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Czernowitz, Lincoln, Jerusalem, and the Comparative History of American Jurisprudence

*Assaf Likhovski**

Recent histories of American jurisprudence tend to ignore the fact that ideas that appeared in the United States often appeared simultaneously in Europe. Even those works that do not ignore the European context are content with tracing the influence or reception of European thought in America. This article suggests that another possible approach is to compare jurisprudential developments in the United States, Europe, and other places in order to reach more general, sociology-of-knowledge-like insights into the reasons why certain ideas appear at certain times and places. One concrete example is discussed: the rise of an interest in the distinction between formal and "living" law (or between "law in the books" and "law in action") in American and European jurisprudence in the first decade of the twentieth century. This distinction was central to the work of Roscoe Pound in the United States and the work of the Austro-Hungarian legal thinker Eugen Ehrlich. Pound and Ehrlich shared similar personal backgrounds. When they began advocating the study of informal law, both Pound and Ehrlich were teaching law in provincial towns (Czernowitz and Lincoln) situated on the frontiers

* Senior lecturer, Tel Aviv University Faculty of Law. I would like to thank Leora Bilsky, Orly Erez-Likhovski, Joshua Getzler, Ron Harris, Laura Kalman, Roy Kreitner, Menny Mautner, Steve Presser, and Leon Sheleff, as well as the participants of the Joint Northwestern-Tel Aviv Law Schools Conference, the Tel Aviv University Law and History Workshop, the Writing Legal History Conference, and the Legal History Colloquium at New York University School of Law, especially Bill Nelson, for their comments on earlier drafts. I would also like to thank Duncan Kennedy for providing me with copies of his unpublished lectures and for discussing his work with me, Amit Yariv for his research assistance, and Gila Haimovich and Dana Rothman for their editorial assistance. Permission to reprint the reproduction of the Gustav Klimt painting *Jurisprudence* was kindly given by the Verlag Galerie Welz. The reproduction appears in Gustav Klimt, Women 11 (1985).

of empires. Both towns were marginal places where different cultures clashed and where the legal culture of the center of the empire had only a tenuous hold. Scholars working in such an environment, it is argued, would tend to be more aware of the gap between formal state law and the actual norms governing the daily lives of people than scholars working at the center of an empire. The article offers additional support for this argument by looking at the scholarship of Guido Tedeschi, an Italian-Israeli legal scholar who taught at the Hebrew University of Jerusalem in the 1940s. The article concludes by calling for the study of the history of American jurisprudence from a comparative perspective, taking into account such issues as the interaction between center and periphery and between empire and provinces in more than one national context.

INTRODUCTION

In 1894, Gustav Klimt, at the time a well-known painter and decorator for the Viennese bourgeoisie, was commissioned to paint part of the ceremonial hall of the University of Vienna. Klimt was to paint three allegorical panels representing philosophy, medicine, and jurisprudence.[1] All three paintings were to have a unifying rationalist theme: the triumph of light over darkness. Klimt won the commission in 1894, but began working on the paintings only in 1898. By that time, Klimt had come to reject the rational-liberal culture that his paintings were supposed to glorify. Instead of illustrating the theme he was commissioned to depict — the triumph of light over darkness — Klimt's paintings conveyed the reverse, pessimistic message. They thus served as the trigger for a famous controversy that divided the Viennese art world at the turn of the twentieth century.[2] *Jurisprudence* was the third of the three paintings (see reproduction below). Klimt began working on it in 1901, and it was exhibited in 1903.[3]

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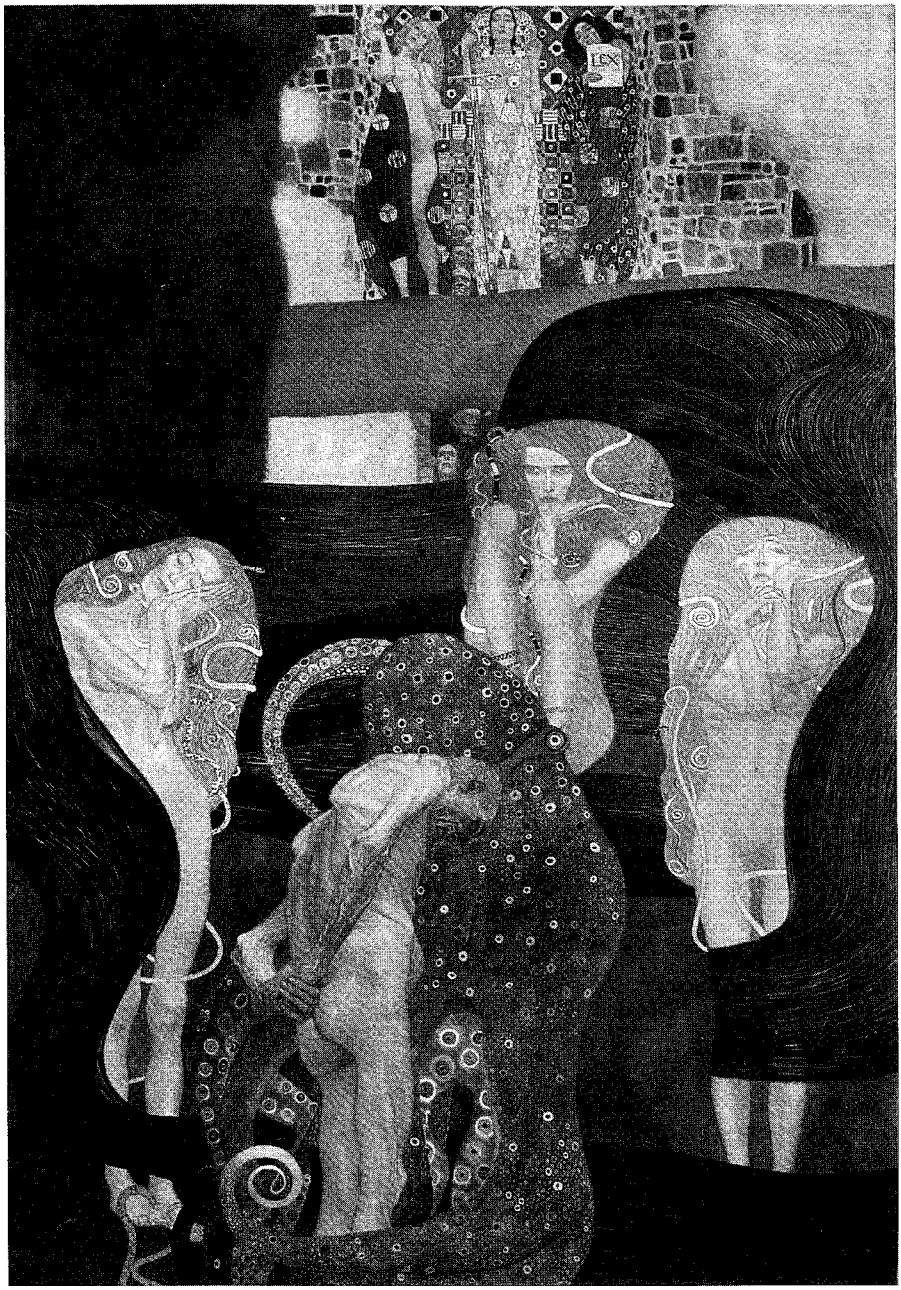
1 The term jurisprudence has a number of meanings. It can designate a given legal system, the academic study of law, or, more specifically, a philosophical inquiry into the nature of law. In this article, I will use the term in the third sense. Similar terms such as "legal theory" or "legal thought" may also be used, but they are less precise because they also refer to ideas produced within specific legal fields.

2 The controversy is described in Carl E. Schorske, Fin de Siècle Vienna: Politics and Culture 208, 226-54 (1992). *See also* William M. Johnston, The Austrian Mind: An Intellectual and Social History 1848-1938, at 143-44 (1972); Gottreid Fliedl, Gustav Klimt: 1862-1918: The World in Female Form 77-88 (1989).

3 *See* Kirk Varnedoe, Vienna 1900: Art, Architecture & Design 152 (1986).



Klimt's painting can be analyzed in a number of ways. Intellectual historians such as Carl Schorske have viewed the painting as an expression of the decline of the optimistic, liberal-bourgeois culture of the mid-nineteenth century and the rise of a pessimistic *fin-de-siècle* culture.[4] Art historians such as Gilles Néret have interpreted the painting as a manifestation of the widespread fear in late nineteenth- and early twentieth-century Austrian culture of the castrating power of women and the threat this power posed to male hegemony.[5] As a legal historian, I am interested in what Klimt's painting can reveal about his conception of the law. The painting is based on a dichotomy. The upper part is the place of static order. In the middle of this part are three allegorical figures: "Truth" (on the left), "Justice" (in the middle), and "Law" (holding a book entitled *Lex* on the right). The central figure, "Justice," is depicted in the traditional manner — holding a sword. This part of the painting also contains the body-less heads of judges and background geometrical, rectangular ornamentation. It represents the realm of rationality, clarity, and clear-cut boundaries. It is also the realm of pretense — depicting a definitive and just law that does not actually exist.[6] The lower part of the painting, "Hell," is devoted to law as it really is, that is, an obscure, chaotic, irrational realm dominated by the three furies, at the center of which we find the passive figure of an aged male prisoner caught in the tentacles of a womb-like octopus.

All the elements of the painting are meant to convey the contrast between its two parts. For example, the background in the upper part is composed of inanimate, orderly, static, rectangular, and "male" ornamentation. The lower part, however, is composed of organic, chaotic, dynamic, circular, and "female" forms such as the sucking cups of the octopus' tentacles. Another example of the contrast between the two parts is found in the way Klimt depicted the hair of the female figures. In the upper part, the hair of the middle female figure ("Justice") is presented in a highly stylized, elaborate, and ancient-eastern way. By contrast, the hair of the furies in the lower part of the painting is unkempt, and the pubic hair of one of the furies is revealed. Snakes, an attribute of the furies, also appear in the hair of the three female figures in the lower part. The snakes are meant to identify the furies, but they may also be symbols of bisexual associations and dissolved boundaries.[7]

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4 Schorske, *supra* note 2.

5 *See* Gilles Néret, Gustav Klimt 1862-1918, at 7, 20-21 (2000).

6 *See* Schorske, *supra* note 2, at 250; Néret, *supra* note 5, at 29.

7 Schorske, *supra* note 2, at 242.

What does the painting tell us about law? In an article about the images of law written in 1987, Judith Resnick, a procedure scholar, referred to this painting in passing, arguing that it is about "the miseries of punishment that flow from judgment."[8] However, the meaning of this painting, as with any work of art, obviously depends on the interpreter. Resnick understood the painting as illustrating the two stages of the criminal legal process (trial and punishment). I would argue that one can also interpret the painting as being about the nature of law — about the gap between the conception of law as a formal, rational, and geometric entity promising clarity and certainty, on the one hand, and the understanding that real-life law is messy, chaotic, and irrational, on the other hand. In short, the painting can also be interpreted as being about what Americans tend to identify as Roscoe Pound's famous 1910 distinction between "law in the books" and "law in action."[9]

The observation that a gap exists between formal, positive law, on the one hand, and "living" law, on the other, was not confined to the realm of art. While the Klimt controversy was raging, one of the leading legal thinkers in the Austro-Hungarian Empire, Eugen Ehrlich, was producing works that reflected the same interest that Klimt (at least according to my interpretation) had shown in undermining the pretense of formal law.[10]

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8 Dennis E. Curtis & Judith Resnik, *Images of Justice*, 96 Yale L.J. 1727, 1752 (1987).

