

OUTLINE OF COMMENT

***Regulation on the road to Damascus:  
how Continental jurists can help American Sauls become  
Pauls***

**Round Table 2  
Improving both consumer protection and credit risk management**

Comment by James R. Maxeiner<sup>1</sup> on  
Dr. iur. Jörg W. Haase, How to revive consumer credit whilst avoiding over-borrowing?  
Alain Gourio, Framing creditworthiness for homebuyers.  
Prof. Achim Albrecht, Lessons to be learnt from the consumer credit crunch.

Les Acteurs Français  
Du Droit à L'International  
The Continental Law Professions  
International Initiative

Continental law  
and the global financial crisis

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*Contributions towards a better regulation*

World Bank  
Washington D.C., U.S.A.  
May 11, 2009

**I. Introduction**

- We have just heard three reports on how European regulation can improve “both consumer protection and credit risk management.”
- Earlier this morning we heard of “Continental law antidotes to the sub-prime mortgage turmoil.”
- This afternoon we continue in a like vein, in
  - “treating distressed business” and in
  - “Regulation revisited”.
- These are all specific solutions to real problems.

**A. Our theme is topical;**

**E.g., yesterday’s New York Times (10 May 2009)**

- Editorial—The **Credit Card Squeeze**
  - “unexpected increases in fees or interest rates that double or triple for no reason”
  - “One major card company began charging a late fee of 3 percent on unpaid balances, which means that on a \$5,000 bal-

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ance, the cost of being just a day or so late jumped from \$39 to \$150.” Late charges in the U.S. challenged as usury, but OK.

- Dr. Haase would ameliorate this problem with disclosure.
- Page 1: For Victims of Recession, **Patchwork State Aid**
  - As millions of people seek government aid, many for the first time, they are finding it dispensed American style: through a jumble of disconnected programs that reach some and reject others, often for reasons of geography or chance rather than differences in need.

## B. Limits on Learning—Good Ideas are Not Enough

- Professor Murray’s presentation a few moments ago reminds us that good ideas alone are not enough.
  - He noted how a true land registry is unquestionably superior to land recording + title insurance, Americans have known that for century, yet there has been no system change.

## C. Culture as Cover

- Societies and legal systems are change resistant.
  - Not infrequently participants resist change asserting that a present-day system is just part of the culture.
    - That does not mean we should accept no change.
      - America’s “peculiar institution,”<sup>2</sup> i.e., slavery, is gone from DC & Virginia.

## D. But the time for change must be right

- Earlier today we were reminded of the remark of President Obama’s Chief of Staff, Emanuel Rahm,
  - “Rule one: Never allow a crisis to go to waste. They are opportunities to do big things.”
- Americans may be ready to learn from foreign experiences.<sup>3</sup>
  - It is no longer a question of whether **should be** regulation, but of making regulation the **best it can be**.
- European jurists—not just Europeans—can play an important role.
  - They know how to make regulation work well.

<sup>2</sup> E.g., KENNETH M. STAMPP, THE PECULIAR INSTITUTION: SLAVERY IN THE ANTE-BELLUM SOUTH (1956).

<sup>3</sup> See James R. Maxeiner, *Learning from Others: Sustaining the Internationalization and Globalization of U.S. Law School Curriculums*, 32 FORDHAM J. INT’L L. 32 (2008) available at SSRN: <http://ssrn.com/abstract=1269598>. Cf., *Why are U.S. Lawyers not Learning from Comparative Law?* (with Ernst C. Stiefel), in Nedim Vogt et al. (eds.), THE INTERNATIONAL PRACTICE OF LAW 213 (1997) available at <http://ssrn.com/abstract=1250002>.

## II. Conversions

### A. Free market economists

- Global economic crisis has American free-market enthusiasts recognize that the free market by itself is not sufficient.
- It needs corrections for failures & tools to prevent failures.
- Alan Greenspan, U.S. Banker No. 1, appropriate to our present venue.<sup>4</sup>

### B. Duh!

- In Germany, already 1930 & 1940s, ORDO-Liberal school.
  - Social Market Economy:
    - E.g., Leonhard Miksch, Walter Eucken, etc.
    - *Wettbewerb als Aufgabe*.
- Reflected in law: my Doktorvater, Wolfgang Fikentscher.
- In United States, Sherman Act of 1890!

### C. Who is next?—the law & economics jurists?

#### 1. Judge Richard Posner's conversion?

- Richard Posner, book appeared **last THURSDAY**
  - *A Failure of Capitalism: The Crisis of '08 and the Descent into Depression*
- The book is already being called a “conversion.”

