

International Karl Polanyi Society

Karl Polanyi and the Law of Market Society



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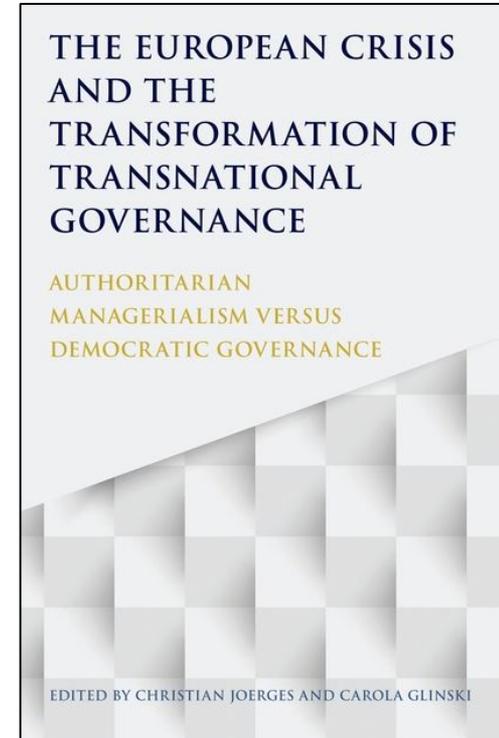
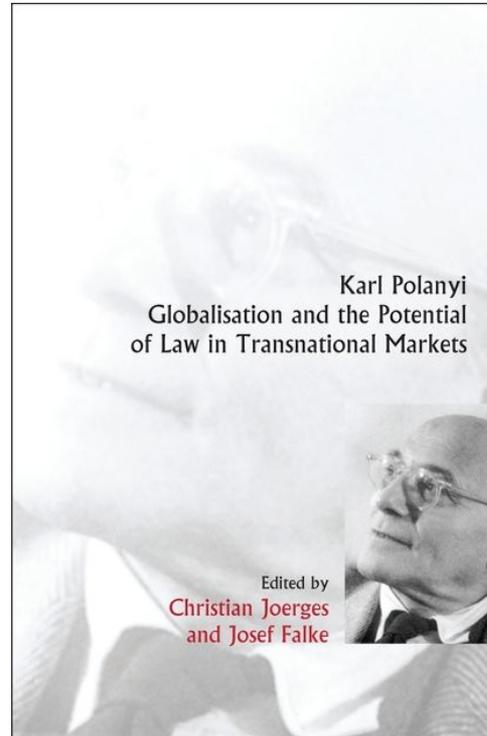
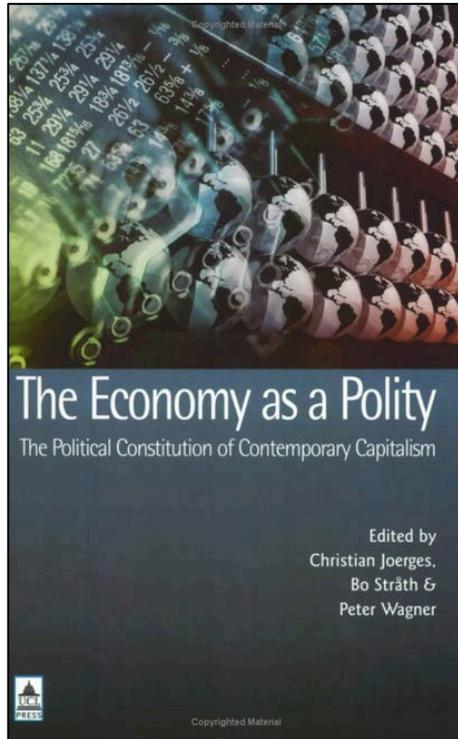
Structure

- Analytical Perspective: Economic Sociology of Law
- Object of Analysis: The Law of the Market Society
- Specific Problem: Proliferation of Debt Discharge

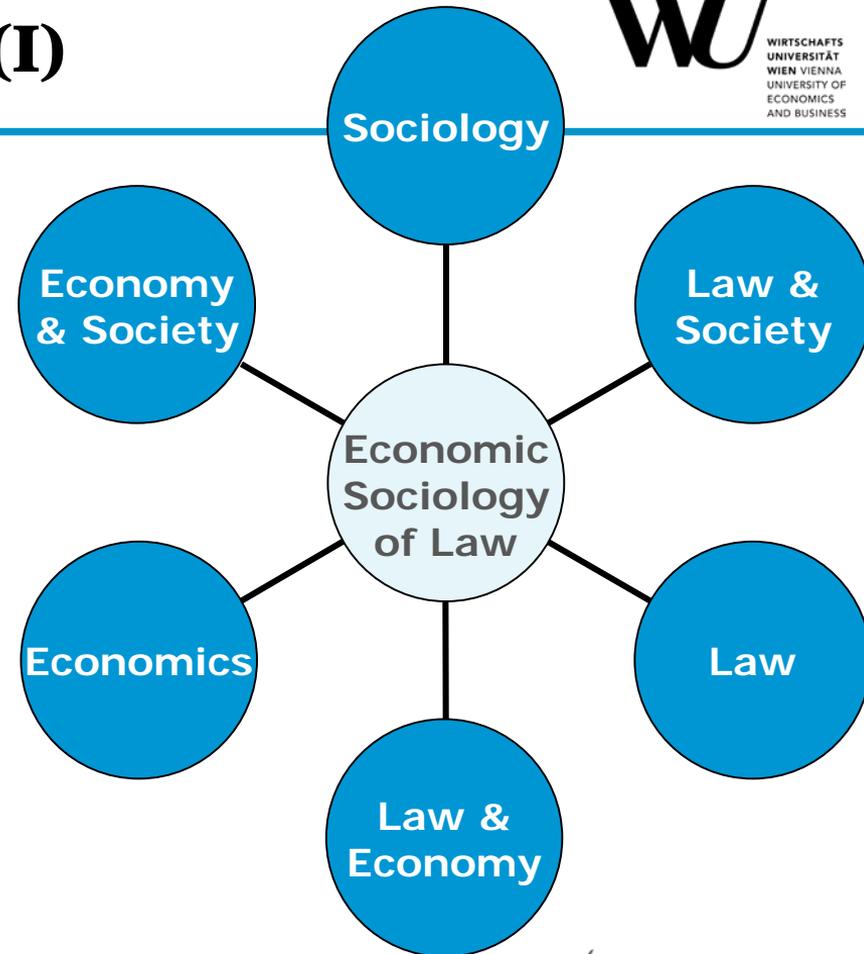
Analytical Perspective: Economic Sociology of Law



