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## A Note on the History of European Law and Economics: Wertheim's Dissertation

Heico Kerkmeester  
University of Rotterdam

### **Abstract**

In 1930 a young Dutch scholar named W.F. Wertheim published his J.D.-dissertation *Aansprakelijkheid voor schade buiten overeenkomst* (Extra-contractual liability for damage). This dissertation did not attract much attention, and the author himself hardly did any further research on its topic. Taking in mind the development of law-and-economics some decades later, however, the book is highly remarkable. Long before the modern economic analysis of law was to be developed in the United States, attention was paid to the preventive effects of liability law and its influence on the welfare of society. In the first paragraph of this paper, Wertheim's theory will be explained. The second paragraph is devoted to the reception of the book by the legal community and to the second thoughts the author himself had about it. In the third paragraph a comparison is made between method and application of Wertheim's theory and contemporary law-and-economics. The fourth paragraph offers a conclusion.

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## A Note on the History of European Law and Economics: Wertheim's Dissertation

Heico Kerkmeester\*

In 1930 a young Dutch scholar named W.F. Wertheim published his J.D.-dissertation *Aansprakelijkheid voor schade buiten overeenkomst* (Extra-contractual liability for damage).<sup>1</sup>

This dissertation did not attract much attention, and the author himself hardly did any further research on its topic. Taking in mind the development of law-and-economics some decades later, however, the book is highly remarkable. Long before the modern economic analysis of law was to be developed in the United States, attention was paid to the preventive effects of liability law and its influence on the welfare of society.

In the first paragraph of this paper, Wertheim's theory will be explained. The second paragraph is devoted to the reception of the book by the legal community and to the second thoughts the author himself had about it. In the third paragraph a comparison is made between method and application of Wertheim's theory and contemporary law-and-economics. The fourth paragraph offers a conclusion.

### 1 Wertheim's theory and its background

This paragraph starts with some biographical notes. Thereafter, the contents of the dissertation will be explained.

#### 1.1 A short biography<sup>2</sup>

Willem Frederik Wertheim was born in 1907 in St. Petersburg in a Jewish-Dutch family. His father worked there as the director of a local branch of a Dutch insurance company. After the Russian revolution the company was nationalized and the family returned to the Netherlands.

After secondary school, Wertheim started his law studies in Leiden. The choice for law was motivated by the short duration of its study, taking into account the dire financial straits of the Wertheim family. Wertheim indicated that he was not really interested in the study of law, because it failed to present the law in its social context. He was much more interested in economics, and took an elective course in it after having been fascinated by the lectures of Van Blom, a professor of economics.

After graduation in 1929, Wertheim decided to write a dissertation under the supervision of Professor E.M. Meijers, one of the most respected lawyers in The Netherlands. In that time, law dissertations were of a limited size and could be written in a relatively short time. Wertheim's 183 page long work was certainly no exception to this rule and it was already defended in 1930. Thereafter, Wertheim moved to the Dutch East Indies, where he first worked as a civil servant and was appointed as a professor of law in 1936. After the Second World War an effort of Meijers to provide

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\* Professor, University of Antwerp; Associate Professor of Law and Economics, Erasmus University of Rotterdam; e-mail kerkmeester@frg.eur.nl.

<sup>1</sup> W.F. Wertheim, *Aansprakelijkheid voor schade buiten overeenkomst*, dissertation Leiden University, Eduard IJdo, Leiden, 1930. Referred to below as *dissertation*.

<sup>2</sup> This information is derived from an interview with Wertheim shortly before his death to the Dutch judicial weekly *Nederlands Juristenblad*. See A.J. Verheij, *De dingen die voorbij gaan: interview met Prof. dr W.F. Wertheim* (The things that pass by: interview with Prof. dr W.F. Wertheim), 73 *Nederlands Juristenblad*, 21 August, 1998, pp. 1297-1304 and J.C. Breman, In Memoriam, 6 *Facta*, December 1998, p. 19.

Wertheim with a chair for civil law on a sociological foundation at Leiden University failed. He therefore accepted a professorship in History and Sociology at the University of Amsterdam, specialising in the study of Asia.

Wertheim's career as a sociologist was a highly successful one and he earned himself an international reputation in the study of non-Western societies. His experiences during the Indonesian struggle for independence influenced his political viewpoints, and he became even notorious for his leftist thoughts. Many obituaries mentioned that he had taken Wertheim until short before his death, before he managed to see the mistakes of Mao Zedong. Wertheim died in 1998.

### 1.2 The foundation of liability law: Wertheims economic approach

The dissertation contains two parts. The first part is devoted to the legal foundation of extra-contractual liability. In the second part the relation between the theory and black letter law is investigated. Because Wertheim wrote in the Dutch language, no literal quotations are given. All the time I have represented his statements into English, staying as close as possible to their original meaning.

Wertheim argued that he was not the first one to take an economic approach to law and named Victor Mataja and René Demogue as his predecessors. In 1888, Mataja had published *Das Recht des Schadenersatzes vom Standpunkte der Nationalökonomie*.<sup>3</sup> In Wertheims eyes, however, Mataja did not go far enough because he allegedly regarded the economic viewpoint as just one of the viewpoints possible.<sup>4</sup> The authoritative legal scholar Demogue, who wrote a seven-volume *Traité des Obligations*, is mentioned several times. It does not become clear, however, what his influence on Wertheim has been and it is doubtful whether there was some influence at all.

Wertheim contended that until the middle of the nineteenth century, the authors had agreed upon the foundation of liability law. This foundation lay in the principle of guilt. Thereafter, however, the scholars still agreed on the *how* of liability law, but no longer shared their opinions on *why*.

Most authors invoked fairness as a governing principle. According to Wertheim fairness is a useful tool if questions of *how* are concerned, but it is not helpful if an explanation is to be found. He argued that the aim of the law is the promotion of the common good, which is only possible through the gratification of desires. Those desires might be material, but might be desires of the mind or the soul as well. Only individuals can experience desires, but an interpersonal comparison of those desires is possible and therefore it can be stated that the common good is promoted by a maximal gratification of individual desires.

The former is not to say that feelings concerning fairness do not have a place in Wertheims theory. They even have a twofold function. In the first place they provide for an intuitive judgment about whether a rule is in the general interest. In the second place they are the basis in which a particular type of psychological desires rest, namely the altruistic desires. For example, individuals are supposed to derive a certain amount of utility from the fact that justice is done to others.

Wertheim pretended to apply a deductive approach. The desirability of a rule could allegedly be explained by logical deduction from the postulated assumptions. The aspiration is to be as honest as possible in showing the relation of the rule with the human desires, and to make it clear that in this way a maximal fulfilment of needs will be obtained.<sup>5</sup> The extra-contractual liability for damage serves as an illustration of

<sup>3</sup> V. Mataja, *Das Recht des Schadenersatzes vom Standpunkte der Nationalökonomie*, Verlag Von Duncker & Humboldt, Leipzig, 1888.