#### 2. Who is Richard Posner?

- Mr. Law & Economics
- Since the 1970s he has been the leading exponent of the law & economics school
- No. 1 advocate of de-regulation in America
  - He is a judge of the United States Court of Appeals for the 7<sup>th</sup> Circuit in Chicago and Professor at the University of Chicago School of Law
- He, together with colleagues such as Judge Robert Bork, have been enormously influential in the deregulation movement of the 1980s and after, above all in scaling back antitrust law.

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<sup>4</sup> See Alan Greenspan, *We need a better cushion against risk*, FINANCIAL TIMES, March 26, 2009, [http://www.ft.com/cms/s/0/9c158a92-1a3c-11de-9f91-0000779fd2ac.html?nclick\\_check=1](http://www.ft.com/cms/s/0/9c158a92-1a3c-11de-9f91-0000779fd2ac.html?nclick_check=1); see also ALAN GREENSPAN, *THE AGE OF TURBULENCE* (2008); Roderick T. Long, *How Alan Greenspan Learned to Stop Worrying and Love the State*, April 1, 2008, <http://www.lewrockwell.com/long/long19.html>.

### C. How has Judge Posner converted?

- “I am happy to rethink my position about deregulation of banking.”<sup>5</sup>
- “We ... need a more active and intelligent government to keep our model of a capitalist economy from running off the rails.”<sup>6</sup>
- “The government’s regulatory failure was great, but it cannot extenuate the market’s failure. More precisely, it cannot conceal—indeed it highlights—the need for better government regulation to secure the public good of financial stability.”<sup>7</sup>
- “Insofar as the depression can be attributed to mistakes by Greenspan, Bernanke, Summers, Rubin, Paulson, and Cox ..., the mistakes may be due in part to an overinvestment by economist, policymakers, and business leaders in a free-market ideology that opposes aggressive governmental intervention in the operations of the economy.”<sup>8</sup>

### D. Is the conversion complete?

- No. Carefully limits to banking.
- Even then, Robert Kuttner speaks of a “reversal without a recantation.”

## III.

### Why converting the jurists matters

#### A. Jurists put economic theory into practice.

#### B. American law & economics scholars mistook legal system failures for failures of regulation.

- Their theory of deregulation was based on the belief that regulation was not working well and could not work well.
  - They assumed that failures in regulation in the United States necessarily meant that regulation was a mistake.
- What they overlooked was that the problem was not so much that regulation could not work, but that **American** forms of regulation did not work.
  - They were guilty of a common sin in social science:
    - From one example, they generalized to the universal.
- In this, they were wrong.

#### C. Prime example: Robert H. Bork, *The Antitrust Paradox: A Policy at War with Itself* (1978)

- In this book Bork took apart American antitrust law.

<sup>5</sup> Richard A. Posner, *Has Capitalism Failed?*, National Public Radio, ON POINT, May 7, 2009, at 5:45, <http://www.onpointradio.org/2009/05/richard-posner-on-a-failure-of-capitalism>.

<sup>6</sup> RICHARD A. POSNER, *A FAILURE OF CAPITALISM: THE CRISIS OF '08 AND THE DESCENT INTO DEPRESSION* xii (2009).

<sup>7</sup> *Id.* at 248.

<sup>8</sup> *Id.* at 259-260.

- American antitrust law did not work:
  - it took forever to apply,
  - it was hopelessly uncertain, and
  - it reached bad economic results.
- From that he concluded that antitrust law was misguided.
  - He concluded that it needed to be scaled back.
- What Bork did not realize is that Germany, at the same time, in its law against restraints of trade, Gesetz gegen Wettbewerbsbeschränkungen (GWB), implemented largely the same antitrust law as the United States, without encountering comparable criticism.
- The reason:
  - Germany applied “American” antitrust law using German administrative law and methods.
  - And, to give due credit to the hosts of this conference, German administrative law draws heavily on French administrative law.
- American antitrust law was mess, not because its concepts were wrong, but because American legal methods are an archaic hodgepodge of failed procedures.<sup>9</sup>
  - Americans do not write statutes well.
  - They do not grant and control discretion well.
  - They do not coordinate regulators well.
  - They do not apply statutes and regulations well.
- These are not tied to whether we have knowledge well to regulate.

#### **D. Posner and Pragmatism**

It will be interesting to see if Judge Posner changes his view of how judges should judge.

- He has espoused pragmatism.
  - Pragmatism is contrary to “legalism” of the rule of law.
- Posner sought to give American judge-made law form, not through legal devices such as statutes and regulations, but through economic theory.
  - That theory could make up for American deficiencies in making rule as rules.
- Posner’s view last year of complaints of American common law methods was—get over it.