A Polanyi-inspired Research Agenda



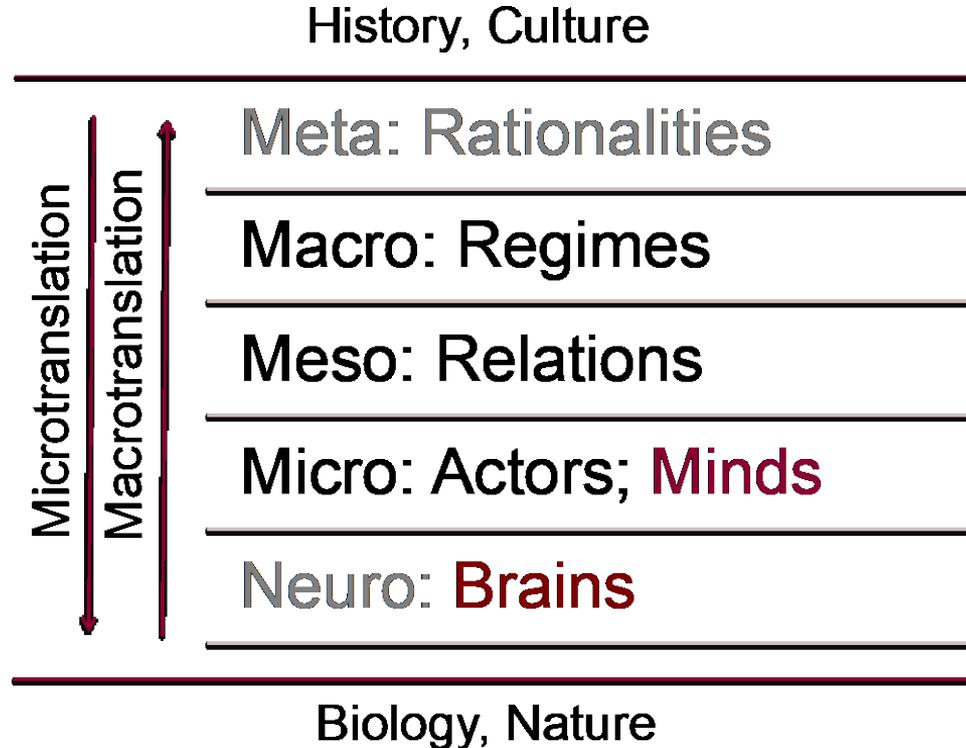
Economic Sociology of Law (I)



Economic Sociology of Law (II)

- Economic sociology not only includes a 'sociology of economy', but also a '[sociology of economics](#)': a sociology of the economic discipline, and of scientific knowledge more generally.
- Likewise, the sociology of law includes a '[sociology of jurisprudence](#)', that is, a critical interest in legal scholarship, which it shares with critical legal studies.
- In the economic sociology of law, the cognitive turn from the *subject matter* of the law and the economy to the *disciplines* constructing and reproducing these spheres of reality, takes the form of a [criticism of law and economics](#), or of any positive (or normative) theory that describes (or prescribes) how legal and economic rationalities are (to be) mediated.

Levels of Analysis



Legal Construction of Economic Rationalities

- “[I]n what ways, if any, are the cognitive infrastructures of markets – and therefore the particular forms of calculative rationality characteristic of such markets – created, entrenched, and mobilized through law and legal practices? What, in other words, is law’s role in the construction, maintenance, and transformation of frameworks of knowledge and their associated practices of economic rationality in particular market contexts?” (Lang 2013, 170)

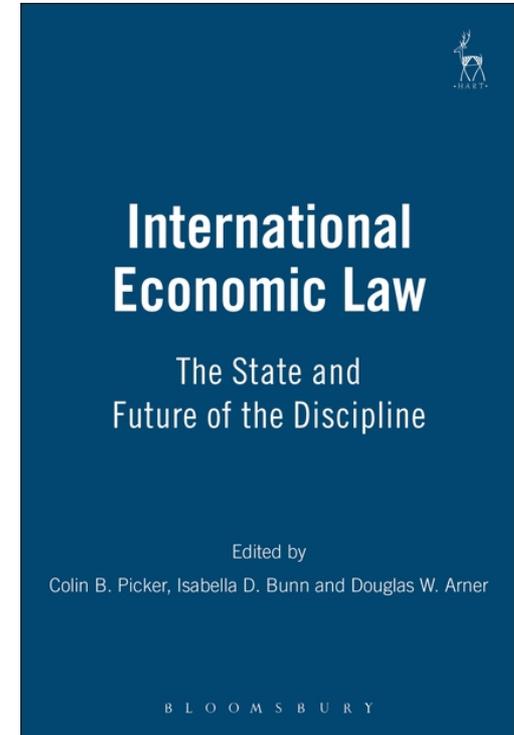
Economic Construction of Legal Rationalities

- “In recent years, the relationship between law and the economy has been front and center in policymaking around the world, in courts, and in law schools, largely as a result of the law and economics (L&E) movement. L&E has been extremely influential in the policy realm, so much so that concepts of law and justice are increasingly *defined* in economic terms and understood through the lens of market efficiency.” (Edelman 2004, 182; original emphasis)

Defining Economic Law

- The functional approach to economic law “cuts across the boundaries between traditional *fields of law* and those between *legal systems*”.
- “Rules that are part of traditional **fields of law** (eg constitutional law, company law, contract law, tax law, private international law, procedural law, etc) also form part of economic law if, and to the extent that, they are relevant to the establishment and functioning of an economic system.
- [T]he sources of these latter rules may be located within various **legal systems**: of a national, trans-national, regional, supranational or international nature.”