<sup>4</sup> See Wertheim, *dissertation*, pp. 10-11.

<sup>5</sup> *Idem*, p. 8.

this method, but according to Wertheim it should equally work for other parts of the law.

In Wertheim's point of view the foundations of economic life are the following:<sup>6</sup>

- I. A maximal fulfilment of needs can only be obtained by a maximization of human labour, which should be steered into the right direction.
- II. Certainty about the performance of this labour will only be obtained, if simultaneously the fulfilment of the needs of the labouring individual is realized.
- III. Generally it holds that pursuing one's own interest will result in the activities that are most useful from an economic point of view.

Thus, welfare is the result of production and production takes place if it is in the interest of individuals to realize this. The task of the law is, according to Wertheim, to stimulate the human selfishness in an artificial way, whenever this is needed.

A next economic law that is invoked by Wertheim is the law of diminishing utility, which shows why the spread of losses makes sense.<sup>7</sup> If one person has to bear all the losses, not only the least important needs will be stopped to be satisfied, but the loss will also interfere with desires of a more vital importance. If, on the contrary, the damage is spread over many, everyone will be hurt only in his least urgent need.

Our society is built on an individualistic pattern and this leads to the principle that everyone has to bear his own damage. This did not hold for primitive societies, because in those societies damages were spread along the collectivity. In our society, however, an overkill of collectivisation would lead to too much control and coercion, albeit that in practice a collective spread of damages often is realized by means of insurance and particular regulations.

Referring to Mataja, Wertheim indicates that the principle that everyone has to bear his own damage generally has the result that an incentive to prevent an accident is provided to the individual that is in the best position to do so. Usually it is the owner of a good that is in the best position to take precautions.<sup>8</sup> The relocation of damage can result in an improved fulfilment of needs because it is conceivable that it results in the loss being borne by somebody who is in a better position to do so. The most important thing, however, is the indirect effect: the relocation of damage might result in more favourable incentives.

The desirability of a legal rule can be demonstrated by showing the relation of the rule with the human desires and to clarify that it leads to a maximal fulfilment of needs. Wertheim contended that the deductive approach he defends, is sensitive in the sense that a tiny mistake in assumptions or conclusions might have severe consequences. Therefore, he still regarded feelings about fairness as an important tool for making the necessary corrections.

### *1.3 Incentive to an advantageous activity*

In the second chapter of his dissertation Wertheim argued that the first foundation of liability is to give incentives for an advantageous activity. This is what he called the *activity* principle. The prospect of an obligation to pay damages is likely to influence the behaviour of a potential tortfeasor. This is not because we expect that the obligation will result in a remorseful tortfeasor who repents. Only criminal law might possibly have this effect. The effect of liability law is one of general prevention. Wertheim agreed with Hold von Ferneck, whom he cites: 'Nicht concrete sondern

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<sup>6</sup> Idem, p. 14.

<sup>7</sup> Idem, pp. 15-16.

<sup>8</sup> Idem, p. 8, referring to Mataja, o.c., p. 20.

abstracte, nicht individuelle sondern generelle Interessen schützt das Recht'.<sup>9</sup> On the other hand, he was critical about Petrazycki, who allegedly exaggerated the extents to which legal rules function as norms.<sup>10</sup> The preventive effect results from the prospect of reward and punishment, not just from the fact that a particular act is labelled as wrongful. If legal rules really would function as norms, it would be left unexplained why tort law is needed besides criminal law, since this provides for clear norms.

Wertheim differed from Mataja in the respect that he rejected the opinion that prevention requires that a disadvantageous result is the certain consequence of a tortuous act, and therefore only works in case of intentional torts.<sup>11</sup> Liability for negligent acts can equally have a useful influence on human activity and therefore one should not only take the undesirability of a result into account but also the chance that this will be realized. Wertheim meant, however, that the optimistic nature of man bars an objective estimation of probabilities. A probability of 50% will often be estimated to be 25%, while a chance of 10% might be neglected altogether. In chapter III alternative foundations for liability are discussed.<sup>12</sup> Wertheim objected to ability to pay as a criterion for allocating damages. If the aim is to improve the position of economically weaker parties, tort law is a tool that works irregularly while progressive taxes might do a much better job.<sup>13</sup> Redress cannot be the foundation either.<sup>14</sup> As opposed to the Middle Ages the personal desire for revenge is no longer of utmost importance, and the rest of the society does not have strong feelings as to victim compensation by means of liability law either.

In his fourth chapter Wertheim pursues his aim of reducing the different foundations for liability that have been mentioned in the literature, to the fundamental foundation of giving incentives for advantageous activity. The suggested foundations to be discussed are guilt, endangerment, control, and interest.

Wertheim regards it as evident that prevention makes sense in case of guilt, since in Dutch tort law guilt includes wrongfulness and wrongfulness plus guilt implies undesirability.

Endangerment as such cannot be the legal foundation, because lawful competition also results in damage. In the context of the activity principle, however, it is clear that liability stops where it interferes with a more useful activity.

Mataja already had argued that it might be useful to regard who was in control regarding the damage. In this context vicarious liability is relevant, such as the liability of parents for children and of employers for employees. The principle of activity then results in a higher degree of awareness, a more careful selection of personnel, etcetera.

Taking interest as legal foundation means that the one who has the most interest in the occurrence of an act, also has to bear its negative consequences. This point can be applied in the context of production.<sup>15</sup> According to Wertheim, a restrained role of government – *laissez faire, laissez passer* – generally leads to the benefit of the whole society, although disturbances may occur. It might happen that the costs of accidents are not accounted for in the costs of production. If, however, these costs have to be borne by the entrepreneur, they will become part of the production costs. If liability results in such a decline of profits that the company is no longer profitable, this shows that it was right to curb the activity. In this context two points should be taken into account. The first is that perverse effects on prevention by the victim

<sup>9</sup> See Wertheim, *disseration*, p. 24.

<sup>10</sup> *Idem*, p. 25.

<sup>11</sup> *Idem*, p. 34.

<sup>12</sup> *Idem*, p. 43.

<sup>13</sup> *Idem*, p. 44.

<sup>14</sup> *Idem*, p. 50f.

