels of culture lead him to favouring the Nietzschean idea of the “Übermensch,” a species he already perceived to exist in the cultured nations of the Occident, specifically if we look at his view on the figure and the power of the judge who when she discovers in herself the conviction that the law “as it is” should be discarded in favour of a law fit for that presumed higher level of civilization, should act accordingly.

Kohler contrasts the great cultured nations, Germany being one of the more prominent among them, with “Peoples that must be brought down, so that world

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84 In *Über die Interpretation von Gesetzen*, Grünhuts Zeitschrift 13 (1886): 1–60, Kohler explicitly notes that what matters is not the legislator’s intent, but what the law wants to accomplish as an organical strife after a purpose, and that does not essentially differ from Von Ihering’s concept of the purpose of the law.


culture does not suffer distress in its very essence. After World War I, Kohler is nationalistic and somewhat reactionary in his remark that his second edition of *Shakespeare vor dem Forum der Jurisprudenz* is his contribution in hard times to prove that the Germans “are and will always be the first in science.”

Obviously, the idea of the judge as “Übermensch” is a dangerous concept. The subjective judicial consciousness as the decisive factor in the judicial construction of the applicable norm sits uneasily with the principles of equality before the law and legal certainty. And even though Kohler insisted that the judge’s discretionary power was not absolute in the sense that it could go *contra legem*, the Free Law Movement was increasingly criticized in the first decade of the twentieth century. Kohler’s view on the matter has an uncanny resemblance to what Hermann Kantorowicz wrote in his 1906 work significantly entitled *Kampf um die Rechtswissenschaft*. In it, Kantorowicz argued that ultimately the progress of the law depends on the culture and will of the (individual) judge,

We therefore demand that the judge [...] decide a case as much as a case can be decided according to the clear wording of the code. He may and should abandon this, first, the moment the code appears to him not to offer an undisputed decision; secondly, if it, according to his free and conscientious conviction, is not likely that the state authority in power at the time of the decision would have come to the decision as required by law. In both cases he ought to arrive at the decision that, according to his conviction, the present state power would have arrived at had it the individual case in mind. Should he be unable to produce such conviction, he should then decide according to free law. Finally, in desperately involved or only quantitatively questionable cases such as indemnity for emotional damages, he should – and he must – decide according to free will.

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87 Josef Kohler, “Ein letztes Kapitel zum Recht und Persönlichkeit,” *ARWP* 8 (1915): 170, as cited in Gängel and Schaumberg, 302, n.66, my translation of “Völkern die niedergedrückt werden müssen, damit die Weltkultur nicht wesentlich notleidet.”

88 Kohler, *Forum* 1919, iii, my translation of “dass wir in der Wissenschaft die Ersten sind und die Ersten bleiben werden.”


The German judges did not agree and reacted accordingly. At the second Conference of German Judges in 1911, they restricted the freedom that the Free Law Movement would give to judges. Firstly, they stated that all judicial power is subject to positive law, and that the judge is not allowed to deviate from positive law; secondly, that even when the content of the law is uncertain, the judge is not allowed to decide according to his own feeling, but is to solve any doubt by interpretation of the law according to its intended meaning and purpose, when need be by means of analogy; thirdly that in event that a law can be interpreted in different ways, the judge must give precedence to the interpretation that best fits the general legal consciousness and the demands of society.¹ In the latter, stricter requirement than the Free Law’s unbridled subjectivism, we can see the turn to the sociological view espoused by Von Ihering. So it may well be that Kohler’s diatribe kept feeding on the disappointment that Von Ihering’s view, as had been the case since his turn to the jurisprudence of interests, prevailed. The Free Law Movement subsequently petered out and was discontinued in 1933.² The year is as significant as it is ominous, because by then what the Free Law theorists had propagated was trumped by the very instincts of the people (healthy as these supposedly are) as the new, formal and sole guideline for judicial decisionmaking, “das gesundes Empfinden des Volkes” as the National Socialist creed had it.

There the fuss about the footnote ended. And what a fuss it was if we consider that the Law of the Twelve Tables on the subject of debt enslavement had already been abolished in 326 BCE.³ So this goes to show that uses and abuses

so getroffen haben würde, wie das Gesetz verlangt. In beiden Fällen soll er die Entscheidung treffen, die seiner Überzeugung nach die gegenwärtige Staatsgewalt, falls der einzelne Fall ihr vorgeschwebt hätte, getroffen haben würde. Vermag er sich eine solche Überzeugung nich herzustellen, so soll er nach freiem Recht entscheiden.”


92 Riebschläger, Freirechtsbewegung, 89.

93 Cf. Mary Beard, S.P.Q.R., A History of Ancient Rome [2015] (London: Profile Books, 2016), 14, for the sobering view on the Twelve Tables that “later Romans looked on this motley collection of regulations as the beginning of their distinguished tradition of law,” and 142 for the view that later on, as a result of paraphrasing the earlier texts, “In some cases, even learned Roman lawyers misunderstood what they read in the Twelve Tables. The idea that a defaulting debtor who had several creditors could be put to death and his body divided between them, in appropriately
of literature in the sense of out-of-context appropriations for purposes of the development of (a) legal theory, or for self-aggrandizement should be viewed critically. Sometimes there is already also something outside the text, pace Derrida. The example of the Kohler-Von Ihering controversy should also make us pause and reflect on contemporary interdisciplinary ventures lest we perpetuate ancient or new grudges to the detriment of the future development of *Law and the Humanities* and end up with a reductionist picture of both Shakespeare and the law, and our own field(s) of inquiry.

sized pieces, according to the amount owed, looks like one such misunderstanding (or so many modern critics have hoped),” and 563, the abolition of debt enslavement in 326 BCE.