Defining the Common Good and Social Justice

Popular and Legal Concepts of *Wucher* in Germany from the 1860s to the 1920s

**MARTIN H. GEYER**

**Introduction**

*Wucher*, or usury, is an ambiguous and elusive term. It intermingles various meanings derived from popular, political, economic, and juridical language. However, the phenomenon itself always addresses a constellation of injustice and real or perceived social dependencies and inequalities. In the vernacular of German-speaking countries, the term *Wucher* had traditionally been tinged with moral outrage that was codified in more neutral terms in civil and criminal law. In common legal terminology, the term was used primarily to describe the potentially exploitative relationship between debtors and creditors and their respective interests. *Wucher* could be defined as a ‘business, especially an interest-earning business, by which one increases one’s capital in an illicit or at least dishonourable manner’,¹ or as ‘large, exploitative capital gains’.² However, towards the end of the nineteenth century, many German political economists broadened the narrow meaning of ‘excessive interests’.³ They interpreted *Wucher* as including the ‘use of a de facto monopoly in economic life, in the hands of certain people, solely for their benefit and to the

This brief sketch has already shown that the term \textit{Wucher} depicts several very different types of phenomena with apparently little in common. A juridical analysis of the clause pertaining to

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5 Peschke, \textit{Wucher}, 1082.


Wucher in the Civil Code (§ 138 BGB) and Penal Code (§ 302 StGB), for example, will not deal with the issue of Mietwucher (rack-rent) in the inter-war period because the latter term pertains to another area of law. However, phenomena appearing different at first might actually have many things in common if one does not study them through the perspective of normative concepts. Hence the aim of this essay is not to study the development of the juridical codification of Wucher, but to examine the semantics of this word and the legal and social action prompted by the various uses of this term. Of particular interest here is the problem of administrative and judicial intervention in contractual relations. I will describe the fundamental tension between efforts to regulate by law something as opaque as Wucher, on the one hand, and popular perceptions of morality and social justice, on the other. The essay deals with what might well have been said at the time by individuals and social groups who dwelt on the injustices associated with Wucher and with what actually could be done through the existing laws to alleviate these perceived injustices. Thus this essay will demonstrate how the term was used in the popular, legal, and political discourse. It will be shown that the word lent itself to being used to legitimize a system of social protection and to define, if often vaguely, principles of the ‘common good’ by addressing a system of social and economic inequalities. This is of interest for two reasons. First, an examination of this issue reveals a vital, though rarely studied aspect of how the modern interventionist welfare state came into being. Second, and more precisely, the discourse on Wucher and the specific, albeit ever-changing use of the term illustrate an interesting aspect of the ‘modification of private rights by reference to their social function, the restriction of legal powers by social ethics, and the retreat from the formalism of the classical private law system of the nineteenth century’, a development

8 A good example is Markus Sickenberger, Wucher als Wirtschaftsstrafart: Eine dogmatisch-empirische Untersuchung (Freiburg, 1989). The author treats the inclusion of Mietwucher in the Civil Code in 1971 focusing narrowly on § 305 BGB, and thus missing most of the legal history of rack-rent.

which redefined the ways in which people of unequal social and economic status could use the law. It will be argued that these changes in legal practice were rooted in a broader discourse about justice and the law in which the First World War marked a watershed.¹⁰

Contending with liberalism

Ever since the beginning of Western civilization, efforts to regulate interest rates in lending have reflected almost paradigmatically the ambiguities involved in coming to terms with money and the marketplace. Even though canon law, with its strict and unrelenting prohibition on demanding interest for loans ("pecunia pecuniam parere non potest"), had become perforated by the end of the Middle Ages and was replaced by state-administered maxima for interest rates, canon law’s stigmatization of money-lenders and their supposedly pernicious impact on society had a long-lasting legacy, whose worse aspect was popular anti-Semitism.¹¹ The new political economy of the eighteenth century attacked publicly fixed maxima for interest rates as well as for food prices.¹² These restrictions were not only considered infringements on the free development of markets, but they were also thought to advantage certain groups over others. After the ill-fated efforts of the French Revolution, the ideas of economic liberalism quickly prevailed in the mid-nineteenth century. In most countries usury laws regulating interests for both private and commercial


loans were repealed one by one, starting in the late 1830s (with a notable delay on the part of France, as described by Fabien Valente in this volume). England took the lead here, starting with the liberalization of commercial credit. Even if these laws had long been circumvented or simply not enforced at the time of their repeal, they were nevertheless thought to have legally undermined the position of the creditors. Reform was not easy and often highly contested. In Prussia, the debate over the abolition of interest maxima dragged on for over two decades. Even though agrarian interests in the Herrenhaus (the First Chamber) were losing ground—in 1866 interest rates for loans not secured by mortgages were liberalized—they remained steadfast in their opposition to initiatives put forward by both the liberal majorities in the lower house and, just as importantly, the liberal, reform-oriented members of the state bureaucracy. However, in 1867, the liberals and the reforming bureaucrats prevailed, just as they had in other states such as England (1854), Spain (1856), the Netherlands (1857), Belgium (1865), Württemberg (1839), the main cantons of Switzerland (1855–1867), Saxony (1864), and the city of Frankfurt (1864). Austria followed suit in 1868 after a series of protracted political struggles. 13