<sup>15</sup> *Idem*, p. 65f.

should be avoided. The second is that liability for lawful competition is out of the question. The most profitable company has proven itself to be the most viable, and if this company has to compensate the damages of the other, a more useful activity would be sacrificed at the benefit of a less useful one. A free competition with all its consequences is in the interest of maximal productivity.<sup>16</sup>

Bringing benefits and harms into one hand is important in other contexts as well. Buying a dog might result in a nuisance for the neighbours and if the owner is not confronted with this harm, then an incongruity between his private interest and that of society will result.<sup>17</sup>

Wertheim finally concluded that liability for the one whose interest is served by the activity that causes harm, again simply is an application of the activity principle.<sup>18</sup>

Wertheim opposed the supporters of endangerment theories who had argued that liability could be based on the performance of an activity, regardless of any interest.<sup>19</sup>

He is of the opinion that an actor always has an interest in the act he performs, at least *ex ante*. It is psychologically unthinkable that somebody performs an act without expecting that it will maximize the fulfilment of his needs.<sup>20</sup>

## 2 The reception of Wertheim's ideas

Three topics will be discussed in this paragraph. The first is the attention for Wertheim's dissertation among lawyers. The second refers to the debate in sociological circles, which was stimulated for a while by Pot's dissertation in 1960. Finally, it will be discussed how Wertheim himself looked back at his dissertation.

### 2.1 The legal debate

The renowned law professors Wolfsbergen and Langemeijer both wrote a critical review of Wertheim's dissertation.<sup>21</sup>

Wolfsbergen indicated that he would not debate with Wertheim on the promotion of the common good as the aim of the law, since Wertheim had postulated this goal as an axiom. Wolfsbergen doubted, however, whether it could provide the sole foundation of liability law and attempted to give some counterexamples. He argued that it would be socially useful if state organisations would nationalize the property of an international holding company without compensation. Moreover, competition would be undesirable because it would inevitably result in monopolization and the formation of trusts.

Other remarks of Wolfsbergen seem to be less debatable. He points out that the existence of accident insurance undermines incentives for prevention, since employees tend to take less care if they are insured.<sup>22</sup> Moreover, their focus will be less on the cure of their disease and therefore their recovery is likely to take more time. Wolfsbergen adds that even if the economic disadvantages of the insurance would be higher than the benefits, fairness – allegedly so much defamed by Wertheim – would suffice to maintain the current existence of obligatory insurance.

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<sup>16</sup> *Idem*, p. 68.

<sup>17</sup> *Idem*, p. 69.

<sup>18</sup> *Idem*, p. 76.

<sup>19</sup> *Idem*, p. 77.

<sup>20</sup> *Idem*, pp. 77-78.

<sup>21</sup> A. Wolfsbergen, *Bespreking van W.F. Wertheim, Aansprakelijkheid voor schade buiten overeenkomst* (Review of Wertheim's dissertation), *Themis* 1931, pp. 285-297. G.E. Langemeijer, *Boekbespreking* (Book review), *Weekblad voor Privaatrecht, Notariaat en Registratie* 3187, 1931, pp. 52-54.

<sup>22</sup> See Wolfsbergen, *o.c.*, p. 292.

According to Wolfsbergen, the fact that the insane might be held liable for their acts is also hard to explain on the basis of considerations of prevention.<sup>23</sup>

Wolfsbergen noted that the public at large is not much interested in liability law, which proves that only the relation between the tortfeasor and his victim is relevant. Therefore, victim compensation must be the most important need that is satisfied by liability law.<sup>24</sup>

Langemeijer was equally critical. He did not regard Wertheim's thesis concerning the common good as goal and standard of the law as obviously wrong.<sup>25</sup> This thesis, however, would be easier to apply to inheritance law than to liability law. Inheritance law indeed serves economic goals, because the fact that a testate may decide upon the fate of his estate stimulates him to acquire this capital in the first place.<sup>26</sup>

Langemeijer shared Wolfsbergen's opinion that compensation rather than prevention is the aim of the liability law. He accused Wertheim of finding a public law justification for the payment of damages, thereby removing himself miles apart from the reality of the law. If prevention were the goal, it would not be left to the victim to claim damages. Moreover, the compensation than should be proportional to the dangerousness and carelessness of the act, rather than to the damage as it occurred.

Langemeijer applied a more positive tone where he reviewed Wertheim's opinions concerning strict liability. He agreed with the author's vision on vicarious liability for employers and with the idea that damage should be borne by the person who is in the best position to obtain insurance.

It should be added that Langemeijer five years later admitted that his review had been too negative and that, on second thoughts, the opinion that law serves the common good is maintainable for the whole of the law.<sup>27</sup>

Wolfsbergen, on the contrary, kept on insisting that the acceptance of general prevention as a goal ignores that not the economic useful, but first and foremost justice determines the law.<sup>28</sup>

An important criterion for judging the reception of Wertheim's ideas obviously is their influence on liability law. The conclusion can only be this influence is all but absent. In the exceptional cases in which Wertheim was cited at all, the only aim appeared to be to criticize his opinions and consequently present the ideas of the author as a more acceptable alternative. For example, R.J. Polak argued that to search for the foundation of tort liability in an economic motive is equal to the denial of its legal character.<sup>29</sup> It could not provide for a legal right of the victim, but only allowed him to take profit from the principle.

W.J. Slagter spent a considerable number of pages for an attack on Wertheim in his dissertation on the foundation of tort law.<sup>30</sup> His first remark is that Wertheim fails to distinguish public law and private law. Liability law is private law that serves to protect the individual victim, no public law that protects the whole community against

<sup>23</sup> Idem, p. 296.

<sup>24</sup> Idem, p. 294-295.

<sup>25</sup> See Langemeijer, o.c., p. 53.

<sup>26</sup> Compare Wertheim, *dissertation*, p. 177.

<sup>27</sup> See G.E. Langemeijer, Een belangwekkende theorie op het gebied der algemeene rechtsleer (An important theory in the area of the general theory of law), *Nederlands Juristenblad*, 1 februari 1936, p. 95.

<sup>28</sup> See A. Wolfsbergen, *Onrechtmatige daad* (Tort), Universitaire Pers Leiden, Leiden, 1946, p. 4.

<sup>29</sup> See R.J. Polak, *Aanspraak en aansprakelijkheid uit onrechtmatige daad* (Claim and liability out of tort law), dissertation University of Amsterdam, W.E.J. Tjeenk Willink, Zwolle, 1949, p. 8.

<sup>30</sup> See W.J. Slagter, *De rechtsgrond van de schadevergoeding bij onrechtmatige daad* (The legal foundation of damage payment in tort law), dissertation Leiden University, Luctor et Emergo, Leiden, 1952, pp. 159-176.

tortuous acts.<sup>31</sup> Wertheim misused damage payments to serve as punishments, and his focus on general prevention brought him at the domain of the criminal law.<sup>32</sup> In the second place, being wrongful is not the same as being objectionable from an economic perspective. Not all legal norms are aimed at pursuing economic aims, since some have social or moral goals.<sup>33</sup> In the third place, Slagter argued that the activity principle cannot explain the existence of strict liability. In cases of strict liability, such as the vicarious liability that employers bear for their employees, the liable person cannot avoid the damage and therefore prevention as a goal makes no sense.<sup>34</sup> Apparently, Slagter overlooked the point that strict liability might provide for incentives for reduction of the probability of damage.