9 Roscoe Pound, *Law in Books and Law in Action*, 44 Am. L. Rev. 12, 17 (1910). This distinction was just one element in a new conception of law that emerged in the last decade of the nineteenth century and first decades of the twentieth century in opposition to what is sometimes called "formalist" or "classical" legal thought. The new conception included rejection of the idea of law as a gapless geometric-like system in which specific rules can be abstractly deduced from general propositions; the notion of the legal order as embedded in society and emanating from "the people" rather than from an all-powerful state headed by a sovereign (anti-positivism); a conviction that because law is a reflection of society, the academic study of law must be informed by the social sciences; an interest in non-state normative systems (legal pluralism); and, finally, an interest in the use of the law to mitigate the flaws of liberal individualism. In this paper, I use the term "anti-formalism" to describe this new set of notions about the law. For a general survey of various variants of these conceptions, see, e.g., Neil Duxbury, Patterns of American Jurisprudence (1995); Marie-Claire Belleau & Duncan Kennedy, *François Gény aux États-Unis, in* François Gény, Mythe et réalités: 1899-1999, at 295 (Claude Thomasset et al. eds., 2000); Duncan Kennedy, Three Legal Globalizations: 1850-1914, 1900-1970, 1945-the present (unpublished manuscript, on file with author).

10 There are other early twentieth-century "Austrian" examples of an artistic interest in exposing the gap between formal and real law, most notably in the work of Franz Kafka. It should also be noted that some elements in Ehrlich's work were based on previous attempts by lawyers to use sociological insights in the study of law. *See, e.g.*, Nicholas S. Timasheff, An Introduction to the Sociology of Law 49-54

In 1903, the year in which Klimt completed *Jurisprudence*, Ehrlich, a professor of Roman Law at the University of Czernowitz in the province of Bukovina, on the eastern frontier of the Austro-Hungarian Empire, published an essay whose main theme was the inadequacy of formal law. The essay aimed to establish a distinction between what Ehrlich called "rules of decision" and what he called "rules of action." By the former, Ehrlich meant formal, "technical," codified state-law, impersonally applied by bureaucrat judges. Such law, Ehrlich stated, promises certainty but, in reality, does not deliver it. In contrast, "free decision" or "lawyers' law" is composed of "living," unwritten, customary rules based on social institutions and social needs and is not produced by the state. These rules are the ones that actually determine most cases.[11] "Law," Ehrlich remarked, "is not a rigid dogma, but a living power."[12] Therefore, he argued, "[I]t is the business of legal science to teach law as it actually works ... the problem is not simply to know what a rule means but how it lives and works."[13] Having made the distinction between dogma and living law, Ehrlich pointed to the gap between the two, stating,

> We lawyers are always inclined to assume that our rule of decision is a faithful expression of how things are actually done — that a rule of law is also a rule of life as it is. In reality life creates primarily its own rules.[14]

Ehrlich's work served as one of the cornerstones of the German Free Law School.[15] It was also one of the sources on which American legal scholar

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(1939); James E. Herget & Stephen Wallace, *The German Free Law Movement as a Source of American Legal Realism*, 73 Va. L. Rev. 399, 401-02 (1987). For a survey of various late nineteenth-century law and society approaches, see Joshua Getzler, *Law, Sociology and Economic History: Rethinking Intellectual Traditions in Late 19th and Early 20th Century Europe*, Current Legal Issues (forthcoming); David M. Rabban, *The Historiography of Late-Nineteenth-Century American Legal History*, 4 Theoretical Inquiries L. 542 (2003).

11 Eugen Ehrlich, Freie rechtsfindung und freie rechtswissenschaft (1903). This essay was translated, with some omissions, as *Judicial Freedom of Decision: Its Principles and Objects, in* Science of Legal Method: Select Essays by Various Authors (IX Modern Legal Philosophy Series) 47, 51-53, 63-71 (1917) [hereinafter Ehrlich, *Judicial Freedom*].

12 Ehrlich, *Judicial Freedom, supra* note 11, at 70, 77.

13 *Id.* at 77-79. On Ehrlich's notion of living law, see also William H. Page, *Professor Ehrlich's Czernowitz Seminar of Living Law, in* Proceedings of the Eleventh Annual Meeting of the Association of American Law Schools 46, 47-54 (1914), *reprinted in* Jerome Hall, Readings in Jurisprudence 825 (1938).

14 Ehrlich, *Judicial Freedom, supra* note 11, at 80.

15 On Ehrlich as one of the founders of the Free Law School and on the book/life dichotomy in Free Law thought, see Albert S. Foulkes, *On the German Free Law*

Roscoe Pound based his thought.[16] Like Ehrlich, Pound, in a series of articles published beginning in 1904, stressed that there was an urgent need to "look more to the working of law than to its abstract content,"[17] to distinguish between "law in the books" and "law in action,"[18] and to pay attention to the "custom of the people."[19]

Pound's work is not an exact copy of Ehrlich's scholarship or of that of other contemporary European legal thinkers. First, Ehrlich's distinction between dogma and living law is based on an optimistic view of the nature of law. Ehrlich did not think that the hollow promise of "technical" law (i.e., formalism) conceals a truth of oppression.[20] Pound (like Klimt) *did* take this view.[21] Second, Ehrlich, who was opposed to the obsession with codification typical of nineteenth-century Continental lawyers, was an advocate of judicial activism.[22] Pound, opposed to the conservative tendencies of the American

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School (Freirechtsschule), 1969 Archiv fur Rechts- und Sozialphilosophie 367, 382, 395; Timasheff, *supra* note 10, at 25-26, 52-53. *See also* Vivian Grosswald Curran, *Rethinking Hermann Kantorowicz: Free Law, American Legal Realism and the Legacy of Anti-Formalism, in* Rethinking the Masters of Comparative Law, 66, 70 (Annelise Riles ed., 2001) [hereinafter Rethinking] (discussing the contribution of Kantorowicz to the foundation of the school).

16 *See, e.g.*, 2 Albert Kocourek, *Libre recherche in America, in* Recueil d'etudes sur les sources du droit en l'honneur de François Gény 459 (1977); Herget & Wallace, *supra* note 10, at 422-26; N.E.H. Hull, Roscoe Pound and Karl Llewellyn: Searching for an American Jurisprudence 2 n.7, 108-12 (1997); Mathias Reimann, *A Career in Itself, in* The Reception of Continental Ideas in the Common Law World 1820-1920, at 165, 197 (Mathias Reimann ed., 1993) [hereinafter Reception of Continental Ideas]; James E. Herget, American Jurisprudence 1870-1970: A History 164-66 (1990) [hereinafter Herget, American Jurisprudence]; James E. Herget, *The Influence of German Thought on American Jurisprudence, 1880-1918, in* Reception of Continental Ideas, *supra*, at 203 [hereinafter Herget, *The Influence of German Thought*]; Edwin W. Patterson, Jurisprudence: Men and Ideas of the Law 509, 511 (1953). *But see* David Wigdor, Roscoe Pound: Philosopher of Law 114ff. (1974) (arguing that Jhering was Pound's main source of influence).

17 Roscoe Pound, *The Scope and Purpose of Sociological Jurisprudence*, 25 Harv. L. Rev. 489 (1912).

18 Pound, *supra* note 9, at 17. Other American scholars sometimes used the term "living law." *See, e.g.*, Louis D. Brandeis, *The Living Law*, 10 Ill. L. Rev. 461 (1916).

19 Roscoe Pound, *The Need of a Sociological Jurisprudence*, 19 Green Bag 607, 615 (1907).

20 Pound, *supra* note 9, at 17.

21 *Id.*

22 On the gap problem and the free law movement, see, e.g., Herget & Wallace, *supra* note 10, at 406-07; Herget, *The Influence of German Thought, supra* note 16, at 216.

Supreme Court at the time, called for giving precedence to legislation over judge-made law.[23] Finally, Pound's jurisprudence was more reform-oriented than was Ehrlich's, whose interest in law was more academic in nature.[24] Still, there are intriguing similarities in Ehrlich's and Pound's thought: both were reacting against the excesses of late-nineteenth century formalist "legal science." Both wanted to expose the gap between formal and real-life "living" law, and both saw law as the product of the people rather than the state. Both were, thus, interested in non-state norms of various sorts.[25]

It is not surprising to find the American distinction between "law in the books" and "law in action" in the earlier works of an Austrian painter and an Austrian scholar. Jurisprudence is not an isolated national enterprise. Contemplating the meaning of Klimt's *Jurisprudence* can make us aware of the porous nature of national boundaries that often unjustifiably frame and confine the history of legal ideas. Thus, I would like to use Klimt's painting in this article as the departure point for a methodological argument about the historiography of American jurisprudence. It is my contention that this historiography suffers from too narrow a focus. I would like to discuss one specific direction of research, which seems to have been neglected in recent histories of American jurisprudence: a comparison of the factors that gave rise to parallel movements and developments in Europe and the United States.

This article is divided into two parts. In the first part, I discuss the insular nature of recent works on the history of American jurisprudence. I mention some of the reasons for the relative lack of interest in comparative work and analyze a number of exceptions, demonstrating why these exceptions do not

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23 *See, e.g.*, Roscoe Pound, *Common Law and Legislation*, 21 Harv. L. Rev. 383 (1908); *but see* Roscoe Pound, *The Decadence of Equity*, 5 Colum. L. Rev. 20, 35 (1905). For the similarity and difference between what Herget calls the "Poundian Paradigm" and the work of the Free Law School, see Herget, *The Influence of German Thought*, *supra* note 16, at 228.

24 *See, e.g.*, Roscoe Pound, *Sociology of Law and Sociological Jurisprudence*, 5 U. Toronto L. Rev. 1, 2-3 (1942); Georges Gurvitch, Sociology of Law 124-30 (1947); Patterson, *supra* note 16, at 509, 511.

25 In his later works, Pound outlined a sociological jurisprudence "program," which included: "the study of the actual social effects of legal institutions"; "sociological study in preparation for lawmaking"; "study of the means of making legal precepts effective in action"; "psychological study of the judicial, administrative, legislative and juristic process"; "sociological legal history"; and "recognition of the importance of individualized application of legal precepts." 1 Roscoe Pound, Jurisprudence 350-58 (1959). *See also* Roscoe Pound, Outlines of Lectures on Jurisprudence 28-39 (5th ed. 1943).

exhaust the potential uses of the comparative method. In the second part of the article, I examine in detail one concrete way in which one's understanding of the history of American jurisprudence could be enriched by expanding the framework of research beyond the borders of the United States. The example used in this discussion is the emergence of anti-formalist notions of law in the first part of the twentieth century. Based on an examination of the biographies of Ehrlich and Pound, as well as that of an Italian-Israeli legal scholar, Guido Tedeschi, I argue that in some (though certainly not all) cases, living in frontier conditions was a factor in the emergence of anti-formalist notions of law.

I. THE INSULAR NATURE OF HISTORIES OF AMERICAN JURISPRUDENCE

In the late nineteenth and early twentieth centuries, many facets of intellectual life in the United States were dominated by European, mainly German, ideas.[26] There can be no doubt that American jurisprudence, like other intellectual pursuits, was influenced by European works. The traces of such influence can be seen in many turn-of-the-century American legal texts. One can find them not only in Roscoe Pound's articles but, also, for example, in Oliver Wendell Holmes' massive reliance on German scholarship.[27] Another example of the close link between American and European jurisprudence is found in the impressive translation project of Continental works on the philosophy of law initiated in 1910 by the American Association of Law Schools Committee on the Study of Jurisprudence and Philosophy of Law.[28]

However, when one examines some of the leading histories of American jurisprudence written in the last two decades, such as Morton Horwitz's *Transformation of American Law 1870-1960* and Neil Duxbury's *Patterns of*

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26 *See, e.g.*, Peter Novick, That Noble Dream: The "Objectivity Question" and the American Historical Profession 21 (1988).