Despite some opposition to the politics of liberalization, the issue only came to a head when the economic boom of the 1860s bust in the following decade. The impact of the economic crisis, namely the tightening of credit, was felt particularly in agriculture, which for almost three decades was to experience falling prices for its products. 14 The resulting squeeze on profits was felt in an increasing burden of debt, the total value of which rose in proportion to the value of agricultural products. This situation was a powerful factor in mobilizing interest groups representing farmers as well as artisans who decried the financial distress that led to an increase in foreclosures and the ruin of their businesses. 15


The ideological confrontations that had been mounting during the debate over the policies of liberalization suddenly escalated sharply. *Wucher* became a highly politicized slogan, the use of which defined fundamental ideological positions. The term became part of a divisive political code. Critics argued that the abolition of the usury laws marked the victory of what was disrespectfully called *Manchester liberalismus.* In fact, the rhetoric of *Wucher* implied first and foremost an attack on liberalism. The programme of deregulation, whether it applied to the monetary arena or to the question of eliminating corporations of artisans, epitomized the ideal of the free circulation of goods, people, and ideas. In line with Bentham’s argument of 1788, defenders of liberalism stressed that usury—like other phenomena which the state attempted to control by setting maxima—had been caused by the pernicious laws themselves, since these prevented the free flow of money; protection was based on privilege, prejudice, and an ill-conceived understanding of the public interest. The people supposedly protected by these laws were actually being victimized by them. If left solely to market forces, the price of money would cause usury to disappear as lenders asking for excessive interest would be forced to comply with the demands of the marketplace.

Running parallel to this economic argument was a powerful juridical argument, pertaining particularly to issues involving the freedom of contract. Contracts were not to be regulated by socially and politically defined standards of equity; the state should not be the arbiter of ‘morality’ (*Sittlichkeit*). Furthermore the freedom to enter into a contract was based on the idea of the free individual, responsible for himself. The construction of usury by the existing laws prior to liberal reform threatened both the principles of contractual freedom and contractual fidelity and thus the principle of *pacta sunt servanda* so fundamental to the

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17 The German debate had been sparked off in the 18th century largely by Jeremy Bentham’s *Defense of Usury* (1787), translated and published as *Verteidigung des Wuchers* (Halle, 1788), and A.-R. J. Turgot, *Mémoire sur le prêt à intérêt et sur le commerce de fers* (Paris, 1789); see Caro, *Der Wucher*, 16ff.

The liberal concept of private law. Moreover, it also threatened concepts of an individualistic conception of the state. The setting of maxima for interests as well as for food prices was by definition a public regulation of economic activities. Finally, the pre-modern usury laws were equated with leniency towards debtors at the expense of creditors.

The issue of Wucher, reintroduced into public debate by opponents of eighteenth-century political economy, gave them a means of addressing the new political, social, and legal order, as well as the system of inequality existing between debtors and creditors. In other words, the rhetoric of Wucher re-emerged in the 1870s as a powerful weapon in the political arena. It was a weapon that could be used not only to contest economic and political liberalism, but also to question the effects of liberal reform on the relationship between debtors and creditors.

The first legislative initiatives in this backlash against the earlier policies of liberalization were proposed in the diet of the Austrian province of Galicia in 1874. The judicial committee of the diet painted a gloomy picture of the situation of the rural population and attacked what it considered to be the perniciousness of the liberal laws, claiming that these laws had entirely overlooked the state's responsibility to enforce certain moral standards. The committee's evaluation started a protracted political struggle that was to have an important spillover effect, particularly in German-speaking regions. The eventual passage of usury laws in Galicia and the Bukovina in 1877 demonstrated, first, that a revision of liberal policy was indeed feasible and, second, that the acerbic political rhetoric of Wucher with its inherent anti-Semitism was spreading like wildfire and could be politically instrumentalized. Soon similar legislative initiatives were introduced in both the Prussian and Bavarian diets in 1879. In that same year, the Swiss canton of Solothurn actually put a usury law back on the books. The pressure on the Reich to react similarly was also mounting. Things finally came to a head when a delegate of the Catholic Centre Party, Peter Reichensperger, a long-time advocate of usury laws, proposed far-reaching legislation to define and combat usury. He was supported by sixty-nine fellow party members and