An exception to the rule of neglect of or negative attitude towards Wertheim, was his high school friend Carel Vigelius. Vigelius elaborated upon the idea of prevention as a goal of tort law, arguing that the foundation of damage in liability law was exactly the same as the foundation of punishment in criminal law. In both fields it amounted to special prevention and particularly general prevention.<sup>35</sup>

The only other author that wholeheartedly agreed on a number of Wertheim's main points was J.M.M. Maeijer.<sup>36</sup> He agreed on the point that while the principle that everyone has to bear his own damage fits well in our individualistic society, a certain amount of collectivisation makes sense.<sup>37</sup> Maeijer also shared the opinion that prevention is a goal of tort law, although he regarded this goal as only subordinated.<sup>38</sup> He is definite in his opinion that Wertheim was right in stating that the transfer of damages on the basis of ability to pay, is a very poor method for the mitigation of the discrepancies in society.<sup>39</sup>

## 2.2 The sociological debate

A short revival in the attention for Wertheim's dissertation occurred in 1960, when H.J. Pot published a dissertation *Maatschappij en Recht* (Society and Law) on the effect of law on society.<sup>40</sup> In this work, also paid extensive attention to an article *Kernvragen van wetgeving* (Fundamental question of legislation) that Wertheim had published in 1935.<sup>41</sup>

Pot was critical about lawyers who aim at determining the contents of the law on the basis of legal principles, without taking the effect of laws on society into account. Wertheim, who pretended to do the latter, is similar to other lawyers in the respect that his main goals were in the ethical domain.<sup>42</sup> Wertheim stated that the law can

<sup>31</sup> Idem, p. 167.

<sup>32</sup> Idem, p. 170.

<sup>33</sup> Idem, p. 171.

<sup>34</sup> Idem, p. 173.

<sup>35</sup> See C. Vigelius, *De elementen van artikel 1401 BW* (The elements of article 1401 Dutch Civil Code). In: *Rechtskundige Opstellen door oud-leerlingen aangeboden aan prof. Meijers* (Liber amicorum Prof. Meijers), 1935, blz. 831.

<sup>36</sup> See J.M.M. Maeijer, *Matiging van schadevergoeding* (Mitigation of damage payments), dissertation Catholic University Nijmegen, Louis Vermijs, Breda, 1962.

<sup>37</sup> See Maeijer, *o.c.*, pp. 68-69.

<sup>38</sup> Idem, pp. 132-133.

<sup>39</sup> Idem, p. 139.

<sup>40</sup> See H.J. Pot, *Maatschappij en Recht: Beschouwingen over de maatschappelijke werking van het recht als studieobject der rechtswetenschap* (Society and Law: Views on the social effect of law as an object of study for the science of law), dissertation University Leiden, H.D. Tjeenk Willink, Haarlem, 1960.

<sup>41</sup> W.F. Wertheim, *Kernvragen van Wetgeving* (Fundamental questions of legislation). In: *Rechtskundige Opstellen door oud-leerlingen aangeboden aan prof. Meijers* (Liber amicorum Prof. Meijers), 1935, pp. 716-792. Cited below as *Kernvragen*.

<sup>42</sup> See Pot, *o.c.*, p. 55.



only be right if it results in the right effects on society. A consequence of this normative approach is that there is hardly any room left for actual research on the effects of law.<sup>43</sup> The empirical data that supported Wertheim's pretension that liability law has a preventive effect clearly was insufficient.<sup>44</sup>

Another point of critique was that Wertheim was too much focused on proving that his deductive approach yields the same results as could be obtained with the traditional approach, that was based on sense of justice. As a consequence, Wertheim was reasoning towards his goal and hardly developed any new viewpoints as to the desirable contents of the law.

### 2.3 Wertheim's retrospective

Three themes can be recognized in later publications, in which Wertheim was critical about his own dissertation. In the first place he was not so much interested anymore in applying a deductive method as well as in the study of the effects of law, which he regarded to be a task of the sociology of law. In the second place he is no longer convinced about the congruence between senses of fairness and the demands of the common good. In the third place he came to regard the concept of man used in his dissertation as too simple

As to the first point, the article *Kernvragen van wetgeving* already indicated a change of mind. Here Wertheim admitted that although in his dissertation he had pretended to recognize the effect of law on society, he had tested his theory on the basis of the contents of law and not on the basis of its functioning. In reply to Pot he agreed with the point that he had failed to make a sharp distinction between *Sein* and *Sollen*, since he had been guilty of making normative judgments about the law<sup>45</sup>

As to the second point, in his 1961 article on the social effects of the law - *De maatschappelijke werking van het recht* – Wertheim cast doubts about the non-problematic concept of the common good that he had used in his dissertation. Moreover, he had been of the belief that law is aimed at the promotion of this common good. Already in his 1935 article *Kernvragen*, Wertheim had come to recognize that legislation often is not enacted with the common good in mind, but may well be the result of a collision of numerous interests.<sup>46</sup> The common good could no longer be regarded as the only founding criterion for the law. In the law all type of results can be found that are not directly related to the fulfilment of needs. Law is also under the influence of ethical notions in society, of constitutional outcomes and of all kind of cultural factors.<sup>47</sup> Like Bentham did with his criterion “the greatest happiness of the greatest number of men”, he had wrongly suggested in his dissertation that the common good would amount to a simple sum of interests. In reality, many rate their individual interest or group interest higher than the general interest. Others are of the opinion that immoral needs should be left out, that it should be required that the fulfilment of needs further cultural interests, or that a just fulfilment of needs is concerned. Wertheim regarded it as problematic that in his dissertation his focus had been on showing how his analysis could yield the same results as could have been obtained by the traditional method through senses of justice.<sup>48</sup> Hereby he had introduces an ethical element that put up smokescreens around the real issue, namely the empirical question about the effects of the law.

<sup>43</sup> Idem, p. 67.

<sup>44</sup> Idem, p. 68.

<sup>45</sup> W.F. Wertheim, *De maatschappelijke werking van het recht* (The social effect of the law), *Mens en maatschappij*, 1961, p. 260. Cited below as *Maatschappelijke werking*.

<sup>46</sup> See Wertheim, *Kernvragen*, p. 771.

<sup>47</sup> Idem, p. 785.

<sup>48</sup> See Wertheim, *Maatschappelijke werking*, p. 258.