27 *See, e.g.*, 3 Oliver Wendell Holmes, *The Common Law, in* The Collected Works of Justice Holmes 110 (Sheldon M. Novick ed., 1995). *But see* Mathias Reimann, *Holmes's Common Law and German Legal Science, in* The Legacy of Oliver Wendell Holmes, Jr. 72 (Robert W. Gordon ed., 1992) (arguing that Holmes turned to German scholarship not in order to emulate it, but to reject its methodology).

28 This project, the *Modern Legal Philosophy Series*, is briefly discussed in John Henry Schlegel, American Legal Realism and Empirical Social Science 23-24 (1995). *See also* Herget & Wallace, *supra* note 10, at 428; Herget, American Jurisprudence, *supra* note 16, at 171.

American Jurisprudence, one finds that in many of the recent works on the subject, the interaction between American and European jurisprudence in the late nineteenth and early twentieth centuries is ignored or mentioned only in passing.[29] This lack of attention seems to be a reflection of the general lack of interest in comparative law and comparative legal history in the United States in recent decades.[30] Why is it that American legal scholars in general and American legal historians in particular are not interested in comparative insights? There are a number of possible explanations. One is the lack of required linguistic skills.[31] This explanation, however, cannot account for the fact that there is also little comparative work on the similarities and differences between the United States and other English-speaking countries such as Canada, Australia, New Zealand, and South Africa.[32]

Another possible explanation for the dearth of studies is "professionalism," i.e., the feeling that, given the standards of the legal and historical professions today, it is impossible to seriously engage in comparative work because it is impossible to become truly familiar with the law and history of more than one legal system and any comparative work is, therefore, dilettantish.[33] However, such an argument is not convincing either. If the comparative question is

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29 *See, e.g.*, Morton Horwitz, The Transformation of American Law 1870-1960: The Crisis of Legal Orthodoxy (1992); Duxbury, *supra* note 9; Anthony J. Sebok, Legal Positivism in American Jurisprudence (1998). This is also the case in works that are more philosophically oriented, for example, Robert Samuel Summers, Instrumentalism and American Legal Theory (1982), and the more recent Stephen M. Feldman, American Legal Thought from Pre-modernism to Post-modernism: An Intellectual Voyage (2000).

30 *See, e.g.*, Charles Donahue Jr., *Comparative Legal History in North America*, 1997 Tijdschrift voor Rechtsgeschiedenis 65. *See also Comparative Law and Legal History in the United States*, 46 Am. J. Comparative L. 1 (1998). On the present state of comparative law scholarship, see Annelise Riles, *Introduction: The Project of Comparison, in* Rethinking, *supra* note 15.

31 Previous generations of American scholars seem to have been far more interested in European legal culture and better versed in European languages, whether because they were immigrants or because they spent part of their formative years abroad. *See, e.g.*, Oscar Kraines, The World and Ideas of Ernst Freund: The Search for General Principles of Legislation and Administrative Law 2 (1974); William Twining, Karl Llewellyn and the Realist Movement 89-90 (1973).

32 One exception that proves the rule is Law for the Elephant, Law for the Beaver: Essays in the Legal Histories of the North American West (John McLaren et al. eds., 1992) [hereinafter Law for the Elephant]

33 Donahue, *supra* note 30, at 9-17. *See also* Annelise Riles, *Encountering Amateurism: John Henry Wigmore and the Uses of American Formalism, in* Rethinking, *supra* note 15, at 94.

narrowly framed and the comparative method is viewed merely as a source of new questions and insights, it does not seem reasonable to object, even today, to attempts to write comparative legal histories on the ground of lack of professional expertise.[34]

An additional practical argument is that since there are fifty-one legal systems in the United States, comparative efforts have in fact been directed toward comparing the law of the different states. The problem with this argument is that while it is true that there is a difference between the law of the different states, American jurisprudence is a national or, indeed, a transnational enterprise. It can only be studied using a national or transnational perspective.

There are also other, less practical explanations. One of these explanations finds the culprit for the lack of comparative work in the notion of American exceptionalism.[35] Perhaps another reason is the general decline of evolutionary conceptions of social theory to which comparative methodology was wedded.[36]

In fact, it would be incorrect to state that the non-American context is *always* ignored in works dealing with the history of American jurisprudence. In recent years, historians of the United States have begun to venture outside the national framework within which much of American historiography was previously written and have shown a growing interest in the "internationalization" or "globalization" of American history. This has resulted in more attention being paid to issues such as transnational contexts of historical development (for example, the Atlantic world) and to comparative history.[37] The globalization of American history has also led to an interest in the transnational nature of American *legal* history.[38]

The historiography of American jurisprudence has also witnessed the appearance of several different kinds of works that take into account

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34 Donahue, *supra* note 30, at 12.

35 *See, e.g.*, David Sugarman, *Reassessing Hurst: A Transatlantic Perspective*, 18 Law & Hist. Rev. 215, 217-19 (2000) (discussing Hurstian legal history).

36 *See generally* Stefan Collini et al., That Noble Science of Politics: A Study in Nineteenth-Century Intellectual History (1983).

37 *See, e.g.*, Organization of American Historians/New York University Project on Internationalizing the Study of American History, The LaPietra Report *at* www.oah.org; David Thelen, *The Nation and Beyond: Transnational Perspectives on United States History*, 86 J. Am. Hist. 965 (1999); Rethinking American History in a Global Age (Thomas Bender ed., 2002).

38 *See, e.g.*, Mary L. Dudziak, Cold War Civil Rights: Race and the Image of American Democracy (2000); Eileen P. Scully, Bargaining with the State from Afar: American Citizenship in Treaty Port China 1844-1942 (2001).

non-American contexts. Below, I briefly discuss these works and argue that they do not exhaust all possible approaches to the comparative history of American jurisprudence. The existing works are satisfied with tracing the influence of European thought on American thinkers or with adopting one-way models of legal "reception." Another possible approach, I argue, is to ask comparative questions such as what personal, social, economic, or political conditions led to the appearance and adoption of similar ideas in different places.

First, there are some general surveys of Western jurisprudence that recount the history of jurisprudence from a global rather than a national perspective.[39] Such accounts, however, do not examine in any detail the various connections that existed between American and European jurisprudence. Second, some studies seek to uncover the interaction between American and non-American thinkers. Thus, there are studies dealing with the impact of Roman and Continental law on American legal thinkers in the nineteenth century or the interaction between nineteenth-century American and English legal thinkers.[40] There are also studies of American-German and American-French interaction in the nineteenth and early twentieth centuries.[41] Many of the works written in this vein seem, however, merely to tell a rather traditional "influence" story, in which the major question that concerns the historian is which European thinker was cited by which American scholar, without exploring additional questions about the interaction between European and American legal thought.[42]

The influence approach can be seen, for example, in N.E.H. Hull's recent examination of the thought of Roscoe Pound and Karl Llewellyn. Hull notes

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39 *See* J.M. Kelly, A Short History of Western Legal Theory (1996).

40 *See* M.H. Hoeflich, Roman and Civil Law and the Development of Anglo-American Jurisprudence in the Nineteenth Century (1997); Richard A. Cosgrove, Our Lady the Common Law: An Anglo-American Legal Community, 1870-1930 (1987).

41 See works discussed at *infra* text accompanying notes 43-48, as well as Twining, *supra* note 31, at 106-09; Herget, American Jurisprudence, *supra* note 16; Reimann, *supra* note 27; William M. Wiecek, The Lost World of Classical Legal Thought: Law and Ideology in America 1886-1937, at 192 (1998); Belleau & Kennedy, *supra* note 9.

42 For example, *why* was one or another European idea borrowed by one or another American scholar? For a discussion of the influence paradigm, see Donahue, *supra* note 30, at 16. For methodological discussions of the problems of tracing influence in legal literature, see, e.g., Alan Watson, Legal Transplants: An Approach to Comparative Law at 10-15 (1974); Neil Duxbury, Jurists and Judges: An Essay on Influence 5-22 (2001).

that Pound read Ehrlich and took some of his ideas from him.[43] She is, however, interested in this influence only as the backdrop to the story she tells. She does not explore the comparative questions that can arise from examining the interaction between Pound and Ehrlich.[44] A second example is Herget and Wallace's article on the German Free Law Movement[45] and Herget's more recent book on the history of American jurisprudence,[46] both of which tell a story of European jurisprudential transplantation and inspiration. A third example is a collection of essays edited by Mathias Reimann in 1993 entitled *The Reception of Continental Ideas in the Common Law World 1820-1920*.[47] As the title suggests, the goal of most of the articles in this collection is to trace various facets of German influence on American law and jurisprudence in the nineteenth and early twentieth centuries. It is *not* the goal of these articles to seek general comparative insights.[48]

Finally, there are two new projects that have been undertaken recently that examine the history of American jurisprudence from two distinct, comparative vantage points. The first is Neil Duxbury's *Jurists and Judges*.[49] Duxbury's book examines the way academic legal thought influenced judicial decisions in the United States, France, and England. The book is based on a sophisticated notion of influence and on an awareness of the complexity of doing comparative research. However, in this book, Duxbury is interested primarily in a very narrow question, namely, to what extent are contemporary judges influenced by academic legal thought? The book cannot, therefore, be seen as a contribution to a comparative or transnational history of American jurisprudence. The second recent effort is a project sponsored by the European Law Center at Harvard Law School. This project seeks to study the global

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43 *See* Hull, *supra* note 16, at 108-09.

44 Hull uses the notion of bricolage to describe the way Pound constructed his legal philosophy from bits and pieces of ideas taken from other thinkers. *Id.* at 8-12, 90-91. On American scholars as bricoleurs of Continental ideas, see Mathias Reimann, *Introduction*, *in* Reception of Continental Ideas, *supra* note 15, at 17.

45 Herget & Wallace, *supra* note 10.

46 Herget, American Jurisprudence, *supra* note 16, at 8, 164.

47 Reception of Continental Ideas, *supra* note 16.

48 *See, e.g.*, Mathias Reimann, *A Career in Itself: The German Professorate as a Model for American Legal Academia*, *in id.* at 165; Herget, *The Influence of German Thought*, *supra* note 16, at 203, 205. One variation of the influence paradigm is Reimann's *Holmes's Common Law and German Legal Science*, *supra* note 27, in which it is argued that Holmes referred to nineteenth-century German legal science in his book *The Common Law* not as a model to be emulated but as a method similar to Langdellian formalism, which should be rejected.

49 Duxbury, *supra* note 42.

underpinnings of modern legal thought. In 2001-2002, the Center held a series of workshops and a conference on global aspects of nineteenth-century and twentieth-century legal thought.[50] This "global legal thought" project is based on a scheme suggested by Duncan Kennedy, according to which the world has witnessed three waves of legal globalization since about 1850, each characterized by the production of a "legal consciousness" in one or another metropolitan center and its reception in a number of different peripheries. German ideas about law were most influential during the period between 1850-1900; French anti-formalist and social ideas about law were influential during the period 1900-1950; and American ideas from about 1950 to the present.[51] Kennedy has suggested that the history of the "three globalizations" should deal with the "production and reception" of styles of legal thought and should be based on a complex notion of transplantation, in which components of legal thought may be transformed as they migrate from one country to another.[52]

The audacity and brilliance of the three globalizations thesis is captivating. However, this thesis does not fully address major questions such as what exactly caused the process and how it occurred.[53] Kennedy suggests a number of causes for this reception: "direct colonization"; "gun-boat diplomacy"; "imposition by international bodies such as the IMF"; and "cultural prestige."[54]

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50 *See* http://www.law.harvard.edu/programs/ELRC/events/2001-2002/fallworkshop.shtml (briefly describing a December 2001 workshop on "The French Influence in the Globalization of Anti-Formalist Socially-Oriented Legal Thought, 1900-1950"). *See also* http://www.law.harvard.edu/programs/ELRC/events/2001-2002/jan.workshop.shtml (which contains an audio version of Duncan Kennedy's January 2002 lecture outlining his argument about the globalization of legal thought since the middle of the nineteenth century and a discussion of the "first stage" in the process: the spread of "Classical Legal Thought").