19 Caro, Der Wucher, 40ff., 176ff.; Chorinsky, Der Wucher, 118ff. 20 Ibid. 45. 21 Peter Reichensperger, Gegen die Aufhebung der Zinswuchergesetze (Berlin, 1860); id., Die Zins- und Wucherfrage (Berlin, 1879).
by the Conservatives. Reichensperger's bill imposed ceilings on interest rates, graduated according to the purpose of the loan, and also introduced civil law provisions that would have made it possible to annul any contract exceeding the prescribed maximum interest rate. This provision, which alone did much to limit the principle of freedom of contract, was supplemented by another provision that would have restricted the capacity of individuals to draw bills of exchange (Wechselfähigkeit). Soon afterwards, the Conservative deputies von Kleist-Retzow, von Flottwell, and Freiherr von Marschall submitted a bill that differed from Reichensperger's, not least by ignoring the issue of interest rate ceilings. This bill eventually provided the basis for the legislative draft that was adopted by the government early in 1880 and became law in May of the same year.

More than anything else, the legislative initiative of 1879/80 must be seen as a fundamentally political gesture. For one thing, the established parties stirred up an issue propagated by unruly anti-Semites in order to use the widespread discontent among the rural and urban populations to broaden the electoral base of their support. For another, Wucher rhetoric fitted in with the efforts of the political right to form a political alliance with the Catholic Centre Party. Finally, the incorporation of the concept of Wucher into 'legislation designed to assist, protect, and reprimand' ideologically complemented the often evoked concept of 'protection for the nation's labour' (Schutz der nationalen Arbeit), namely social insurance legislation and tariff policies, which were being hotly debated at the same time as the usury bills were introduced early in 1879.

Thus there are many good reasons to view the government's draft legislation of 1880 primarily as part of its efforts in coalition-building. Furthermore it might be argued that the new law did not have much of an impact. Although much of what was said in the

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24 Wehler, *Von der 'Deutschen Doppelrevolution*', 990ff.; Lothar Gall, *Bismarck: Der Weiße Revolutionär* (Frankfurt am Main, 1980), 590 (with regard to the protagonists of the usury laws of 1879).

ensuing debate on this legislative proposal might have been little more than a smokescreen, the debate itself did indeed fundamentally challenge the prevailing legal positivism. At stake was the question of how to use the law to define social standards and then how to use these standards to shape the moral order of society.

The law and the 'common good'

One of the striking features of the debate surrounding the usury legislation was the appeal to the sentiments of the Völk, and to a supposedly prevailing feeling of righteousness, a Volksbewußtsein, that did not 'concur with (liberal) legislation'. Reichensperger appealed to 'the sentiment of the people'. What needed to be expressed, he claimed, was that an 'internal, communal cause prevailed in the legislation'; law was to be a 'sword of justice' for the 'defence of the common good' (Schutz des Gemeinwolhs). As in many other fields, the advocates of using legislation contested the liberals' claim that they represented the people and that they spoke for the people. Reichensperger argued that the new legislative proposal would destroy the 'doctrinal chains under whose weight the German nation had suffered for all too long'. In much the same way, Kleist-Retzow viewed the new legislation as a victory over the 'power of moneyed interest', the Geldmacht, which had gained the 'prerogative' over royal power.

This appeal to Rechtsgefuhl, Rechtsempfinden (sense and feeling of justice), and Volksgeist (spirit of the people) was standard fare both in the contemporary literature on this topic and in the parliamentary debates in Germany and Austria. Even Eduard Lasker, the liberal champion against the earlier usury laws in the 1860s, grudgingly noted in 1880 that the initiators of this new legislation had 'satisfied a public and justified demand to stigmatize usury in legislation to the degree it deserves'. If the wolves were 'howling for freedom', as the jurist Rudolf von Jhering noted, this was understandable; he added sarcastically that if the sheep, namely the liberals like Lasker, were joining them in raising their voices,
it only proved that they were indeed sheep. In 1872 Jhering pro-
claimed the ‘fight for justice against injustice’ by warning that the 'people did not understand the law and the law did not under-
stand the people’. With regard to the relationship between credi-
tors and debtors he wrote apodictically: ‘It is better to do glaring
injustice to a hundred creditors than possibly to treat one debtor
too harshly.’ Small wonder that the proponents of usury laws
claimed him as one of their own. Jhering was quoted as saying
that the freedom of contract and movement were nothing but a
‘hunting license for thieves and pirates with the right to prey upon
all those who fall into their hands’.