As to the third theme, Wertheim was influenced by the Swedish author Anders Lundstedt. In *Kernvragen*, Wertheim indicated that he shared Lundstedt's objections to the concept of the homo economicus.<sup>49</sup> The Benthamite vision that human acts are a result of an exact and conscious calculation of pleasure and pain creates the fiction of the homo economicus, which does not fit into twentieth century law. Man is not an isolated individual, but the plaything of countless social influences.<sup>50</sup> Moreover, he is ambivalent and sometimes irresistibly attracted to danger or even to the certainty of pain.<sup>51</sup> The consequence of these second thoughts was that Wertheim came to see the influence of civil law as restricted to the economic domain.<sup>52</sup> This brought him to criticize not only the science of economics, but also the old ideal of *laissez faire, laissez passer*. Any legal rule interferes with this principle.

### 3 The dissertation from the viewpoint of contemporary law-and-economics

It goes without saying that Wertheim, who had received no mathematical and hardly any economic training, could not be expected to develop an economic analysis that comes close to the rigour with which it is performed nowadays. But as Ronald Coase and Richard Posner have shown, formal rigour is no necessary condition for the development of path-breaking views. An interesting issue is whether Wertheim predated some of the insights of contemporary law and economics, and whether his conclusion about the optimal rules corresponds with the present thoughts. In the first part of this paragraph Wertheim's goals, hypothesis and methodology, as presented in Part I of his dissertation will be discussed. The second part of this paragraph is, like Part II of the dissertation, devoted to the applications of his theory on liability law.

#### 3.1 Goals, hypothesis, and methodology

A first issue is the main contribution that is expected from economics. Did Wertheim believe in correct predictions of the influence of legal rules on individual behaviour? If so, did those predictions serve as a tool for developing those legal rules that would allow the aim of a maximal fulfilment of needs would be reached? Or is economics rather a tool that allows a check on the internal logic and coherence of a legal system?

In this respect there is some ambivalence in Wertheim's work, which corresponds with the ambivalence that exists in law-and-economics. As indicated above, Wertheim on the one hand pleads for research into the effects of the law, while on the other hand he is sceptical about the possibility to base legislation on this research. In his dissertation he did not offer any empirical proof for the alleged effects of the law, but this did not restrain him from making statements about the desirability of concrete legal rules on the basis of conclusions derived from his deductive system. The parallel with law-and-economics is obvious. The development of a positive economic theory is a praiseworthy endeavour that is propagated in law-and-economics as well, but the practical value of the economic analysis of law impossibly can be found only here. To which extent individuals really act in accordance with the predictions derived from economic models, is an issue of empirical research that has yet to be settled.<sup>53</sup> Like Wertheim in his dissertation, law-and-economics scholars

<sup>49</sup> See Wertheim, *Kernvragen*, pp. 748-749.

<sup>50</sup> Idem, p. 749.

<sup>51</sup> See Wertheim, *Maatschappelijke werking*, p. 82.

<sup>52</sup> See Wertheim, *Kernvragen*, p. 761.

<sup>53</sup> D. Dewees, D. Duff en M. Trebilcock, *Exploring the Domain of Accident Law: Taking the Facts Seriously*, Oxford University Press, Oxford, 1996, provides for an overview of empirical support for the economic analysis of (part of) liability law.

generally feel that they find sufficient support for their conclusions in the fact that they logically follow from the assumptions stated in their deductive models.

An additional explanation for the existence of the parallel just described might be found in the ideological effects of economic theories. Nineteenth century economic theories arguing for a restrictive role of government in economic life clearly influenced the vision of law that was expressed in Wertheim's dissertation and it is equally clear that those theories influenced the black letter law of their times. Pleas for a restraint government are common in law-and-economics as well, and it should come as no surprise that law-and-economics scholars tend to derive their examples of efficient law from nineteenth century court cases.<sup>54</sup>

A similar analysis can be made as to the correspondence that exists concerning the alleged orientation of the law towards the common good. Wertheim originally was of the opinion that the law can be understood on the basis of its goal to promote the common good. In its essence this is in accordance with Richard Posner's well-known thesis that the Common Law can be explained from a strive towards wealth maximisation.<sup>55</sup> Posner uses this concept of wealth maximisation as his personal variant on the utilitarian principle, measuring not in terms of utility but in terms of money. One of the reasons to do so, is to facilitate interpersonal comparisons. The fact that interpersonal comparisons of utility are hard to make is an issue that is taken too light-heartedly by Wertheim. For the economic analysis of concrete rules of liability law, however, this distinction in measuring rods is of a very limited importance. On the contrary, there is an important difference between the law-and-economics approach and the adjusted ideas on welfare that Wertheim presented in *Kernvragen van wetgeving*. The amendments he made there, concerning the exclusion of immoral desires, demands of justice, and the like, are not common in law-and-economics.<sup>56</sup>

An interesting point is that Posner merely argues that the Common Law, that is judge made law, is efficient, while statute law on the other hand is supposed to be inefficient. As has been elaborated in public choice theory, statute law often is the result of rent-seeking by groups that have either a particular conception of the general interest in mind, or simply further their particular interests. Wertheim does not clearly distinguish judge made law and statute law, but in accordance with the public choice vision he connects his subsequent doubts about the orientation of the law towards the coming good with statute law allegedly being the result of a collision of group interests.<sup>57</sup>

Another remarkable parallel exists as to Posner's efficiency-as-justice-thesis.<sup>58</sup> While Wertheim regarded senses of fairness as an intuitive judgment about the conformity of a legal rule with the general interest, Posner argued that notions about justice actually are judgments about efficiency. Posner's thesis is often criticized, and as indicated Wertheim later had his doubts about his own variation. On close scrutiny, however, Wertheim's position is not that odd. It should be considered that he wrote in a different time, and moreover referred back to Mataja's work from 1888. In this light it is certainly possible that the ideologies that pleaded for a restrictive role for

<sup>54</sup> The clearest example of course is R.H. Coase, *The Problem of Social Cost*, 3 *Journal of Law and Economics*, 1960, pp. 1-44.

<sup>55</sup> See R.A. Posner, *Economic Analysis of Law*, 4<sup>th</sup> edition, Little, Brown & Co, Boston, 1992.

<sup>56</sup> Although admittedly the qualification of illicitly acquired utility as immoral and the need for its exclusion from the social welfare function is vehemently debated in the economic analysis of criminal law. See D.D. Friedman, *Law's Order: What Economics Has to Do with Law and Why It Matters*, Princeton University Press, Princeton, 2001, for an overview of this discussion.

<sup>57</sup> See Wertheim, *Kernvragen*, p. 711.