51 *See* http://www.law.harvard.edu/programs/ELRC/events/2001-2002/springconference.shtml (describing the agenda of the April 2002 conference on "The Globalization of Modern Legal Thought: Production and Reception, 1850-2000"). A more detailed discussion of these ideas can be found in an earlier unpublished lecture. *See* Kennedy, *supra* note 9.

52 Kennedy argued that such a transformation took place when American classical legal thought adopted the assumptions of nineteenth-century German legal science, which was concerned with private law, but applied them to American public law.

53 This was one of the critiques of Kennedy's thesis voiced by commentators. The comments can be found at http://www.law.harvard.edu/programs/ELRC/events/2001-2002/janworkshop.shtml.

54 Kennedy, *supra* note 9, at 5-7, 22-23. In another article, Kennedy suggests that formalist ("classical") legal thought was globalized by direct imperial export, by "gunboat diplomacy" combined with commercial incentives, and, indirectly, by the adoption of metropolitan notions in peripheries because of the cultural prestige

All these factors seem to be based on a rigid understanding of center-periphery intellectual interaction. In Kennedy's suggested scheme, the world is divided into metropolitan centers that produce ideas (nineteenth-century Germany, late-twentieth-century America). These ideas are then received or "consumed" by legal scholars in the periphery (nineteenth-century United States, late twentieth-century Europe and the Third World). This account assumes that ideas always appear in one place and are then transmitted to another. It ignores the fact that ideas can also appear simultaneously in two or more places, with no process of transmission. It also assumes that countries in the periphery are more or less passive receivers of intellectual innovations that always first appear in a metropolitan "center." However, the relationship between empire and colony, center and periphery, is often one of interaction, mutual influence, or independent parallel development.[55] Ultimately, the framework of Kennedy's narrative is that of conventional national history. While Kennedy is interested in global interaction, the basic unit that he uses to construct his global story is still the nation-state: one national jurisprudence influencing another national jurisprudence.

In the next part of this article, I suggest another possible approach to the comparative history of American legal thought, one that is not present in any of the works discussed above. I suggest that the comparative method can be used to achieve more contextual, synchronic, sociology of knowledge-like generalizations about the history of American legal thought and its causes. Thus, instead of trying to see if American scholar X cited (and therefore was influenced by) European scholar Y and instead of trying to trace the reception or "consumption" of European ideas by American scholars, I ask another kind of question that intellectual historians and sociologists of knowledge ask themselves when they discover similar ideas in different places, namely:

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of metropolitan ideas. Duncan Kennedy, The Disenchantment of Logically Formal Legal Rationality (unpublished manuscript, on file with author).

55 One example of a "reverse influence" is the way the academic study of English literature emerged in nineteenth-century India and was then "exported" back to England. *See* Gauri Viswanathan, Masks of Conquest: Literary Study and British Rule in India (1989). Another example is the emergence of modern economics and other social sciences, which, it has been argued, has a colonial genealogy. *See* Timothy Mitchell, Rule of Experts: Egypt, Techno-Politics, Modernity 6-7 (2002). Kennedy does acknowledge that sometimes the ideas created in peripheries can be imported back to the center, as was the case with nineteenth-century American constitutional law, which was exported after 1945 to places such as Germany. However, his account seems to imply that the process will occur only once the periphery becomes the center of a new empire and the old center becomes, in turn, a periphery.

What personal, political, economic, social, or cultural factors facilitated the appearance and adoption of these ideas?[56] Thus, I suggest that the fact that similar ideas appeared in the United States and the Austro-Hungarian Empire at about the same time can generate such questions as, What are the conditions that enabled the appearance and acceptance of these anti-formalist approaches to law? Having used comparison between the two places to elicit such a question, one can begin to look for general similarities. The list, of course, would be quite long. Both the United States and *fin-de-siècle* Austria were undergoing a process of urbanization at the time; both countries had experienced a political crisis that resulted in the decline of liberal ideology; and both countries were witnessing the rise of moral relativism. All these factors led to the sense, in both places, that existing law was lagging behind social changes.[57] Another set of possible questions would focus on the biographies of specific thinkers. One such question would be, Was there something similar in the biographies of Pound and Ehrlich that facilitated their adoption of anti-formalist notions? This is the question that I will now explore.[58]

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56 A contextualist interest in the personal and social background of creators of ideas has traditionally been a major characteristic of intellectual historians. Following the structuralist and post-structuralist revolutions in intellectual history during the last decades, such questions have become less fashionable. However, they are still valid. On recent trends in intellectual and cultural history generally and in the intellectual and cultural history of law in particular, see Lynn Hunt, *Introduction: History, Culture and Text, in* The New Cultural History (Lynn Hunt ed., 1989); Histories: French Constructions of the Past (Jacques Revel & Lynn Hunt eds., 1995); David Sugarman, *Introduction: Histories of Law and Society, in* Law in History: Histories of Law and Society at xi (David Sugarman ed., 1996); William W. Fisher III, *Texts and Contexts: The Application to American Legal History of the Methodologies of Intellectual History*, 49 Stan. L. Rev. 1065 (1997).

57 *See* Marie-Claire Belleau, *The "Juristes Inquiets": Legal Classicism and Criticism in Early Twentieth-Century France*, 1997 Utah L. Rev. 379, 381 (discussing the political and economic context in which anti-formalism appeared in late nineteenth-century French legal thought).

58 My discussion is based on the traditional assumption that there is a link between the biography of legal thinkers and the texts they produce. For the refusal to accept such a link, see, e.g., Peter Goodrich, *Doctor Duxbury's Cure: or, a Note on Legal Historiography*, 15 Cardozo L. Rev. 1567, 1575 (1994). *See also* Michael Ansaldi, *Gossip and Metaphysics: The Personal Turn in Jurisprudential Writing*, 94 Mich L. Rev. 1517 (1996); Laura Kalman, *Eating Spaghetti with a Spoon*, 49 Stan. L. Rev. 1547 (1997).

II. The Frontier and Early-Twentieth-Century Anti-Formalist Jurisprudence

Roscoe Pound and Eugen Ehrlich shared similar backgrounds. Both were born and taught law in towns situated on the quasi-colonial frontier of an empire. The term "frontier" is, of course, a highly controversial term. In fact, there is a whole set of terms that can describe the environment to which I am referring: frontier, borderland, periphery, province, colony. These terms are synonymous in the sense that they all denote geographical marginality. But each term also bears additional meanings.[59] It is my claim that despite major differences, both late nineteenth-century Nebraska and late nineteenth-century Bukovina were frontier societies. The two main features that characterize many (though not all) frontier societies and are relevant to my argument are, first, the distance from the center of the empire and, second, a culturally diverse population, often living in segregated communities.

The frontier conditions of Nebraska and Bukovina, I argue, led to legal heterogeneity, due to the fact that the homogenizing influence of the center of the respective empires was weak. It seems quite natural, therefore, to submit what may be called a "frontier thesis" of anti-formalist jurisprudence:[60] the argument that sometimes legal scholars who live on the frontier of an empire will be more receptive than their center of empire counterparts to anti-formalist notions of law.[61] In some sense, this is merely another form

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59 *See* S. Ilan Troen, *Frontier Myths and Their Application in America and Israel: A Transnational Perspective*, 86 J. Am. Hist. 1209 (1999).

60 The notion that frontier conditions may have a role in shaping various aspects of society goes back, of course, to Frederick Jackson Turner's 1893 frontier thesis of American history. Frederick Jackson Turner, *The Significance of the Frontier in American History, reprinted in* Frederick Jackson Turner, The Frontier in American History (1920). Turner's notions are no longer in fashion, but there are now some works discussing the history of law in the American West. *See, e.g.*, John Phillip Reid, Law for the Elephant: Property and Social Behavior on the Overland Trail (1980) [hereinafter Reid, Law for the Elephant]; John Phillip Reid, *Some Lessons of Western Legal History*, 1 Western Legal Hist. 3 (1988); John Phillip Reid, *The Layers of Western Legal History, in* Law for the Elephant, *supra* note 32, at 23; John R. Wunder, *What's Old about the New Western History? Part 3: Law*, 10 Western Legal Hist. 85 (1997). Unfortunately, these studies of Western legal history do not deal with the impact of conditions in the American West on legal thought. I am aware of only one attempt to study the effect of conditions in the Midwest on jurisprudential thought, Scott Landers, *Practicing What You Preach Against? Karl Llewellyn, Legal Realism and the Cheyenne Way, in* Law and the Great Plains: Essays in the Legal History of the Heartland 93-134 (John R. Wunder ed., 1996).

61 Perhaps a further elaboration of the thesis would be that anti-formalism should be associated not with scholars who lived in frontier environments, but with scholars

of the argument that innovation often emerges in the provinces and not the metropolis.[62]

In his 1995 book *American Legal Realism and Empirical Social Science*, John Henry Schlegel discusses the academic careers of some of the American legal scholars who were involved in empirical legal research in the 1920s and 1930s. Schlegel implicitly links the fact of being a young teacher in universities in "the West" with challenging "the received wisdom of the elders."[63] Further on in the book, he discusses the way Langdellian legal education spread from Harvard to the rest of the United States and the appearance of a career pattern that he calls "service in the provinces" or "advancement through colonial service." According to Schlegel, promising young law teachers were sent to provincial law schools in the Midwest and were then expected to work their way back to the established law schools of the East.[64] However, since Schlegel's aim in writing his book was to trace the

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like Ehrlich and Pound who were nomads along a periphery-center axis. They grew up in a periphery, studied law in the center, and then returned to teach law in the periphery. Thus, they became more critical of existing legal conventions and more aware than other scholars living in the center, or in the peripheries, of the existence of alternative conceptions of what "law" really is. The impact of marginality (usually of an ethnic or cultural kind) on intellectual innovation has long intrigued intellectual historians and sociologists. *See, e.g.*, Thorstein Veblen, *The Intellectual Pre-Eminence of Jews in Modern Europe*, 34 Pol. Sci. Q. 33, 38-40 (1919); Everett V. Stonequist, The Marginal Man: A Study in Personality and Cultural Conflict (1937); Steven Beller, *The Role of Jews in Viennese Culture and Society at the Turn of the Century, in* Decadence and Innovation: Austro-Hungarian Life and Art at the Turn of the Century 14 (Robert B. Pynsent ed., 1989); Péter Hanák, *Social Marginality and Cultural Creativity in Vienna and Budapest (1890-1914), in* The Garden and the Workshop: Essays on the Cultural History of Vienna and Budapest 160-61, 171, 174-77 (1998) [hereinafter The Garden and the Workshop].

62 For example, the use of nineteenth-century India as "a vast canvas upon which to illustrate" and put into practice Benthamite legal ideas. *See* Kartik Kalyan Raman, *Utilitarianism and the Criminal Law in Colonial India: A Study of the Practical Limits of Utilitarian Jurisprudence*, 28 Mod. Asian Stud. 739, 740, 759 (1994). *See also* Pierre Bourdieu, Homo Academicus (Peter Collier trans., 1988). One also could argue that in such conditions, there is a stronger tendency, at least among the representatives of the empire's center, to adopt formalist notions of law. For a concrete example of these two opposite but (in a sense) parallel tendencies, see Assaf Likhovski, *Colonialism, Nationalism and Legal Education: The Case of Mandatory Palestine, in* The History of Law in a Multicultural Society: Israel 1917-1967, at 75-93 (2002).