(Ortino and Ortino 2008, 95; original emphasis)



Focusing on Consumer Protection

- “The **law of the market economy** has a wide scope. It covers law which sustains, promotes, curtails and adjusts the structure of a free market.”
- “**Consumer protection law** is susceptible to neither neat nor narrow definition. Its scope is open-ended. It embraces **both private law and public law**; it requires appreciation of **both national and transnational law**.”
- “[T]he map of consumer protection law has fuzzy edges and one should know what lies beyond, including paths to **other areas of law** and the bridges to **other academic disciplines** such as economics, politics, sociology and psychology.”

(Howells and Weatherill 2009, 5)

Object of Analysis: Law of Market Society



Law as Institution and Commodity

- As an institution, law 'institutes' the economy.
- Law can be conceived as the 'fifth' institution that mediates between the key institutions of the international political economy: gold standard, balance-of-power system, liberal state, and self-regulating market.
- As a 'commodity', law is subject to market forces.
- Law can be conceived as a 'fourth' commodity that may take embedded or commodified forms, similar to other 'fictitious commodities': land (nature), labour (humans), money (credit), law (solidarity).

Law in Modern Capitalism

- Karl Marx
- Evgeny Pashukanis
- Isaac Balbus
- Pierre Bourdieu
- Beyond the debate of formalism vs instrumentalism
- Focus on interactions between law and economics

Law of Market Society

- Karl Polanyi
- Neo-Polanyian perspectives
- Role of the law in the commodification process
- Potential of the law for decommodification

- Technically, commodification means that the fictions of the economic discipline are translated into legal concepts.
- Reversing this perspective, Supiot (2007, 94) speaks of the “dogmatic foundations” of the market in “legal fictions”.
- The concepts of private **property**, **contract** of will, and legal **personhood** reflect the necessities of market exchange in capitalist societies.
- **Land**, **labour**, and **money** can only be bought and sold for a market price by abstraction from their natural, social, and cultural underpinnings.

Commodification of Law (I)

- Similar to labour, land, and money, law can itself become subject to market forces and, in that way, commodified.
- The commodity character of law is most concrete when regulatory competition allows a 'law market' to arise, and certain legal rules or regimes can be marketed and shopped for at the national, regional or global level.



ERIN A. O'HARA
LARRY E. RIBSTEIN

A la Européenne

- In more abstract terms, the commodification of law is also furthered by the rise of 'economic constitutionalism', which prioritises the "functional unity' of private and public, national and international regulation of the economy" (Petersmann 2011, 536).

A l'Américaine

- Likewise, the 'economic analysis of law', which explains legal regimes in terms of rational choice (positive analysis) and evaluates their contribution to economic efficiency (normative analysis), implies a commodified understanding of law (cf. Brion 2000).

Two Types of Institutions (I)

Durkheimian	Williamsonian
Authoritative organization	Voluntary coordination
Creation of obligations	Reduction of transaction costs
Public order	Private ordering
Government	Governance
Obligational	Voluntaristic
Exogenously imposed	Endogenously contracted
Third party enforcement	Self-enforced

(Streeck 2009, 155)

Two Types of Institutions (II)

- Streeck (2009, 252; original emphasis) points out that “*Polanyian institutions* that are market-breaking rather than market-making probably need to be Durkheimian in character: public rather than private, obligatory rather than expedient, and political instead of economic”. In practice, we may observe an opposite trend: law becomes more private, voluntary, and economic again.
- In capitalist economies, the “**slowly grinding force**” of private interest also gnaws at the law (ibid., 146): non-contractual institutions that impose social obligations from above (as part of the public order, or authoritative forms of organisation) tend to be replaced by privately contracted institutions that result from individual choices from below (as part of systems of private ordering that facilitate voluntary coordination).

The Great Transformation Continued

19th century: The rise and fall of market economy

→ Polanyi (1944): The Great Transformation

20th century: The rise and fall of *social* market economy

→ Streeck (2009): Re-forming Capitalism

Law's Great Transformation (I)

The "laws governing a complex society" discovered by the economic discipline have the status of "laws of Nature". The principle of *laissez-faire* is enforced by the 'liberal state'. For Polanyi, self-regulating markets "required that the individual should respect economic law even if it happened to destroy him".

Market exchange is embedded in law, and law is embedded in society. Polanyi speaks of an (undifferentiated) complex of "custom and law, magic and religion".