<sup>58</sup> See on this thesis R.A. Posner, *The Economics of Justice*, 2<sup>nd</sup> ed., Harvard University Press, Cambridge, MA, 1983, pp. 88-115.

government and that believed in realizing the general interest by stimulating individual interests, might have influenced the ethical judgments of their time. A next point is the similarity between Wertheim and law-and-economics where the relation between norm and fact is concerned. The relationship between positive and normative approaches in law-and-economics is complicated and continuously up for discussion. On the one hand it is pretended that the aim is the explanation of the law out of a pursuit of the common good, respectively wealth maximization. This is a positive approach, as is empirical research on the effects of the law. On the other hand, it is argued that black letter law should be in accordance with the goals that have been postulated by the scholars and then a normative approach pops up. Like Posner in his *Economic Analysis of Law*, Wertheim in his dissertation actually was mostly involved in justifying and evaluating the law from an economic perspective. As indicated, in retrospect Wertheim had his doubts about his approach at this point. The last issue to be mentioned here is Wertheim's opinion that progressive taxes are a better way of redistribution from rich to poor, than a favourable attitude of the judge towards weaker parties is.<sup>59</sup> This is evidently in accordance with the reigning viewpoint on this issue in law-and-economics, as presented by Kaplow and Shavell.<sup>60</sup> In order to compare Wertheim's methodology with the dominant neo-classical approach in law-and-economics the three main characteristics of the latter approach have to be distinguished. Those characteristics are methodological individualism, the hypothesis of rationality, individual property rights, and the existence of explicit or implicit markets.

Methodological individualism states that individuals are the starting point of the analysis. Only individuals are able to act and welfare is measured on the basis of individual welfare. In his dissertation, Wertheim applies this when he argues that in order to motivate to perform labour, it is needed to realise the maximal satisfaction of the needs of the individual whose labour one is considering.<sup>61</sup> Moreover, he defines the common good as a maximum of fulfilments of individual needs.<sup>62</sup>

The hypothesis of rationality implies that individuals order their preferences, relate these to the limit of their possibilities given the restraints, and finally choose on the basis of this balancing. In law-and-economic it is added that it is not decisive whether individuals make such calculations as a matter of fact, but whether it is possible to predict their behaviour by acting *as-if* this is the case. At this point there is a principled methodological difference with Wertheim, who requires that already at the level of the assumptions conformity with human behaviour should exist.

In being sceptical about the human ability to estimate chances correctly, Wertheim deviates from the neo-classical model, but is more in line with behavioural law and economics.

Obviously Wertheim does not use the term property rights, which anyway is hard to translate into Dutch legal terminology. However, I already referred to his viewpoint that for a maximal production it is required that the performers of the labour maximize the satisfaction of their needs by working.<sup>63</sup> This indicates that Wertheim recognized the importance of individual property rights in body and labour. Elsewhere, Wertheim indicates that legal certainty is required in order to make use of all the energies in society, since individuals should be aware of the fact that they enjoy safe and undisturbed possession of the goods they have obtained.<sup>64</sup>

<sup>59</sup> See Wertheim, *dissertation*, p. 44.

<sup>60</sup> L. Kaplow and S. Shavell, Why the Legal System is Less Efficient than the Income Tax in Redistributing Income, 23 *Journal of Legal Studies*, 1994, pp. 667-681.

<sup>61</sup> See Wertheim, *dissertation*, p. 14.

<sup>62</sup> *Idem*, p. 7.

<sup>63</sup> *Idem*, p. 14.

<sup>64</sup> *Idem*, p. 72.

Wertheim's recognition of the importance of markets becomes – albeit implicitly – apparent from his statement that productive labour consists of moving goods to the places where they can be used best.<sup>65</sup>

### 3.2 Applications

The degree to which Wertheim's goals, hypotheses, and methodology are in accordance with those of law-and-economics suggests that his statements about the law will appear to be similar as well. Whether this indeed is the case will be discussed in this paragraph. The topics under consideration are general insights of law-and-economics, as well as the more specific subjects of contributory and comparative negligence, causation, strict liability, liability insurance, and the relation between liability law and criminal law.

#### 3.2.1 General insights

Apart from the Coase-theorem, that is not really relevant since Wertheim discussed cases of high transaction costs, the most important tool in the economic analysis of liability law is the Hand-formula. In Judge Learned Hand's original formulation liability exists if  $B < p * L$ , where B stands for the burden of precautions, p for probability and L for loss.

The formula should be interpreted in the sense that  $p * L$  is the expected damage, existing of the sum of all possible extents of damages, multiplied by their probabilities. This requires among other things the ability to determine the probability of low frequency events. It is evident that such an explicit formula does not fit into Wertheim's assumption that men's optimistic nature brings him not only to underestimate probabilities of accidents, but also to neglect small probabilities completely.

A second explanation for the fact that Wertheim did not anticipate the Hand-formula, is that he was so obsessed with the aim of prevention that he overlooked the possibility that the benefits of preventive measures fail to outweigh the costs of care. This is obvious from his remark that it almost never happens that additional care is inappropriate.<sup>66</sup> At this point Wertheim was rightly criticized by Pot, who noted that a heavy liability would rather have a paralysing than a useful effect.<sup>67</sup> It should be noted here that Wertheim makes an exception to the rule just formulated in case the possibility of prevention by the victim is relevant, an issue to be discussed in the next paragraph.

Another issue where Wertheim failed to anticipate contemporary economic analysis is the so-called level of activity, introduced by Steven Shavell in 1980.<sup>68</sup> Besides the level of care of tortfeasor and victim, also the intensity with which they perform an activity is relevant. An owner of a dog can take care by means of precautions like muzzling, but also lower his activity level by walking his dog less often. Again this was a point noted by Pot, who correctly blamed Wertheim for taking account of the first alternative, but failing to notify the second one.<sup>69</sup> An additional consequence of Shavell's terminology is that Wertheim's choice for the expression activity principle is a bit awkward.

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<sup>65</sup> Idem, p. 20.

<sup>66</sup> Idem, p. 88.

<sup>67</sup> See Pot, o.c., p. 129.

<sup>68</sup> See S. Shavell, *Strict Liability versus Negligence*, 9 *Journal of Legal Studies*, 1980.

<sup>69</sup> See Pot, o.c., p. 126, nt 1.

A general insight that Wertheim however did expect was the relevance of risk spreading, in the sense that a loss is a lower burden if it is spread over a larger group of people and/or is spread over time.<sup>70</sup>

### 3.2.2 Contributory and comparative negligence

Wertheim had a strong interest in the issue how in cases where both tortfeasor and victim could have taken precautionary measures (bilateral accidents in the law-and-economics jargon), the damage should be apportioned over both. According to Wertheim, not every obligation to pay damages is useful, because the sense of prevention is limited to prevention towards the victim.<sup>71</sup> The pedestrian would not have been run over by the car, if he had not crossed the street at this point and at this moment of time. The sparks emitted by the locomotive would not have caused damage to the owner of the wood, if he had taken the necessary precautions to protect his timber against fire.<sup>72</sup> Moreover, if a victim has to bear part of his loss, this not only effects prevention, but also results in the spreading of damage.<sup>73</sup>

Two issues are regarded as relevant here. In the first place it is important to find out how far both acts are apart from the economic ideal. Should motorists be more careful in driving, or should pedestrians be more careful in crossing the street? In the second place it should be found out how likely it is that the prospect of having to bear a loss will result in the desired behaviour.<sup>74</sup>

Wertheim's pleads for comparative negligence as a tool for giving both parties the right incentives. This outcome is not wrong to modern standards, but Wertheim formulated it to hastily. There are a few drawbacks for rules that apportion loss over both parties as opposed to a rule of contributory negligence that bars a negligent victim completely from receiving compensation. A rule of comparative negligence is more complex to administer, requires more information, and thus is more expensive to apply. Moreover, there is no guarantee that a compromise leads to optimal incentives for care.<sup>75</sup> It could for example cause both parties to take insufficient precautions.