63 Schlegel, *supra* note 28, at 12.

64 *Id.* at 26-27. In other places, he refers to law professors in the Midwest as "colonial officers." *Id.* at 50. For an earlier and somewhat more detailed example of the use of this metaphor, see John Henry Schlegel, *American Legal Realism and Empirical*

history of a certain strand of legal realist thought, he does not examine this idea in detail. For him, the notion of "colonial service" is just a metaphor to describe the career patterns of some of the Realists. But I propose turning the metaphor into a research question and inquiring as to whether the West (or the East in Ehrlich's case) had an impact on ideas, and not just whether it was a geographic milestone in the academic careers of certain legal scholars. In order to do so, I will explore the shared elements in the backgrounds of Ehrlich and Pound.

Ehrlich was born to a Jewish family in Czernowitz in 1862. He was educated in Czernowitz and later studied law in Vienna, where he obtained his doctorate in law in 1886. He worked and taught in Vienna until 1897 and then returned to Czernowitz. Between 1897 and 1918, he was a professor of Roman law at the University of Czernowitz.[65]

The city of Czernowitz was the capital of Bukovina, one of the eastern border provinces of the Austro-Hungarian Empire. Bukovina was situated between Russia, Romania, Hungary, and Galicia. In the Middle Ages, Bukovina formed part of the Romanian Principality of Moldavia; it later became a Turkish protectorate; and in 1775-1776, it was annexed by Austria. Early twentieth-century Bukovina was a place "inhabited by a strange mixture of races." In 1910, there were approximately 800,000 people living in the province, with 38% Ruthenian (i.e., Ukrainian, 34% Romanian, and 21% German-speaking (two-thirds of the German-speakers were Jews). In addition, the province was populated by Armenians, Gypsies, Hungarians, Poles, Russians, and Slovaks. It was one of the most backward provinces of the Empire. It had the second-lowest percentage of literacy (25% of men and 17% of women). There were very few roads, only "primitive" agriculture, and no export industry of any significance. Czernowitz had a population of 87,000 people. Half the population spoke German and one third was Jewish. In contrast to the general backward nature of the rest of Bukovina, Czernowitz was a "well-built and attractive modern town ... [with] many

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Social Science: The Singular Case of Underhill Moore, 29 Buff. L. Rev. 195, 221-28 (1980). *See also Introduction, in* Voltaire and the Cowboy: The Letters of Thurman Arnold 7-29 (Gene M. Gressley ed., 1977) [hereinafter Voltaire and the Cowboy] (discussing Thurman Arnold, a native of Laramie, Wyoming, and later Dean of the University of West Virginia College of Law and a Yale Law School professor, whose career in some senses resembled that of Pound).

65 *See* Walter L. Moll, *Translator's Preface, in* Eugen Ehrlich, Fundamental Principles of the Sociology of Law at viii (1936); Roscoe Pound, *An Appreciation of Eugen Ehrlich*, 36 Harv. L. Rev. 129 (1922); Johnston, *supra* note 2; Nicholas S. Timasheff, *Eugen Ehrlich, in* International Encyclopedia of the Social Sciences 540 (1968).

elaborate public buildings in the highly decorated modern Viennese style, and [a] prevailing high level of civilization ... [that was] in striking contrast to the primitive and even squalid character of the life in the surrounding country."[66]

The economic and cultural status of Bukovina in relation to the center of the Austro-Hungarian Empire can be described as one of "internal colonialism."[67] The Austrians ruled the province in a manner similar to that of European colonial rulers in Asia and Africa and viewed their mission in Bukovina as a civilizing mission just as the English and the French did in their colonial territories. Thus, the Bukovina-born German writer Gregor Von Rezzori described the province as a "colonial territory on the European continent [that] had sprung up out of windblown cultural sand," and he noted that his German-speaking family regarded itself as "colonial settlers of the old Empire." Von Rezzori's father, who came to Bukovina from the Austrian town of Graz, was convinced that he was

> protect[ing] Europe against the wild hordes who kept breaking in from the East. "Civilization fertilizer" was his bitterly mocking term for the function he ascribed to himself and his kind: they were supposed to settle in the borderland, form a bulwark of Western civilization and show a bold front to Eastern chaos.[68]

The Austrians, like many colonial rulers, not only settled the province, but were also eager to create a class of Germanized "native" middlemen, who would be loyal to the culture and, therefore, to the rule of the Empire.[69] One of the major tools for Germanizing the province was the University of

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66 The description is based on H.M. Stationery Office, Great Britain, Bukovina: Handbook Prepared under the Direction of the Historical Section of the Foreign Office No. 5 (1920). *See also* Eugen Ehrlich, Das Lebende Recht der Völker der Bukowina 3 (1913); In der Sprache der Mörder: Eine Literatur aus Czernowitz, Bukovina 46-53 (Ernest Wichner & Herbert Wiesner eds., 1993) [hereinafter In der Sprache der Mörder]. The legal diversity of early twentieth-century Bukovina has fascinated late twentieth-century legal scholars. *See, e.g.*, Gunther Teubner, *"Global Bukowina": Legal Pluralism in the World Society, in* Global Law without a State at xiii (Gunther Teubner ed., 1997).

67 *See* Albert Lichtblau & Michael John, *Jewries in Galicia and Bukovina, in Lemberg and Czernowitz: Two Divergent Examples of Jewish Communities in the Far East of the Austro-Hungarian Monarchy, in* Jewries at the Frontier: Accommodation, Identity, Conflict 29-30 (Sander L. Gilman & Milton Shain eds., 1999).

68 Gregor von Rezzori, Memoirs of an Anti-Semite: A Novel in Five Stories 6, 17, 194 (1981).

69 For similar attempts elsewhere, see Viswanathan, *supra* note 55.

Czernowitz, established in 1875.[70] One of the major carriers of German culture was the local Jewish population. Jews were, as was the case in other places and times, intermediaries between the colonial rulers and the native subjects, the enthusiastic torch-bearers of "German culture in the Slavic wilderness."[71] An indicator of the social position of Jews and of their alliance to German culture can be seen in statistics on education. In 1905, Jewish students comprised 78% of the student body of the German State High School in Czernowitz, and in 1902-1903, the year in which Ehrlich published his article on free law, 52.4% of the students at the Faculty of Law of the University of Czernowitz were Jews, whereas the proportion of Jews in all Austrian law schools was only 18% at the same time.[72]

This was the social setting in which Ehrlich taught: a new German university that aimed at bringing the culture of the Empire to one of its most backward provinces, a university populated mainly by Jewish students eager to adopt the hegemonic culture of the Empire, built in a quasi-colonial town whose demographic composition and way of life were distinct from the surrounding countryside. Only with this background in mind can we begin to understand what it was like to theorize about law in such a setting, and indeed, it seems that the environment in which Ehrlich lived and worked had an impact on his jurisprudential thought.

Ehrlich became interested in non-formal law while he was still a law student in Vienna.[73] But the fact that he was born and spent much of his life in

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70 *See Vorwort, in* Die K.K. Franz-Josephs-universität in Czernowitz im ersten vierteljahrhundert ihres bestandes (1900). For a brief institutional history of the university, see Gerald Stourzh, *Die Franz-Josephs-Universität in Czernowitz, 1875-1918, in* Wegenetz europäischen Geistes: Wissenschaftszentren und geistige Wechselbeziehungen zwischen Mittel- und Südosteuropa vom Ende des 18. Jahrhunderts bis zum Ersten Weltkreig 54 (Richard Georg Plaschka & Karlheiz Mack eds., 1983). *See also* In der Sprache der Mörder, *supra* note 66, at 51.

71 David Sha'ari, *The Jewish Community of Czernowitz under Habsburg and Romanian Rule, Part One: Habsburg Rule*, 6(22) Shvut: Stud. Russian & East European Jewish Hist. & Culture 150, 152 (1997).

72 *See* Lichtblau & John, *supra* note 67, at 46-47; Sha'ari, *supra* note 71, at 163. Jewish dominance was less pronounced among the faculty. Out of the 127 professors who taught at the University between 1875 and 1918, only twelve were Jews. Out of the forty-four rectors of the University between 1875 and 1919, only nine were Jews. *See* Strouzh, *supra* note 70, at 55; In der Sprache der Mörder, *supra* note 66, at 51.

73 Ehrlich's first book, on wills, published in 1893, already showed an awareness of the difference between the law of wills as it appears in decisions of German, Austrian, and French courts and the way wills are actually created and used. However, Ehrlich himself noted that the use of the sociological method in this work was still

Bukovina was certainly a major factor in shaping his jurisprudential thought. While he was teaching law in Czernowitz, Ehrlich established the Institute for Research on Legal Data, which gathered information on the customs of the people of Bukovina based on a method of ethnographic data collection among peasants similar to that developed by German ethnologists for collecting legal data in European colonies in Africa and Oceania.[74] He collected data on such questions as:

> [W]hat does the man think his rights are with reference to his wife? Does he forbid her to leave the home? To visit the tavern? To associate with her women friends or with her male acquaintances? Does he impose tasks upon her? Does she obey his commands? Does he open her letters? Does he ever punish her? How? ... How is a contract of lease entered into?... [W]hen does the contract begin? How long does it last? Can [the peasant] drive cattle on the pasture land if he has mowed the meadow and harvested the crop?[75]

Thus, one may conclude that Ehrlich's legal notions and research interests were intimately tied to the unique legal environment of Bukovina.

Like Ehrlich's Czernowitz, the town in which Roscoe Pound was born and first taught law, Lincoln, Nebraska, was a frontier town. Pound was born in 1870. At that time, Lincoln (previously called Lancaster) was only three years old.[76] During Pound's childhood, Lincoln experienced rapid growth. In 1867, when his father arrived from the East, the town had only about thirty inhabitants. However, by 1880, it had 13,000 residents and, by 1890, 55,000.[77] Like Czernowitz, the population of Lincoln was heterogeneous. The majority of its inhabitants in the early twentieth century were, like the Pounds, of old

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"unconscious." Ehrlich, *supra* note 65, at 494. *See also* Herget, *The Influence of German Thought, supra* note 16, at 217; Patterson, *supra* note 16, at 79.

74 *See generally* Rüdiger Schott, *Main Trends in German Ethnological Jurisprudence and Legal Ethnology, in* 1 Folk Law: Essays in the Theory and Practice of Lex Non Scripta 201, 208-10 (Alison Dundes Renteln & Alan Dundes eds., 1994) (discussing the questionnaire method of legal data collection developed by Albert Hermann Post and Joseph Kohler).

75 *See* Ehrlich, *supra* note 66, at 10ff. *See also* Page, *supra* note 13, at 63-66; Johnston, *supra* note 2, at 90, 91.

76 The town was formally established in 1859, but the first cabins were erected only in 1863. The city became the capital of Nebraska and was renamed Lincoln only in 1867. *See* Federal Writers' Project Works Progress Admin., Lincoln City Guide 8-11 (1937) [hereinafter Lincoln City Guide].

77 *See id.* at 11. *See also* Paul Sayre, The Life of Roscoe Pound 27-32 (1948); Wigdor, *supra* note 16, at 3-4.