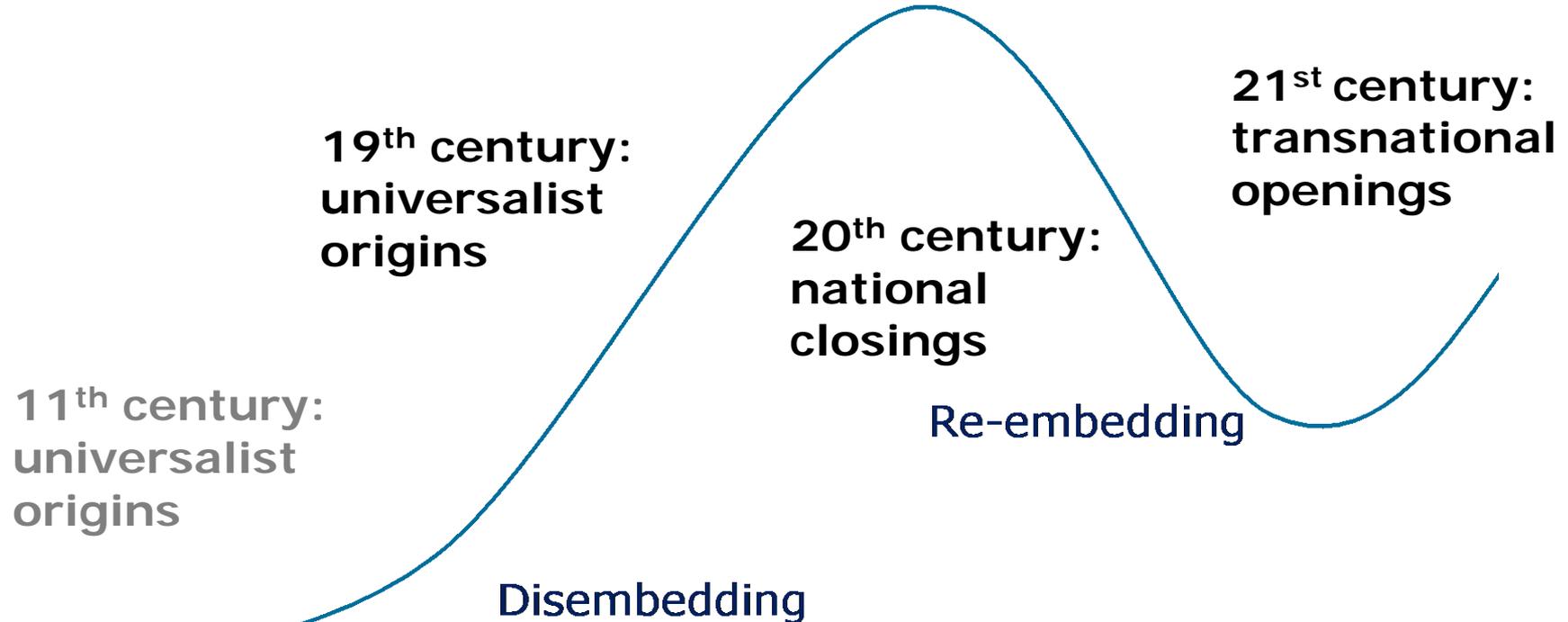
Disembedding

Re-embedding

The axiomatic language of economic liberalism is contested; its naturalist vision of law is replaced with an agenda that includes law as a means of progressive politics.

(Polanyi
1957, 55,
83, 125)

Law's Great Transformation (II)



11th-21st Century: Western Legal Tradition

- Berman (2003, 22–23) links the Western legal tradition, which spans a millennium “from the eleventh to the twenty-first century”, with “‘the rise of the West’ as a great economic power in the world”.
- “For example, the elaborate **rules of contract law and of credit transactions** that were developed in both the new Roman law and the new canon law in the twelfth and thirteenth centuries survived successive economic changes and were an essential foundation of the laissez-faire capitalist economy that emerged in the nineteenth century.” (ibid., 377).

19th Century: Universalist Origins

- “the rise of Classical Legal Thought between 1850 and 1914”
- “the liberal attack on mercantilist [...] economic and social policy making”
- “the creation of a first global system of international economic law, based on free trade, the gold standard, and private international law (often applied by arbitrators) to settle disputes”

(Kennedy 2006, 19, 20, 29, 30)

20th Century: National Closings

- “[the rise of] socially oriented legal thought between 1900 and 1968”
- “rethinking law as a purposive activity, as a regulatory mechanism that could and should facilitate the evolution of social life in accordance with ever greater perceived social interdependence”
- “redefining as public law vast areas that had fallen safely within the [private law] domain of right, will, and fault”
- “[a] ‘national strategy’ based on bilateral agreements and [...] on the formation of blocs”
- “the creation, for the capitalist core countries, of the nationally and internationally regulated market economy”

(Kennedy 2006, 19, 22, 43, 56-57)

21st Century: Transnational Openings

- “privatisation of the function of law”
- “transforming private international law from a national democratic law for the co-ordination of national and foreign legal systems in the light of social transnationalisation into a framework law in which private actors should be able to choose as freely as possible which national legal norms should, in each case, apply to the private legal relations that concern them”

(Rödl 2009, 40-41)

Integration Through Private Law

Model 1	Model 2	Model 3
11 th -18 th Century: Universal <i>Ius Commune</i>	18 th -19 th Century: National Civil Codes	20 th Century: Social Function of Private Law
<i>Ius Commune</i> : From Pre- to Post-National	Preparations for a European Civil Code	<i>Ius Communitatis</i> : EU Regulatory Private Law

- “In the analyses of what, very generally, could be called social justice in contract law, the change is often pictured by the help of dichotomies like freedom versus solidarity, individualism versus altruism, and market-individualism versus consumer-welfarism to mention but only a few. [...]
- In the European setting these dichotomies and new concepts, which typically refer to the growth of **mandatory rules protecting weaker parties like consumers** in the contractual relationship, can be said to reflect the intrusion of the **values of the welfare state into the market-oriented structure** of traditional contract law.
- Therefore the new features are also called ‘welfarism in contract law’ for short.”

(Wilhelmsson 2004, 712-713; references omitted)

Welfarism in Private Law (II)

1. Market-rational welfarism	Regulation aimed at improving party autonomy and the function of the market mechanism (e.g. information rules)
2. Market-correcting welfarism	Regulation aimed at rectifying outcomes of the market mechanism in order to promote acceptable contractual behaviour (e.g. substantive fairness rules)
3. Internally redistributive welfarism	Regulation aimed at redistributing benefits in favour of a group of weaker parties in a contractual relationship (e.g. rules affecting main subject matter of contract)
4. Externally redistributive welfarism	Regulation aimed at redistributing benefits in favour of the disadvantaged within a group of contract parties in similar situations (e.g. equality rules)
5. Need-rational welfarism	Regulation aimed at giving benefits to parties with special needs in comparison with other parties in similar situations (e.g. rules on social force majeure)
6. Public values welfarism	Regulation aimed at giving contract law protection to interests and values not related to the parties (e.g. protection of environmental values and human rights)

(Wilhelmsson 2004, 725)

Welfarism in Private Law (III)

- The decommodification of social relations was reflected in an **increasing welfarism in economic law**, with the 'juridical rationality' of enabling market law being counterweighed by a more 'instrumentalist rationality' of regulatory intervention.
- While the regulatory law of the welfare state was also redistributive in nature, this link can no longer be taken for granted. In fact, 'law after the welfare state' (Zumbansen 2008) combines a **new, legal formalism** with a **new, economic functionalism**.
- The novelty of the present constellation is not that juridical and instrumentalist rationalities are combined but that the reference point of both facilitative and regulatory law is increasingly **trans-, supra- or post-national** in character.

Specific Problem: Proliferation of Debt Discharge



5000 Years of Debt (I)



"I'm not much of a hunter or gatherer. I'm more of a borrower."