Nevertheless, many regard compromises like the one supported by Wertheim as efficient because they take into account that judges might err in applying the correct standard for contributory negligence.<sup>76</sup> The consequences of such an error are only of a limited extent if they merely result in a limited shift in liability and not in a complete reversal.

A related issue that is worth to mention, is Wertheim's viewpoint on insolvency in case there are multiple tortfeasors.<sup>77</sup> Like contemporary law-and-economics,<sup>78</sup> he pleads for joint and several liability for the tortfeasors, so that the tortfeasor who is solvent can be held liable for all of the damage.

### 3.2.3 Causation

<sup>70</sup> Compare G. Calabresi, Some Thoughts on Risk Distribution and the Law of Torts, 70 *Yale Law Journal*, 1961, pp. 499-553.

<sup>71</sup> See Wertheim, *dissertation*, p. 30.

<sup>72</sup> *Idem*, pp. 30-31.

<sup>73</sup> *Idem*, p. 33.

<sup>74</sup> *Idem*.

<sup>75</sup> See R.A. Posner, A Theory of Negligence, 1 *Journal of Legal Studies*, 1972, p. 29.

<sup>76</sup> See e.g. D.L. Rubinfeld, The Efficiency of Comparative Negligence, 16 *Journal of Legal Studies*, 1987, pp. 375-394.

<sup>77</sup> See Wertheim, *dissertation*, pp. 118-119.

<sup>78</sup> Compare L.A. Kornhauser en R.L. Revesz, Apportioning Damages Among Potentially Insolvent Actors, 19 *Journal of Legal Studies*, 1990, pp. 617-651.

In the context of causation a comparison can be made between on the one hand Wertheim's viewpoint regarding the theory of Demogue-Besier, and on the other hand Grady's uncertainty theorem.<sup>79</sup> The theory Demogue-Besier requires a specific relationship between the wrongful character of an act and the damage. If somebody drives a car without a license and an accident happens that is not his fault, then a causal relationship as required by Demogue-Besier is lacking. It is not considered to be relevant that it is unlawful and therefore ipso facto tortious to drive without license. Wertheim offered many arguments against the theory Demogue-Besier, and all the time his crucial point was that it results in a limitation of liability and therefore in a limitation of the effect of tort law on liability.

The law-and-economics literature urges a different conclusion. The issue is illustrated with the help of the case *Bolton v. Stone*. Suppose that the standard for negligence requires the owner of a cricket field to build a ten feet high fence. Experience has shown that given the low frequency of cricket balls crossing such a fence, a higher one is not cost-justified. Suppose now that the owner is negligent by erecting a fence that is only nine feet high. It is clear that he will be held liable for damage caused by balls crossing the fence at a height of between nine and ten feet. If those balls hit a window or a passer-by, the damage would not have occurred if the owner were not negligent. If, however, the owner is also liable for all balls that leave the field at a height of ten feet, a slight deviation from the standard of care might result in a considerable rise in the number of cases in which one will be held liable. This would not be a problem if it could always be determined with precision what is needed to avoid negligence, because in that case a potential tortfeasor could avoid liability by simply follow this guideline. Unfortunately, however, in practice the negligence rule is not so precise. Fear of liability will therefore bring a potential tortfeasor to stay on the safe side and to take a higher amount of care than is optimal from an economic point of view.

#### 3.2.4 Strict liability

Wertheim was particularly interested in the vicarious liability of employers for damage caused by the employees. His arguments for this strict liability are similar to those used in law-and-economics.<sup>80</sup> In the first place, employer's liability results in bringing benefits and harms into the same hand,<sup>81</sup> or in modern terminology will lead to an internalisation of negative external effects. In the second place, the employer generally is most able in foreseeing the damage, and therefore he is also in the best position to take precautions or to buy insurance. In the third place, liability for subordinates will give an incentive for a careful selection and monitoring of personnel. An additional advantage of strict liability is that it is often hard to prove negligence and strict liability might therefore result in a saving of trial costs.<sup>82</sup>

#### 3.2.5 Liability insurance

A well-known problem in the economic analysis of liability and insurance is the undermining of the preventive effect of tort law by moral hazard. If the tortfeasor no longer has to pay for the damage he causes, an incentive to avoid this damage disappears.

<sup>79</sup> See for the latter M. Kahan, 'Causation and Incentives to Take Care under the Negligence Rule', 18 *Journal of Legal Studies*, 1989, pp. 427-447.

<sup>80</sup> S. Shavell, *Economic Analysis of Accident Law*, Harvard University Press, Cambridge, MA, 1987, pp. 170-175.

<sup>81</sup> See Wertheim, *dissertation*, p. 151

<sup>82</sup> *Idem*, p. 157.

Wertheim is correct in distinguishing insurance and contractual exoneration of liability. The latter is not a violation of the principle of prevention being a foundation of liability, since the contracting party will not allow liability to be excluded without receiving an equivalent benefit in return.<sup>83</sup> Insurance does undermine the preventive effect, but this is partly compensated by the effect of more risk spreading. However, insurance must be forbidden in case of intentional acts or gross negligence, and moreover the insured should be made to bear a proportional part of the damage himself.<sup>84</sup>

Again, Wertheim's opinions are generally correct, but as his critic Pot observed,<sup>85</sup> a few important points are neglected. Whether prevention really is undermined by liability insurance depends on a comparison of respective influence on behaviour by judge and insurer. It is possible, at least in theory, that monitoring of the behaviour of the insured by the insurer yields the optimal incentives.<sup>86</sup> Moreover, if Wertheim would be correct in his doubts about the human ability to determine the probabilities of accidents correctly, this would yield an additional argument for insurance. On the basis of the data he has available, the insurer is in a unique position to calculate probabilities. Through his premium settings he provides this information, and the incentives based on it, to the potential tortfeasors.

### 3.2.6 Liability law versus criminal law

The relation between liability law and criminal law is not so much an application of Wertheim's theory, as well as a theoretical issue that already is analysed in the first part of the dissertation.