American stock,[78] but there were also many Germans, Russians, Swedes, and Danes. As was the case with Czernowitz, the surrounding countryside was even more "foreign." According to historian James Olson, the population of Nebraska in the 1870s, during Pound's early childhood, was a "polyglot population, frequently set off in communities dominated by one particular national group. Many of these groups had little contact with other sections of the state, continuing to maintain Old World customs and traditions."[79] In 1910, 45% of the population of Nebraska were foreign-born or had foreign parents. These settlers had come from Germany, Sweden, Ireland, Denmark, Russia, Norway, France, Bohemia, and even Bukovina.[80]

Novelist Willa Cather, writing about Nebraska in the 1920s, remarked that "colonies of European people, Slavonic, Germanic, Scandinavian, Latin, spread across our bronze prairies like the daubs of color on a painter's palette" and recalled how, when she was growing up,

> on Sunday, we could drive to a Norwegian church and listen to a sermon in that language, or to a Danish or a Swedish church. We could go to the French Catholic settlement in the next county and hear a sermon in French, or into the Bohemian township and hear one in Czech, or we could go to the church with the German Lutherans.[81]

A less eloquent but more rigorous demographic and cultural study of settlement patterns in adjacent Kansas in the late nineteenth century confirms these observations.[82] Many of the immigrants continued to speak, teach, and worship in languages other than English.[83] The amalgam of nationalities (and the fact that many of the settlers came from the Austro-Hungarian Empire) meant that the customs of the immigrants would have been familiar to Ehrlich had he visited Pound's birthplace.

Of course, there also were major differences between Bukovina and

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78 Lincoln City Guide, *supra* note 76, at 17.

79 James C. Olson, History of Nebraska 180 (1955).

80 *See* Dept. Commerce & Labor, Census Bureau, Thirteenth Census of the United States Taken in the Year 1910: Statistics for Nebraska 600, 624 (1913); Willa Sibert Cather, *Nebraska: The End of the First Cycle, in* These United States: A Symposium 141, 148 (Ernest Gruening ed., 1924) (data and discussion of the Nebraska demography); Paul Polansky Schneller, *Migration of Bukovina Germans to North America*, 11 J. Am. Hist. Soc'y Germans from Russia 27, 27-28 (1988); Wigdor, *supra* note 16, at 14.

81 Cather, *supra* note 80, at 146, 147.

82 *See* D. Aidan McQuillan, Prevailing Over Time: Ethnic Adjustment on the Kansas Prairies, 1875-1925 (1990).

83 *See, e.g., id.* at 2.

Nebraska. First, Nebraska was a more dynamic place than Bukovina, growing demographically at a tremendous pace. Second, Nebraska was a less peaceful place than Bukovina. Up until the First World War, Bukovina frequently was compared to peaceful Switzerland.[84] In contrast, residents of Nebraska lived in constant fear of the surrounding Indian tribes. As late as 1891, when Pound was already a practicing lawyer in Lincoln, there were still Indian uprisings in the vicinity of the town.[85] Finally, due to the federal structure of the American Empire, Nebraskans enjoyed more political and legal autonomy than that granted to the inhabitants of Bukovina by the Austro-Hungarian government.

One might argue that an additional difference between Bukovina and Nebraska is the fact that European settlers in Nebraska faced far more pressure to shed their cultural and legal traditions than did the peasants of Bukovina. A similar argument was made in 1914 by Wisconsin law professor William Page, who noted, when discussing the applicability of Ehrlich's work to American scholars, that "migration to American shattered ... local customs" and that

> foreign immigrants bring with them few legal ideas. Even when they settle in masses, so as to give a distinctly alien tone to certain communities, they seem to forget their European ideals, legal or otherwise, more readily than they acquire ours. If we except isolated communities which were founded deliberately and systematically, generally for religious motives, we would probably be safe in saying that in the greater part of America, we would find none of the remnants of the old, dying law underlying our modern law, which Professor Ehrlich has discovered in Bukovina.[86]

Page's observations are certainly applicable to the many immigrants who settled in the great urban centers of the United States such as Boston and New York. These immigrants, even those who had settled in segregated neighborhoods, lived in close proximity to other Americans, and this geographical proximity tended to induce early mixing and assimilation. However, Page's argument may be less applicable to European settlements in the Midwest in the late nineteenth century. Demographic historians who have studied such communities have noted that the rural setting and geographical

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84 Sha'ari, *supra* note 71, at 153.

85 Sayre, *supra* note 77, at 28, 42-43.

86 Page, *supra* note 13, at 832-33. On Page and Ehrlich, see Stewart Macaulay, *In Memoriam: Willard's Law School*, 1997 Wis. L. Rev. 1163, 1164.

distance that separated those ethnically segregated communities from each other made the preservation of Old World traditions easier and retarded the process of assimilation.[87]

So while there were certainly differences between late nineteenth-century Bukovina and Nebraska, it seems safe to conclude that the two places also shared some significant similarities. Both places were frontier societies. Both were demographically heterogeneous and culturally diverse. In both places, there were ethnically and culturally distinct rural communities. In both places, there were quasi-colonial towns that linked the rural countryside to the distant centers of the Empire, and in both places, these towns (Lincoln and Czernowitz) were considered "the last official center of civilization ... going west [or east, in the case of Czernowitz]."[88]

How these factors all affected the "living" law of Nebraska is hard to tell. The study of the history of the law of Nebraska and other Great Plains states is still in its infancy.[89] There is yet to be developed any systematic body of scholarship that can give us a clear indication of the impact of frontier conditions and ethnic diversity on the law that Pound encountered as a young lawyer, judge, and law professor in Lincoln. However, as I show in the following paragraphs, the frontier and its "living" law were a major concern of Pound's, just as it was for Ehrlich.

Pound's early education was conducted both at home and in a German-language Sunday school.[90] In 1884, at the age of fourteen, he began studying at the University of Nebraska, established in 1869 (five years before the

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87 This point is made in McQuillan, *supra* note 82, at 14, 93, 108-20. It is, of course, also important to distinguish between first-generation settlers, who tended to retain Old-World ways, and second-generation settlers, who were more keen to assimilate. An anecdotal indication is found in Paul Polansky Schneller's account of Bukovinian settlement in the Midwest. Schneller tells how his Bukovinian-settler grandparents stopped speaking German during the First World War and how this made his young mother happy because

> she wanted to be an American ... she was embarrassed that her parents came from the "old country" and that they spoke American [sic] with a funny accent. Her brother Fred went to the University of Iowa ... but wouldn't let his parents attend the graduation ceremony because he was ashamed of them, of their poor appearance, and un-American accent.

Polansky Schneller, *supra* note 80, at 31-32.

88 Polansky Schneller, *supra* note 80, at 43.

89 *See generally* Kermit L. Hall, *The Legal Culture of the Great Plains, in* Law and the Great Plains: Essays in the Legal History of the Heartland 9 (John R. Wunder ed., 1996).

90 Hull, *supra* note 16, at 38, 116; Sayre, *supra* note 77, at 36.

establishment of the University of Czernowitz).[91] After spending a year at Harvard Law School between 1889-1890, Pound returned to Nebraska and started practicing law. In 1895, while still in practice, he became an instructor at the College of Law of the University of Nebraska.[92] In 1899 he was appointed assistant professor, and in 1903, the year when Klimt painted his *Jurisprudence* and Ehrlich wrote his essay on free law, Pound became Dean of the College of Law.[93] A year later, in 1904, Pound first attempted to present the outline of his sociological jurisprudence in an article entitled *A New School of Jurists*.[94] In this article, Pound noted that as the older schools of nineteenth-century jurisprudence were breaking down, a new school, "the Sociological School," was emerging. Pound traced the emergence of this school to the work of German comparative ethnologists such as Josef Kohler in the last decade of the nineteenth century. However, already at this stage, Pound was aware of Ehrlich's call for a new kind of jurisprudence, made the previous year, including it as an example of the work of the Sociological School.[95] In *A New School of Jurists*, Pound argued that the main contribution of the Sociological School was to serve as an antidote to "the imperative theory of law," i.e., the tendency to identify law with the will of the legislator. The Sociological School, he claimed, pointed to the fact that law is not found only in legislation, but rather, it is a "living and growing" entity and legislation is only one of the means of achieving "the legal order."[96]

In a series of articles published in the decade after 1904, Pound reiterated his conception of law as an organic "living" entity and his calls for the use of sociological insights by lawyers.[97] He also stressed the gap between the abstractions of formal law and the "flesh and blood" reality of "lay conduct"

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91 *See generally* 1 Robert N. Manley, Centennial History of the University of Nebraska (1969) (Volume I: Frontier University (1869-1919)). *See also* Wigdor, *supra* note 16, at 18.

92 Wigdor, *supra* note 16, at 4. *See also* Carl Circo, *1903 & 1946: The Making and Remaking of the University of Nebraska College of Law*, 57 Neb. L. Rev. 44 (1978).

93 In 1906, Pound moved to Northwestern; in 1909 to the University of Chicago; and, finally, in 1910, to Harvard. *See* Hull, *supra* note 16, at 49; Herget & Wallace, *supra* note 10, at 98; Herget, *The Influence of German Thought, supra* note 16, at 204.

94 Roscoe Pound, *A New School of Jurists*, 4 Univ. Stud. 249 (1904) [hereinafter Pound, *New School*]. *See also* Albert Kocourek, *Roscoe Pound as a Former Colleague Knew Him, in* Interpretations of Modern Legal Philosophy: Essays in Honor of Roscoe Pound 419, 428 (Paul Sayre ed., 1947).

95 Pound, *New School, supra* note 94, at 265.

96 *Id.* at 265-66.

97 *See* Roscoe Pound, *The Decadence of Equity*, 5 Colum. L. Rev. 20 (1905); Roscoe Pound, *Mechanical Jurisprudence*, 8 Colum. L. Rev. 605 (1908); Roscoe Pound, *The Scope and Purpose of Sociological Jurisprudence, I*, 24 Harv. L. Rev. 591

or "popular action" — i.e., the gap between "law in the books" and "law in action."[98]

Thus, Pound was keenly aware of the fact that formal state law did not represent the legal reality. However, he was far less interested than Ehrlich (at least at this stage of his life) in the arduous task of empirically studying the "living law" of frontier communities.[99] It seems fair to say that Pound did not practice what he preached but, rather, was content to advocate a new kind of jurisprudence, focused on the sociological study of law, without actually doing the fieldwork entailed by such an enterprise.[100] However, there are strong indications that Pound's frontier background did have a profound impact on his jurisprudential thought and that it indeed was one of the factors that turned him into an early advocate of anti-formalist jurisprudence. The effect of frontier conditions on his thought was manifested in two ways.

First, Pound was most certainly aware of the uniqueness of the legal experience of the West. Thus, when he served as Dean of the College of Law at the University of Nebraska in 1906, he argued that one of the reasons that such a college was an important part of the State University was that "the West has peculiar legal problems and the older and longer-settled portions of the country very often have little or no knowledge of or sympathy with these problems."[101] In addition, in his 1911 article *Law in Books and Law in Action*, one of the illustrations he used to demonstrate the failure of judicial law-making to bridge the gap between formal law and the social

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(1911); Roscoe Pound, *The Scope and Purpose of Sociological Jurisprudence, II*, 25 Harv. L. Rev. 140, 489 (1912).

98 Pound, *supra* note 9, at 14-15, 19.

99 As Grant Gilmore noted, "[I]t is a fact of life that thinking about doing empirical research is much more fun than actually doing it." Grant Gilmore, Ages of American Law 89 (1977).

100 Pound's tendency to propose grand schemes and research agendas can already be sensed in his first article, a satirical piece. *See* Roscoe Pound, *Dogs and the Law*, 8 Green Bag 172 (1896). Therein, Pound outlines a proposal for a two-volume book on "Canine Jurisprudence." *See also* Cosgrove, *supra* note 40, at 202-03. On the other hand, when Pound was teaching at Northwestern University, he established the American Institute of Criminal Law and Criminology, which sought to bring lawyers and social scientists into contact. Pound was later involved in three major social science studies of the criminal justice system in Cleveland, Boston, and China. *See* Michael Ray Hill, Roscoe Pound and American Sociology: A Study in Archival Frame Analysis, Socio-biography and Sociological Jurisprudence 481-576 (unpublished Ph.D. dissertation, University of Nebraska, Lincoln, 1989) (on file with author); Christopher Tomlins, *Framing the Field of Law's Disciplinary Encounters: A Historical Narrative*, 34 Law & Soc'y Rev. 911, 935 (2000).