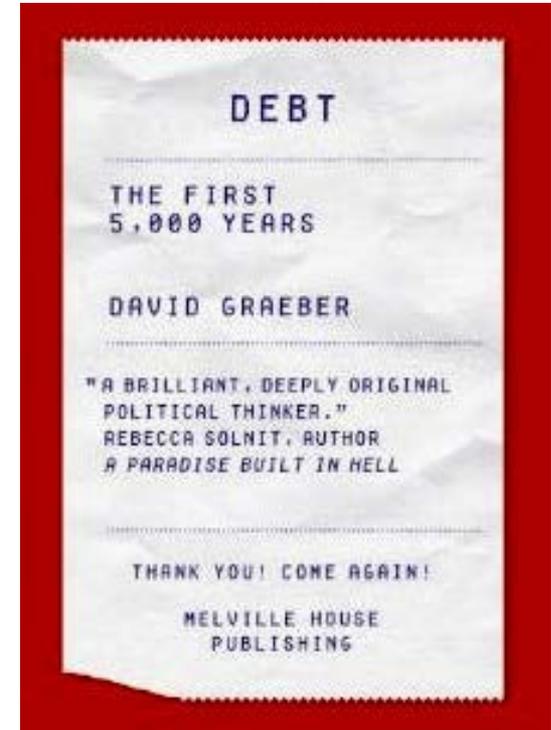
- "For thousands of years, the struggle between rich and poor has largely taken the form of **conflicts between creditors and debtors**.
- By the same token, for the last 5000 years, with remarkable regularity, popular insurrections have begun the same way: with the **ritual destruction of the debt records**."

(Graeber 2011, 8)

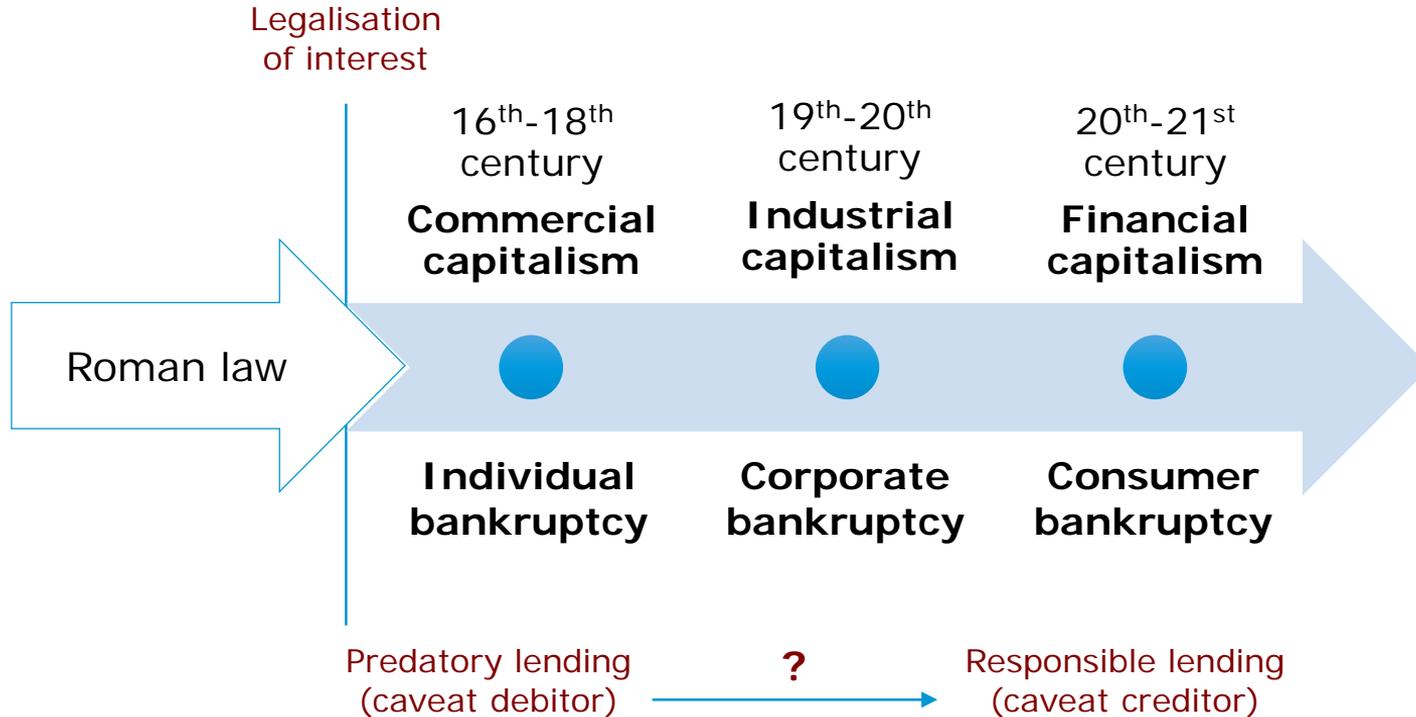
5000 Years of Debt (II)

- “History tends to move back and forth between periods dominated by bullion – where it’s assumed that gold and silver *are* money – and periods where money is assumed to be an abstraction, a virtual unit of account.”
- “If history holds true, an age of virtual money should mean a movement away from war, empire-building, slavery, and debt peonage (waged or otherwise), and **toward the creation of some sort of overarching institutions, global in scale, to protect debtors.**”

(Graeber 2011, 214, 383)



2500 Years of Bankruptcy Law



Normalisation of Bankruptcy

From person to property

- not the person is liquidated but the property

From detention to activation

- debtors get out of prison and back to the market

From moral failure to economic risk

- the debtor is no longer regarded as a criminal but as a risk-taker



No, you can't collect my client's soul.
His personal bankruptcy wiped
out ALL debts.

Ex-ante perspective

- Concerned with the causes and prevention of over-indebtedness and social exclusion
- Focus on consumer transactions, namely credit contracts
- E.g., 'responsible lending'

Ex-post perspective

- Concerned with the negative effects of over-indebtedness and how to remedy them
- Focus on personal insolvency, namely consumer bankruptcy
- E.g., 'fresh start'

(Domurath and Micklitz 2015, 6; Ferretti et al. 2016 a,b)

- “Judicial and legislative intervention [in private law relations] may be directed at the realization of **conceptions of social justice**.
- Consumer protection is but part of this field of inquiry into the **limitations of contractual freedom** as a basis for delivering a **fair distribution of resources**, a perception that invites attempts to adapt the law to a more overt control function, rather than allocating that task exclusively to the tax and welfare systems.”