The modern economic analysis of criminal law started with Gary Becker, who argued that a balance should be made between on the one hand the costs of criminal acts to society, and on the other hand the costs of enforcing the law.<sup>87</sup>

Wertheim's analysis runs as follows.<sup>88</sup> The severity of the punishment is mainly depending on the proportion between the benefit that an act is prevented and the disadvantage that in particular cases the convicted will be made to suffer, the latter always being a wrong from the viewpoint of society. The higher the interest in preventing the act, that is to say the more anti-social it is, the more one is prepared to spend in order to prevent it. The punishment therefore is somewhat proportional to the degree of undesirability.

An important difference is that while Becker regards fines to bring along hardly if any social costs, Wertheim is of a different opinion. On the basis of the theory of declining marginal utility, he points out that the payment of a fine by the individual to the state always results in a net loss of welfare.<sup>89</sup>

Particularly remarkable is that Wertheim considers punishment to have always a shaming element.<sup>90</sup> This fact limits the applicability of criminal law. If the members of society do not regard acts that are legally defined as criminal as objectionable,

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<sup>83</sup> Idem, p. 92.

<sup>84</sup> Idem, p. 94.

<sup>85</sup> See Pot, *o.c.*, p. 127.

<sup>86</sup> S. Shavell, On Moral Hazard and Insurance, 93 *Quarterly Journal of Economics*, 1979, pp. 541-562.

<sup>87</sup> G.S. Becker, Crime and Punishment: An Economic Approach, 76 *Journal of Political Economy*, 1968, pp. 169-217.

<sup>88</sup> See Wertheim, *dissertation*, p. 31.

<sup>89</sup> But see R.A. Posner, An Economic Theory of Criminal Law, 85 *Columbia Law Review*, pp. 1193-1231.

<sup>90</sup> See Wertheim, *dissertation*, p. 28.



punishments will no longer be seen as shameful. In law-and-economics the shaming element of punishment has only recently risen to attention.<sup>91</sup>

#### 4 Conclusion

With the knowledge of seventy years hindsight it is not hard to find weak spots in Wertheim's line of reasoning. Wertheim failed to anticipate the two crucial breakthroughs in the economic analysis of liability law, namely the Hand-formula and the Coase-theorem. On a number of issues – like comparative negligence and insurance – he was on the right track, but his analysis was shallower than that of contemporary writers.

Taking into account, however, that Wertheim wrote his dissertation back in 1930, in a period of one year, and when he was only 22 years old, his achievement is phenomenal. He applied a deductive method based on simplifying assumptions regarding human behaviour. Like Posner would do, over forty years later, Wertheim simultaneously used a welfare criterion as explanation and standard for the law, and strived for economic rationalisations of the positive law.

It is doubtful whether Wertheim has ever recognised what a pioneering work he had done. He was aware of the existence of law-and-economics and of attention for prevention in the economic analysis of liability law, but indicated that he had not kept up with it.<sup>92</sup> He talked about the shortcomings in his dissertation and doubted whether he would have received a cum laude in case that possibility had existed at Leiden University at that time.

The paradox is that the simplifying assumptions that Wertheim later regarded as shortcomings – the conviction that the contents of the existing legal rules was in accordance with the general interest, simplifying assumptions with respect to how law influences individuals – resulted in the remarkable parallels with contemporary law-and-economics.

As so often, a lack of an excess of established knowledge combined with what Wertheim himself labelled as youthful recklessness,<sup>93</sup> were the main ingredients for the ability to write a strikingly original work. What Wertheim wrote at the age of 22, he would not have dared to publish anymore five years later, as is shown by *Kernvragen van wetgeving*.

It is a pity that the dissertation was written in Dutch and specifically referred to the Dutch law, and therefore was inaccessible for the Americans who in the 1930s thought about the economic foundations of the law.<sup>94</sup> By the time the polyglot Wertheim started to write in other languages his interests had shifted towards sociology. Undoubtedly, Wertheim would have picked up his research in the social function of the law in case the intended appointment as a professor in civil law on a sociological foundation at Leiden University had taken place. It is doubtful, however, whether the empirical research that Wertheim would have performed in this function would have been economically orientated. It were exactly the sharp economic statements in his dissertation that Wertheim now regarded as an inability to nuance due to his youth. However, 42 years later it would be the same boldness, which attracted so much attention to Posner's *Economic Analysis of Law*.

<sup>91</sup> See e.g. D.M. Kahan, What do Alternative Sanctions Mean?, 63 *University of Chicago Law Review*, 1996, pp. 591- 653.

<sup>92</sup> See Verheij, o.c., p. 131.

<sup>93</sup> See Wertheim, *Maatschappelijke werking*, p. 255.

<sup>94</sup> Compare N. Duxbury, *Patterns of American Jurisprudence*, Clarendon Press, Oxford, pp. 65-159, on among others Karl Llewellyn, who is cited by Wertheim in *Kernvragen van wetgeving*.

Not only Wertheim's shift from economics to law seems to be relevant in this context, but also his swing in political orientation. Although law-and-economics emphatically is not a political movement, it is fair to state that the laissez-faire ideology that in the nineteenth century influenced economic thinking as well as the law, went through a renaissance in modern law-and-economics. During the economic crisis of 1930s the perceived need for government interventions in economic life increased. It was not only Wertheim who became estranged from the economic thoughts of the nineteenth century, but the dominant ideology changed also and limited the room for economic thinking in the law. The Dutch legal historian Govert van den Bergh indeed explained the lack of attention for the dissertations of Wertheim and Pot out of the separation that had grown between law and economics, as well as out of the radical left-wing viewpoints Wertheim had developed after the Second World War and that made him unaccepted in certain circles.<sup>95</sup>

In retrospect Wertheim's theory looks so modern, because decades before the emergence of modern law-and-economics in the United States he developed an approach that is similar in its essence. The paradox is that for an important part this is the case because he reverted to the work of Mataja from 1888.

The importance of Wertheim is that he anticipated a considerable amount of ways of thinking and conclusions of law-and-economics. On the other hand, he did not in any respect influence any law-and-economics scholar directly, and neither do his ideas urge us to adjust any of the current insights in law-and-economics. His dissertation makes clear, however, that law-and-economics in the Posnerian sense is not at all as typical American, or depending on the Common Law, as used to be thought.

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<sup>95</sup> G.C.J.J. van den Bergh, Het rechtswetenschappelijk forum, een buitenbeentje? (The forum of legal science: an outsider?). In: F.P.H. Dijksterhuis en J. Griffiths (red.), *De forumfunctie bij de sociaal-wetenschappelijke bestudering van het recht* (The function of the forum in social sciences and the law), Wolters-Noordhoff, Groningen, 1990, p. 65