101 Manley, *supra* note 91, at 168.

reality is that "in our western states, where there was abundant opportunity for free judicial development, judicial law making proved inadequate to adjust water rights."[102] Second, and of greater relevance to the argument I present here, Pound's early environment seems to have had a significant and direct influence on his jurisprudential notions. Indeed, he seems to have been preoccupied with the issue of frontier law — the question of whether there was a difference between the old, popular law of the sparsely populated frontier communities of the West and the law required by the new conditions characterizing the densely populated urban centers of the East.

In 1912, eight years after his first foray into sociological jurisprudence, Pound published an article whose subject was the administration of justice in the modern city. The arguments presented in this article later served as the basis for a 1917 article on the limits of effective legal action and a 1921 lecture entitled *The Pioneers and the Law*.[103]

Pound began his discussion of frontier law by noting that "the fathers of the present population of the states immediately west of the Mississippi were pioneers there and many of the present generation [and here he was no doubt referring to himself] were brought up under pioneer conditions."[104] He then argued that the fact that the frontier conditions had prevailed in many parts of the United States until the end of the nineteenth century had had a profound influence on the shape of American law. The law of the frontier was a popular, customary, "non-scientific" (i.e., non-formal) law. "The refined scientific law ... is out of place [in the frontier]. A few simple rules which everyone understands and a swift and decisive tribunal best serve" frontier communities.[105]

According to Pound, a major characteristic of frontier society and, thus, a significant factor in frontier law was the existence of separate farming communities, which, in turn, led to a "lack of interest in universality" and to the existence of "local peculiarities" that set apart the law of one community from that of another. Frontier conditions also led to the rejection of the law of the state since "a pioneer or a sparsely settled rural community is content with and prefers the necessary minimum of government. ... When every farm was for the most part sufficient unto itself the chief concern was

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102 Pound, *supra* note 9, at 23.

103 *See* Roscoe Pound, *The Administration of Justice in the Modern City*, 26 Harv. L. Rev. 302 (1912); Roscoe Pound, *The Limits of Effective Legal Action*, 27 Int'l J. Ethics 150 (1917); Roscoe Pound, The Spirit of the Common Law 112 (1921) [hereinafter Pound, Spirit of Common Law].

104 Pound, Spirit of Common Law, *supra* note 103, at 112.

105 *Id.* at 117.

that the governmental agencies ... might interfere unduly with individual interests."[106]

In none of his discussions of frontier law did Pound explicitly mention Nebraska, but it seems reasonable to assume that his notion of frontier societies and their law was based on his own experience as a young lawyer, judge, and scholar in Lincoln.[107] His conception of frontier societies as being composed of separate, rural communities as well as his anti-formalist notion of law as a local, popular, customary entity emanating from the people rather than the state seem to reflect the conditions of life in Nebraska in the late nineteenth century.

Of course, it is not my claim that Pound's experience as a Nebraskan was the only or even the major factor in shaping his anti-formalist thought. Pound's sociological jurisprudence seems to have had many progenitors: his botanist background (which led him to espouse organicist notions of law); his acquaintance with University of Nebraska sociologist Edward A. Ross; the impact of pragmatism on his thought; the works of German legal thinkers such as Jhering and American ones such as Holmes; and finally a politically motivated desire to undermine the conservative tendencies of the U.S. Supreme Court.[108]

Due to the multiplicity of possible sources of Pound's anti-formalist jurisprudence, it is impossible to provide a reductive, mono-causal argument for the emergence of his ideas. More generally, it should be stressed that living in a frontier environment was not necessarily a precondition for the emergence of anti-formalism in the late nineteenth and early twentieth

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106 *Id.* at 118-19.

107 It should also be noted that in commenting on the works of other scholars, Pound himself noted that anti-formalist notions of law were related to frontier conditions. In Pound's 1922 obituary of Ehrlich, Pound said that "Ehrlich lived and taught in a place where modern law and primitive law came together and a modern complex industrial society jostled with groups of much older type. Thus he had exceptional advantages which he did not fail to improve." Page, *supra* note 13, at 69. Pound made similar comments when, in 1904, he discussed the effect of the "contact of English lawyers with the living body of archaic law in India" on the rise of non-formal conceptions of law in England. Pound, *New School*, *supra* note 94, at 264.

108 *See* Patterson, *supra* note 16, at 509; Wigdor, *supra* note 16, at 111ff., 183ff.; Hull, *supra* note 16, at 44-45, 55; Reimann, *supra* note 44, at 14; Herget & Wallace, *supra* note 10, at 420-26; Herget, *The Influence of German Thought, supra* note 16, at 215, 221-27; David E. Ingersoll, *American Legal Realism and Sociological Jurisprudence: The Methodological Roots of a Science of Law*, 17 J. Hist. Behav. Sci. 490 (1981); Duxbury, *supra* note 9, at 54; Cosgrove, *supra* note 40, at 203.

centuries. Anti-formalist notions of law often emerged in non-frontier environments. Holmes and Jhering (and Klimt) did not live at the frontier of an empire, but they nonetheless embraced anti-formalist conceptions.[109] I do not claim that teaching law in a frontier environment was *a necessary and sufficient* condition for the emergence of anti-formalist notions. Nor am I attempting to present a quantitative argument that most, or even many, of the anti-formalist thinkers of the early twentieth century grew up or worked in frontier environments, and it is certainly not my claim that "frontier" conditions necessarily create non-academic non-formalist conceptions of law.[110] Instead, I argue for a weaker causal connection between anti-formalism and frontier conditions. I argue that during a specific period (the early twentieth century) and in specific places (Austria, the United States), there seems to have been an affinity between anti-formalist jurisprudential ideas and frontier conditions. This claim seems to me quite logical given the nature of law in many frontier societies.[111]

One of the reasons why it is important to consider the existence of

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109 For a discussion of the emergence of anti-formalist ideas in Germany in the late nineteenth century and in the first decades of the twentieth century, see Herget, *The Influence of German Thought, supra* note 16, at 214-21. *See also* Herget & Wallace, *supra* note 16, at 407-08. In addition, one can argue that sometimes the catalyst for law's interaction with the social disciplines (and, therefore, for the emergence of anti-formalist notions of law) was the growing power of the state at its center and not its relative weakness in the frontier area. *See* Tomlins, *supra* note 100, at 935-36. One should also note that from a certain perspective, the empire's center could also be seen as a frontier. Thus, Hungarian cultural historian Péter Hanák notes that "the Habsburg Monarchy itself existed in 'multiple marginality' ... between East and West, with the semifeudal, non-capitalistic southeastern regions of Europe on one side, and the Western industrialized countries and consolidated nation-states on the other." Péter Hanák, *Social Marginality and Cultural Creativity in Vienna and Budapest (1890-1914), in* The Garden and the Workshop, *supra* note 61, at 147, 174. Perhaps the mixed, multi-ethnic, urban population centers of the United States in the later nineteenth century also constitute an example of such "multiple marginality."

110 *See* Reid, Law for the Elephant, *supra* note 60.

111 The following analogy may illustrate this point: The argument that poverty is related to terrorism is not refuted by the fact that master-terrorist Osama Bin Laden is not poor. Nor is this refuted by the fact that many poor people are not terrorists. Nor would the argument be refuted if a quantitative study of terrorists were to reveal that most terrorists come from wealthy families. These facts would just mean that poverty might not be the only cause of terrorism. In a similar way, the argument that frontier conditions are related to the rise of anti-formalist jurisprudence is not refuted by the fact that many, or indeed most, anti-formalist legal thinkers did not grow up or live in frontier conditions.

an affinity between frontier conditions and anti-formalist jurisprudential thought is that a host of additional interesting research questions then arise. Thus, one could try to distinguish between different types of frontiers, for example, places in which the population density is low and therefore there are few law-enforcing institutions and places that are densely populated and where law-enforcing institutions exist but there are also competing non-state institutions and norms. One could distinguish between frontiers that border on another empire and its legal culture and internal frontiers such as immigrant neighborhoods in densely-populated urban centers. One could ask in what ways the rise of anti-formalist legal thought was connected to the growing demographic heterogeneity in Old World and New World *fin-de-siècle* empires. One also could differentiate between various types of legal actors in frontier environments; thus it would seem reasonable to presume that official representatives of the distant state, such as judges, would tend to adopt an ultra-formalist legal stance in frontier environments because of the legitimizing power of formalism, while legal scholars would adopt anti-formalist notions.[112]

I have used Ehrlich as an example of anti-formalist thinking, but he was not the first anti-formalist legal thinker of *fin-de-siècle* Continental thought. One of the forerunners of anti-formalist jurisprudence on the Continent was François Gény, a Frenchman. In 1899 Gény published a book in which he claimed (as Ehrlich did later) that since positive law cannot answer every possible legal question, judges must use custom and sociological data to determine unresolved cases.[113] Gény's biography seems to follow somewhat similar lines to those of Ehrlich and Pound. He was born in Alsace, a border province in which French and German cultures intermingled. In 1885, he began his academic career as professor of law in Algiers and later became professor of law at the University of Nancy (1901-1931), at the time on the eastern border of France.[114] Another example

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112 For a discussion of the connection between formalism and legitimacy in a colonial setting, see Likhovski, *supra* note 62.

113 François Gény, *Science of Legal Method, in* Science of Legal Method: Select Essays by Various Authors 1 (Ernest Bruncken & Layton B. Register trans., 1917). On Gény, see, e.g., B.A. Wortley, *François Gény, in* Modern Theories of Law 139 (1933); Herget & Wallace, *supra* note 16, at 410-11; Herget, American Jurisprudence, *supra* note 16, at 163; Belleau, *supra* note 57; Belleau & Kennedy, *supra* note 9.

114 Herget & Wallace, *supra* note 16, at 409; Herget, *The Influence of German Thought, supra* note 16, at 217. It should be noted that Gény himself attributed his anti-formalist thought to the influence of some French predecessors and the influence of German scholarship. *See* François Gény, Ultima Verba 13-14 (1951).

of an early anti-formalist Continental thinker is Leon Petrażycki, one of the leading anti-formalist legal philosophers in Russia during the first decade of the twentieth century who was a Russified and Germanized Pole born in 1867 in the recently-annexed Russian province of Vitebsk. Petrażycki once described himself in the following manner: "I think in Polish, I write in German and I lecture in Russian."[115] One can also think of additional American examples, such as Thurman Arnold, a leading legal-realist thinker, who was born in Wyoming and began his scholarly career at the University of West Virginia College of Law in the 1920s. In West Virginia, Arnold was involved in one of the first major law-in-action, empirical legal research projects of the legal realist movement.[116]

But the final example I would like to discuss (in somewhat more detail than the previous three) is Guido Tedeschi, one of the founders of Israeli legal academia. Tedeschi was born in 1907 in Rovigo in Northern Italy. His mother's family, the Del Vecchios, was one of the oldest and most distinguished Jewish families in Italy. His uncle, Giorgio Del Vecchio, was a leading philosopher of law and Rector of the University of Rome (another relative of his, Guido Calabresi, was Dean of Yale Law School in the late 1980s and early 1990s). Tedeschi studied law in Rome and later taught in Cagliari and Perugia. In 1936 he was appointed a professor of law at the University of Sienna, but was dismissed two years later following the enactment of anti-Jewish laws by the Fascist regime.[117]

In 1939, Tedeschi settled in Palestine, and in 1941, he was appointed research fellow at the Hebrew University of Jerusalem. At that time, there was no full-fledged law school at the Hebrew University. There was a

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115 On Russian anti-formalist thought during the nineteenth and early twentieth centuries generally and on Petrażycki in particular, see A. Meyendorff, *Leo Petrazycki (1864-1931), in* Modern Theories of Law 21 (1933); Nicholas S. Timasheff, *Petrazhitsky's Philosophy of Law, in* Interpretations of Modern Legal Philosophy: Essays in Honor of Roscoe Pound 736 (Paul Sayre ed., 1947); Max M. Laserson, *The Work of Leon Petrazhitskii: Inquiry into the Psychological Aspects of the Nature of Law*, 51 Colum. L. Rev. 59 (1951); Nicholas S. Timasheff, *Introduction, in* Leon Petrażycki, Law and Morality at xvii, xxi (Hugh W. Babb trans., 1955); Patterson, *supra* note 16, at 81; Andrezej Walicki, Legal Philosophies of Russian Liberalism 213-90 (1992).