(Howells and Weatherill 2009, 8-9, 32)

- “Insolvency is an area of law clearly categorised as ‘private law’ and involving, *inter alia*, the **rights of creditors against debtors**. [...]
- The focus of insolvency law is seen squarely to be on the rights of creditors against a particular debtor(s) and what those creditors will receive by way of payment (if anything).”
- “[T]he **public interest** involves taking into account interests which society has regard for and which are **wider than the interests of those parties directly involved** in any given insolvency situation, that is, the debtor and the creditors.”

(Keay 2000, 509, 525)

Consumer Credit Capitalism (I)

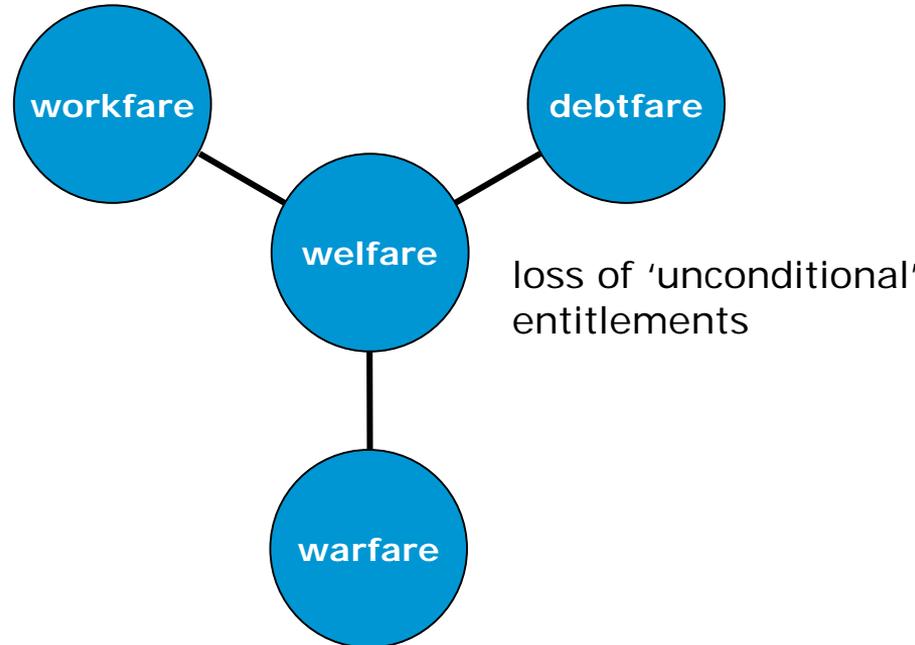
activation in the
labour market

activation in the
credit market

Privatised Keynesianism

“Instead of governments taking on debt to stimulate the economy, individuals did so.”

(Crouch 2009, 390)

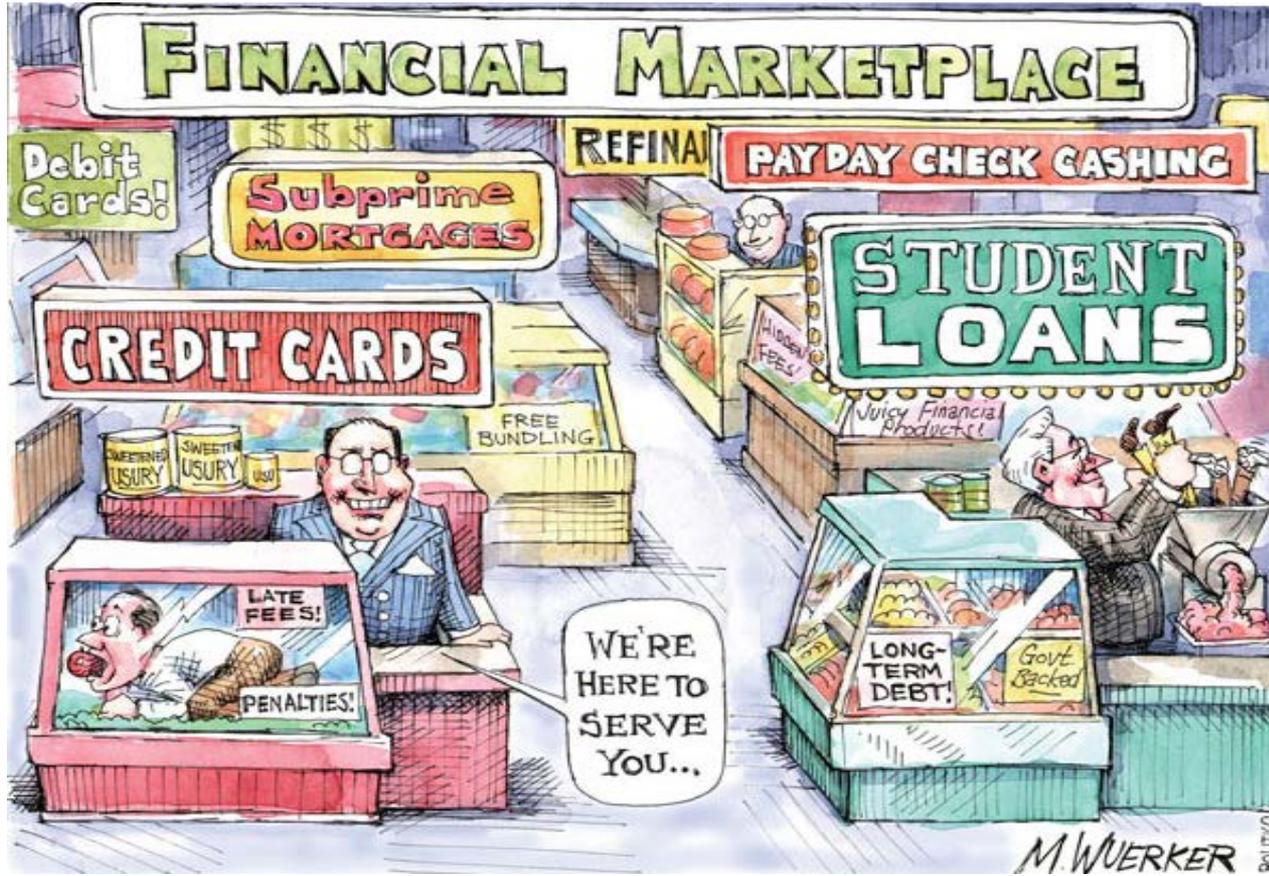


Consumer Credit Capitalism (II)