#### **E. Will Posner look abroad?**

- Not likely. He prefers American solutions.
- “the legislative character of much American judging lie so deep in our political and legal systems that no feasible reforms could alter it ....”<sup>10</sup>
- But other Americans may, now that it is clear that we do not have all the answers.

<sup>9</sup> See JAMES MAXEINER, POLICY AND METHODS IN GERMAN AND AMERICAN ANTITRUST LAW (1986).

<sup>10</sup> RICHARD A. POSNER, HOW JUDGES THINK 15 (2008).

## IV. What can the U.S. learn from Europe? What can the EU help the U.S. learn?

### A. Big ideas of course

- We have just discussed consumer credit.
- Right now Americans are thinking about universal health care
  - Europe offers single payer national health service systems & multi-payer mandatory insurance systems.
- Here we discussed registry systems
  - Who needs title insurance when you have a reliable registry *Grundbuch*?
- A colleague who edits the German notaries' journal asked me whether the European notary system would have avoided the real estate financing crisis because then every borrower would have been educated in the commitments being made.

### B. Little implementing ideas with big results

- These are ideas that do not make fundamental changes in how things are done, but can make big results for people
  - Albrecht
  - Gourio
  - Haase
    - Pre-contractual information
    - Post-contract period of reflection

### C. Techniques that enhance legal certainty

- U.S. legal system parallels other legal systems in substance.
  - Differs in implementation.

#### 1. Legal certainty is a fundamental principle of law in Europe

- Recognized by the European Court of Justice and ECHR<sup>11</sup>
  - Trashed by U.S. academics<sup>12</sup>
  - Recognized by EU academics
  - A. von Arnald, *Rechtssicherheit - Perspektivische Annäherung an eine "idee directrice" des Rechts*
- Recognized by EU governments

<sup>11</sup> See James R. Maxeiner, *Legal Certainty and Legal Methods: A European Alternative to American Legal Indeterminacy?*, 15 TULANE J. INT'L & COMP. L. 541-607 (2007) available at SSRN: <http://ssrn.com/abstract=1150522>.

<sup>12</sup> See James R. Maxeiner, *Legal Indeterminacy Made in America: American Legal Methods and the Rule of Law*, 41 VALPARAISO U.L. REV. 517-589 (2006) available at SSRN: <http://ssrn.com/abstract=1150507>

- Mandelkern Group Report on Better Regulation, 2001<sup>13</sup>
- Even where substance of law highly uncertain, good law makes regulation work better
  - Attention to nuts-and-bolts of how law is applied.
  - Apart from content make regulation much easier

## 2. Who decides

- Posner: “We have an incredible multiplicity of financial regulatory institutions. We have fifty state banking commissioners, fifty state insurance commissioners, about two dozen federal agencies which regulate various financial institutions. That is a chaotic situation. We need some simplification of the regulatory structure.”<sup>14</sup>
  - This is widely true across American law—not just state-to-state, state/federal, municipal, which judges, etc.
- This does not necessarily mean centralization.
  - It means clarity who decides and finality, rather than competition in decision.

## 3. What regulators decide; statutes set limits, no surprises

- Europeans write legal norms.
- Sometimes Americans write only vague general authorizations

## 4. What remedies they may direct

- Big difference whether civil or criminal
- Big difference whether backward or forwarding looking
- Traffic tickets or death sentences?

## 5. How they should go about deciding: granting and controlling discretion.

- Three magic words: must (*muß*), should (*soll*), can (*kann*)
- *Begründungspflicht* (written justification)
- *Legalitätsprinzip*
- *Statutory basis*

## V. Conclusion

- What I have been talking about are what jurists call legal methods: how lawyers go about doing things.
  - Ingrained in lawyers from their earliest studies.
  - They use them without thinking about them.
  - It makes it very difficult for them to assess how foreign solutions work.

<sup>13</sup> [http://www.betterregulation.ie/attached\\_files/upload/static/1145.pdf](http://www.betterregulation.ie/attached_files/upload/static/1145.pdf).

<sup>14</sup> To the Point at 9:50.

**This is where there is an opportunity for American and European *jurists* to work together.**

- If Americans and European who are not legally-skilled get together, they may come to agreement on ideas that are politically acceptable in both places, but that practically may not work out.
  - Add jurists to the mix, and there may be improved chances to make the legal side work out.
  - While it is easy to talk generalities, specific programs need specific laws.
  - One cannot just take over what someone else does
  - Methods are too important, too different.
  - On the other hand, our own methods might rule out some choices when other methods could make work.

**Continental law**

- Americans are more likely to find contributions toward better regulation in the law of the European Union than in the law of any one country.
  - [Addendum]: The initiative is to be commended for presenting Continental contributions rather than purely French ones.