116 *See generally* Voltaire and the Cowboy, *supra* note 64, at 25-27; Laura Kalman, Legal Realism at Yale, 1927-1960, at 32 (1986).

117 *Interview with Professor Tedeschi, in* Essays in Memory of Professor Guido Tedeschi 23, 23-27 (Aharon Barak et al. eds., 1995) (Hebrew). On Giorgio Del Vecchio, see Brendan Francis Brown, *Foreword, in* Giorgio Del Vecchio, Philosophy of Law at ix-xx (Thomas Owen Martin trans., 1953).

program in Jewish law, as well as one in international relations, but Tedeschi, whose expertise was Italian family and inheritance law, did not teach in either.[118] Instead, he spent the 1940s working on legal research projects under the supervision of two leading members of the Jewish Bar Association of Palestine: Shalom Horwitz and Moshe Smoira. Most of these projects were practical and based on a formalist conception of law. Thus Tedeschi wrote a monograph on the inheritance laws of Palestine and several formalist studies on such issues as the application of English law by the British-colonial courts of Palestine.[119]

In 1944, however, Tedeschi wrote a project proposal entitled *On inductive research in legal life (with special reference to Palestine).*[120] This proposal was a call for the creation of a socio-legal research agenda for scholars of the law of British-ruled Palestine that would focus on the "study [of] the life of the law, the law in action," and it applied the works of Free Law thinkers such as Ehrlich, Ernst Fuchs, and Herman Kantorowicz.[121] In his proposal, Tedeschi advocated the study of such issues as the prevalence of bigamy and divorce; the study of the common clauses used in marriage contracts (*"ktubot"*) in Palestine; the study of wills in order to determine the way property was actually divided among heirs in Palestine (as well as the attempt to determine whether class or ethnic origin leads to different property regimes); the study of certain types of contracts that are shaped by local conditions such as leases and labor contracts; and the study of "legal life" on the *kibbutzim*, with an emphasis on private law issues such as property, family, and inheritance norms.

Tedeschi was familiar with anti-formalist ideas before the 1940s. He probably first encountered the works of the Free Law thinkers in the 1920s while studying law at the University of Rome under his uncle Giorgio Del Vecchio. Ehrlich had published an article in a legal philosophy journal edited by Del Vecchio, and Del Vecchio's textbook on jurisprudence contains a brief discussion of the ideas of Ehrlich, Kantorowicz, and other

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118 *See generally* Assaf Likhovski, *Legal Education in Mandatory Palestine*, 25 Tel Aviv U. L. Rev. 291 (2001) (Hebrew).

119 Central Zionist Archives, Jerusalem, A 215/57/5, A 215/57/6 (Hebrew).

120 On Inductive Study in Legal Life (Especially in Palestine), Central Zionist Archives, Jerusalem A 215/57/5 (Hebrew) (later translated into English and published as Guido (Gad) Tedeschi, *On the Inductive Study of Law, in* Studies in Israel Law 1 (1960)).

121 Tedeschi, *supra* note 120.

Free Law thinkers.[122] In 1932, while teaching at the University of Rome, Tedeschi published an article inspired by Ehrlich's work.[123] But his encounter with the colonial legal system of British-ruled Palestine certainly made him more aware of the inadequacy of legal formalism.[124] Socio-legal questions, noted Tedeschi in his research proposal, are especially acute in colonial legal systems such as that of British-ruled Palestine (and later Israel). There are several reasons for this. One reason is the heterogeneous nature of colonial societies such as Palestine that are also settler/immigrant societies. Tedeschi argued that the gap between law in books and law in action has "sometimes been exaggerated by modern scholars" since in a "well-integrated and stable society in which people have common legal habits and attitudes ... the gap between living law and the law of the state ... loses much of its significance," but in Palestine, he remarked,

> the difference between the legal habits and attitudes of the various parts of the population, according to the countries of their origin, have not yet resolved themselves as a result of unified communal life, and in view of the prevailing pattern of immigration are not likely to resolve themselves for a considerable time.[125]

Another factor is the colonial context in which the law of Palestine was formed. This law was created and applied by judges who were unfamiliar with the culture of the population. Thus Tedeschi noted that the British judges in Palestine were required to apply certain provisions of Jewish law that governed family matters. These judges, however, misapplied the norms

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122 Eugenio Ehrlich, *La Sociologia del Diritto*, 2 Rivista Internazionale di Filosofia del Diritto 96 (1921); Del Vecchio, *supra* note 117, at 211, 367-68.

123 Guido Tedeschi, *Su lo Studio dell'applicazione del Diritto civile, in* Annuario di diritto comparato e di studi legislativi VII, fasc. 1 (1932). Tedeschi's 1944 research proposal was partly based on this article. The *Annuario* was published by the Istituto di Studi Legislativi in Rome, an institute devoted to the collection of data on law and legal reform, including statistical and economic data. *See Istituto di Studi Legislativi: Statuto*, 1 Annuario di diritto comparato e di studi legislativi at xi (1927). Tedeschi was a member of this institute, and he was later active in establishing a similar institute at the Hebrew University in Jerusalem, called the Harry and Michael Sacher Institute for Legislative Research and Comparative Law. *See* Curriculum Vitae and Publications of Professor Tedeschi, 23/12/1948, Central Zionist Archives, Jerusalem, A 215/57/6; *Interview with Professor Tedeschi, supra* note 117.

124 *See* Guido Tedeschi, *Preface to the Second Hebrew Edition, in* Studies in Israel Law, *supra* note 120, at 1 (Hebrew).

125 *Id.* at 4-5.

because "they did not grasp the finer distinctions of that law, distinctions which it is difficult to discern if one does not actually 'live' the system: an outsider would just not understand them from a mere study of the abstract rules of the system."[126]

Finally, a third reason for the pertinence of socio-legal issues in colonial legal systems, also rooted in the colonial background of Palestinian law, is legal pluralism. In this context, Tedeschi noted that in Palestine there existed "law-making centers" that competed with and, in a sense, undermined the authority of the state, such as the Jewish Agency, the General Federation of Jewish Labor, and the *kibbutzim*.[127]

Some of Tedeschi's later works, as well as the works of some of his students, showed the same interest in anti-formalist notions of law. For example, in 1973 Tedeschi published an article, *Custom in Our Contemporary and Future Law*, that dealt with such issues as custom in developing/immigrant societies, in ethnically diverse societies, in the *kibbutzim*, and among the Jews and non-Jews in Israel. In this article, he noted that the Institute for Legislative Research and Comparative Law at the Hebrew University of Jerusalem had initiated an "inductive research" project to record customary norms in Israeli law.[128]

Thus, it should come as no surprise that Tedeschi, who is generally considered one of the founding fathers of formalism in Israeli law, should have proposed an Ehrlichian research agenda in 1944. Tedeschi wrote his research proposal while he was a fellow at the Hebrew University of Jerusalem. The Hebrew University was, in many respects, similar to the University of Czernowitz and the University of Nebraska. Established in 1925, it sought to serve as a vehicle for the propagation of a "foreign" culture — in this case, a mixture of Jewish culture and Western culture — in a colonial setting.[129] Like turn-of-the-century Czernowitz and Lincoln, Jerusalem in 1944 was a culturally unstable, colonial city. Approximately 160,000 people lived in Jerusalem at the time, 61% Jews, 20% Moslems,

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126 *Id.* at 6.

127 *Id.* at 19. *See also* Richard D. Schwartz, *Social Factors in the Development of Legal Control: A Case Study of Two Israeli Settlements*, 63 Yale L.J. 471 (1954).

128 Gad Tedeschi, *Custom in Our Contemporary and Future Law*, 5 Mishpatim 9 (1973) (Hebrew). For a survey of the rather disappointing crop of empirical studies on Israeli law produced by Tedeschi and his students, see A.L. Sebba, *Professor Tedeschi and the "Science of Legislation": A Voice Crying in the Wilderness, in* Essays in Memory of Professor Guido Tedeschi, *supra* note 117, at 535, 551-57.

129 On the Hebrew University, see generally History of the Hebrew University of Jerusalem (Shaul Kats & Mikhael Heyd eds., 1997) (Hebrew).

and 19% Christians. The city had witnessed enormous growth during the previous decade, mainly due to the immigration of German Jews fleeing Nazi persecution and the economic boom caused by the Second World War. By 1944 the Jewish population of Jerusalem had doubled (from 51,000 Jews in 1931 to 97,000 in 1944) and the entire population had grown by more than 50%.[130] In many senses, Jerusalem resembled Czernowitz and Lincoln.

In sum, Ehrlich, Pound, and Tedeschi were three legal scholars concerned with the study of the non-formal (or "living") aspects of law. At the time that they were most concerned with this issue, all three were living in frontier societies and working in young universities that occupied an ambivalent position along the center-periphery divide. Comparing the similarities in their backgrounds can provide new insights into the emergence of anti-formalist notions of law and the connection between these notions and frontier conditions and into such issues as the impact of empire/colony, center/periphery interaction on the shaping of jurisprudential ideas.

Conclusion

The aim of this article was to demonstrate how the intellectual history of American law can be enriched by a certain type of comparative perspective: a perspective that seeks to explain the appearance of similar jurisprudential ideas in different places by taking into account background factors (such as frontier conditions). By expanding our research framework beyond national borders, we can elicit new questions and gain new insights about the complex process in which legal ideas are created.

The specific example discussed in this article shows that we can understand the rise of anti-formalist notions of law as at least partly caused by a process of imperial expansion that was taking place simultaneously in Europe and the United States. As metropolitan and local elites sought to consolidate the hold of imperial law and culture in peripheries and frontiers, they established new provincial universities in which the law and jurisprudence of the center of the empire was taught. In such a setting, there was a gaping discrepancy between the positive formal theory of the law of the distant imperial center and the reality of the local legal conditions. The resulting antinomy may have been one factor that made provincial legal scholars like Ehrlich, Pound, and Tedeschi more receptive to anti-formalist conceptions of law.

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130 Palestine Department of Statistics, Statistical Abstract of Palestine 1944-45, at 22 (1945).

Such an understanding, which connects the rise of anti-formalist notions of law to processes of imperial expansion, may generate new perspectives on the political implications of early-twentieth-century anti-formalist jurisprudence. It may also help us to avoid the pitfall of a celebratory narrative of the appearance of anti-formalism, which sometimes plagues the work of historians of sociological jurisprudence.

For a long time, historians of American jurisprudence have been relatively blind to the global context in which this jurisprudence developed. This article is an attempt to decenter the dominant insular narrative about the history of American jurisprudence. This decentralization would mean paying attention not only to what was happening in Boston or New York but also taking into account developments in marginal places like Czernowitz, Lincoln, and Jerusalem, because such places are as important to the story of modern jurisprudence as are the centers of empires and no account of the development of American (or, indeed, any other "national") jurisprudence is complete without them.