- “This shift towards so-called ‘privatised Keynesianism’ is characterised by an emphasis on **competition in private capital markets** and diminished state authority. Privatisation in this context refers to reliance on ‘consumer credit capitalism’ based on the **expansion of consumer credit**, including home mortgages, car loans and credit card debt.”
- “In such a political economy, the design of contracts determines, if, how and under what conditions consumers become indebted, and thus how welfare is allocated. This means that **contract rules that allocate rights, risks and obligations** between the parties have a strong normative salience.”

(Domurath 2016, 759; references omitted)

Consumer Credit Capitalism (III)



Evolution of Personal Insolvency Law (I)

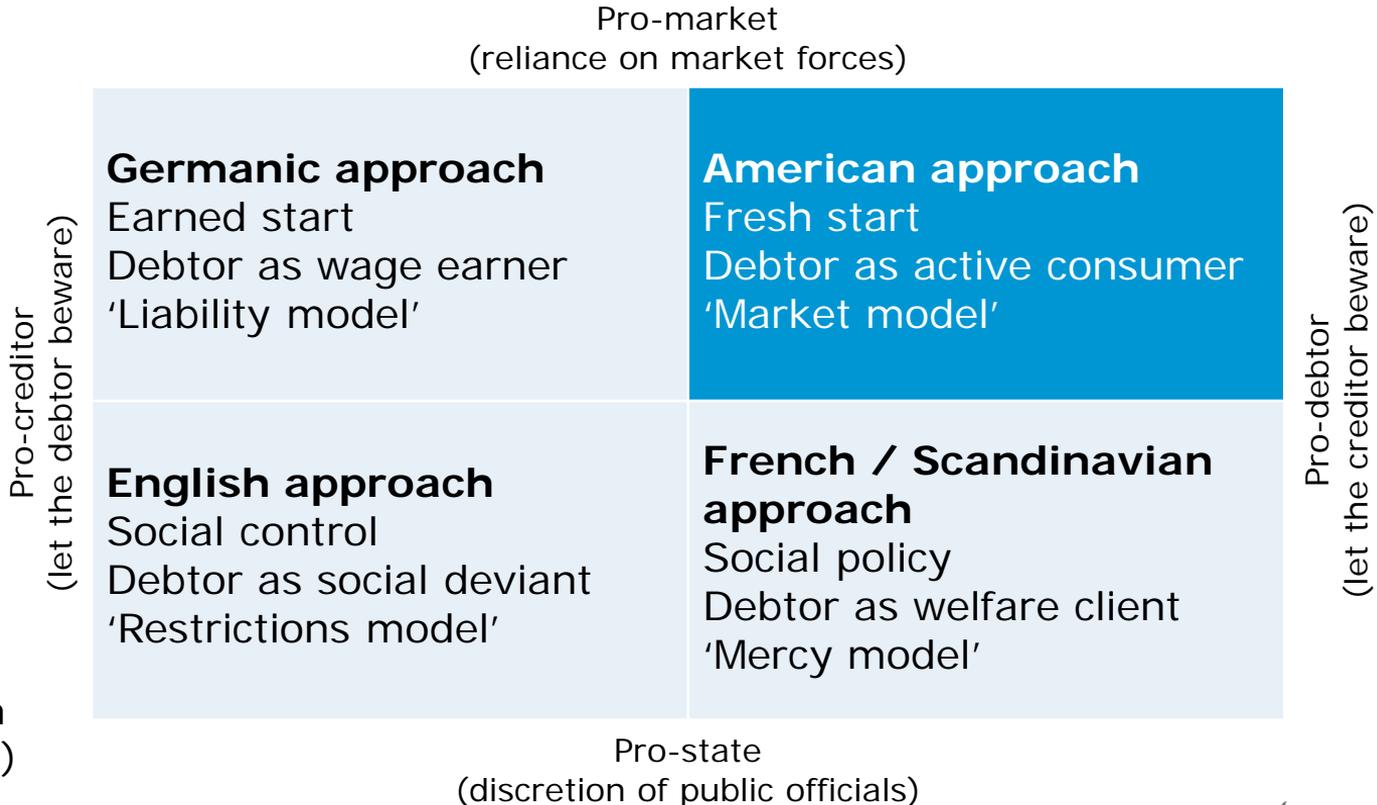
Austria	1993	Lithuania	2013
Belgium	1997, 2005, 2009	Luxembourg	2000, 2013
Cyprus	2015	Netherlands	1998, 2007, 2008
Czech Republic	2006, 2008	Norway	1992
Denmark	1984, 2000, 2005, 2010	Poland	2009, 2014
England and Wales	1986, 1990 (not in force), 2002, 2007, 2015	Portugal	2004, 2012
Estonia	2003, 2010	Romania	2015
Finland	1992, 2015	Russia	2015
France	1989, 1995, 1998, 2003, 2010, 2014	Scotland	1985, 1993, 2002, 2007, 2010, 2014
Germany	1994 (in force 1999), 2001, 2013	Slovakia	2004, 2006, 2011
Greece	2010, 2013, 2015	Slovenia	2007, 2015
Hungary	2015	Spain	2013, 2015
Ireland	1988, 2012, 2015	Sweden	1994, 2007, 2011
Italy	2012	US	1978, 1984, 1994, 2005
Latvia	2007, 2009, 2010, 2013		

(Ramsay 2017, 3-4: reforms of personal insolvency / debt adjustment law since 1978)

Evolution of Personal Insolvency Law (II)

- Introduction of a debt discharge in many European countries
- US 'fresh start' and German 'earned start' as alternative models
- Emerging international/European consensus on personal insolvency

Evolution of Personal Insolvency Law (III)



(drawing on Heuer 2014)

Explaining Divergence/Convergence (I)

- “This US ‘open credit economy’ and approach to credit regulation in a minimal social welfare state contrasts with a European social model of solidarity providing a greater level of security for citizens through state regulation and redistribution.
- If, however, European countries are increasingly adopting the US model of the role of credit in the economy then one might, *ceteris paribus*, expect the growth of similar models of bankruptcy.
- The development of personal insolvency in Europe is linked to credit liberalization since the 1980s and the subsequent crises and social costs associated with the growth of over-indebtedness.”

(Ramsay 2017, 29-30; references omitted)

Explaining Divergence/Convergence (II)

- “[T]his book rejects the story that US consumer bankruptcy law reflects an enduring cultural characteristic of the US or that there is ‘an American cultural of maximal consumer sovereignty and [a] European culture of maximal consumer protection’.”

(Ramsay 2017, 30; reference omitted)

Financial Regulation Before the Crisis

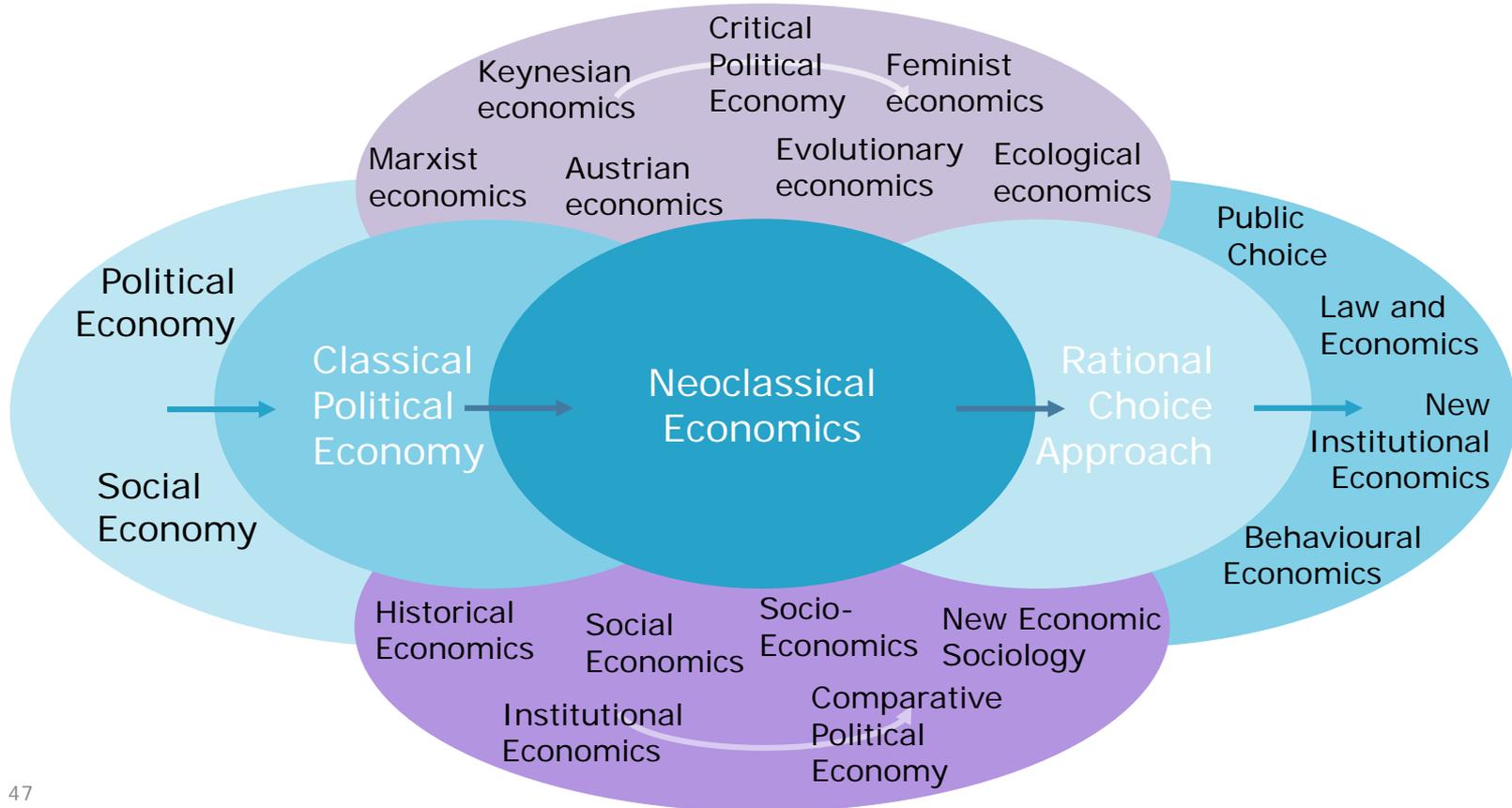
- “During this period, personal insolvency and credit regulation were treated as **separate spheres**, the former part of the social problem of over-indebtedness, the latter an economic aspect of the establishment of a single EU credit market.”
- Consumer Credit Directives before the crisis focused “primarily on promoting market growth and the ‘front end’ of credit markets with a nod to responsible lending in the 2008 credit directive”.
- Insolvency reform focused on business and corporate insolvency “with the objective of preventing forum shopping and ensuring mutual recognition of insolvency proceedings throughout the EU”.

(Ramsay 2015, 191; Ramsay 2017, 170, 172)

- “Despite tremendous intellectual investment in consumer credit research attempting to introduce a collective or societal dimension to consumer credit through the concept of **social force majeure**, this did not materialize.
- In fact, it was not the social dimension but the **economic dimension** behind consumer credit which smashed the genuine individual and individualistic concept of consumer credit and consumer insolvency.”
- “The shift from *micro* to *macro*, from *individual* consumer insolvency to *collective* household debt, from *social* concerns to *economic* concerns, entails consequences for contract law and private law.”

(Micklitz 2015, 231, 233; reference omitted)

Economic Mainstream and Its Critics



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Many thanks for your attention!



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