The excesses of the liberal law of contract were played up time
and again. By putting this political struggle in terms of a fight for
justice in the name of the people, these critics were addressing the
balance of power between creditors and debtors which suppos-
edly disadvantaged the latter. Although no systematic surveys of
the problem were readily available for Germany at the time, the
cases of Galicia and Bukovina, where some data had been gath-
ered, played a major role in the debates. The miserable state of
these two Austrian provinces seemed to corroborate the seemingly
endless number of individual stories and vivid depictions of
‘usurers, bloodsuckers of the worst sort’ preying on the rural
population. Liberated from the fetters of law, it was argued,
these villains, the Wucherer, could go about their evil business in
the light of day; even if an individual judge might have been moti-
vated to act against them, the courts had to allow the usurers to
pursue their legal claims against their victims. Horrifying allusions
to the ‘enslavement of peasants’ and the population at large, to
usurers as parasites of the body social, and to the people at the
mercy of an omnipresent enemy were popular. A survey of 1,173
convictions for debt in Bukovina in the years 1876 and 1877 found
that the interest rates demanded had averaged about 33 per cent

30 Jhering is quoted in Caro, Der Wucher, 50.
31 Rudolf von Jhering, Der Kampf ums Recht (1878), ed. Hermann Klenner (Freiburg,
1991), 8, 15, 94. See also Fritz Loos and Hans-Ludwig Schreiber, ‘Recht, Gerechtigkeit’, in
32 Theobald Rizy, ‘Zur Wucherfrage: Rede, gehalten im österreichischen Herrenhause
am 3. Mai 1881’, Zeitschrift für das Privat- und öffentliche Recht der Gegenwart, 8 (1881), 774–84,
at 780.
34 The term was originally used in 1874 by a Polish representative of the Galician diet
and was picked up by various authors; by 1893 Leopold Caro, Der Wucher, could argue that
it had almost become a ‘household word’ (p. 180).
per year; for the majority of debts of less than 100 Gulden—which actually made up almost half the cases—the interest rates were significantly higher.\(^{35}\)

The persona of the usurer played an important role: he was described as an outsider who attempted ‘to exploit those in dire straits for his own benefit with satanic cunning’.\(^{36}\) The extensive surveys—unsatisfactory even by contemporary methodological standards—published by the Verein für Sozialpolitik in the 1880s are odd collections of sources on ruses. The narratives of social and economic conditions in various regions of Germany thrived on the supposed maliciousness of the usurer who preys on his ignorant victims. Seldom did these studies analyse rural credit relations; instead they judged usurers from an altogether moral perspective, generalizing in a grand narrative on the moral depravity of the moneylenders. The usurer was thought to be both a symptom and the cause of backwardness. Breaking the Wucherer’s hold on the country was considered the prerequisite for modernizing society, and this could be achieved by introducing new credit facilities and promoting efficient agricultural estates.\(^{37}\)

Research on anti-Semitism has often pointed to the connection between the construction of the figure of the Wucherer and the Jew, an issue which cannot be dealt with in greater detail here, yet which is of great importance.\(^{38}\) The surveys mentioned above are a good example of this.\(^{39}\) The appeal to the idea of community

\(^{35}\) Julius Platterer, ‘Der Wucher in der Bukovina’ (1878), in id., Kritische Beiträge zur Erkenntnis unserer sozialen Zustände und Theorien (Basle, 1894) 317–70; material on Galicia is presented by Caro, Der Wucher, 176ff.


\(^{37}\) Bäuerliche Zustände in Deutschland, Schriften des Vereins für Socialpolitik 22–4 (Leipzig, 1883); Der Wucher auf dem Lande: Berichte und Gutachten, veröffentlicht vom Verein für Socialpolitik, Schriften des Vereins für Socialpolitik 35 (Leipzig, 1888). Julius Platterer, ‘Der Wucher und die Bauern in Deutschland’ (1888), in id., Kritische Beiträge zur Erkenntnis, 395–423. For a contemporary critique see Julius Zuns, Der Wucher auf dem Lande: Eine Kritik des Fragebogens (Frankfurt am Main, 1880); Gottlieb Schnapper-Arndt, Zur Methodologie socialer Enqueten (Frankfurt am Main, 1888).

\(^{38}\) M. Kayserling, Der Wucher und das Judenthum (Budapest, 1882) was concerned that debates on the reform of the usury laws would automatically spark off a debate on the role of Jews. A most perceptive study in this respect is James F. Harris, The People Speak! Anti-Semitism and Emancipation in Nineteenth-Century Bavaria (Ann Arbor, 1994).

\(^{39}\) Platterer, ‘Der Wucher und die Bauern’, 387, summarized the survey as follows: ‘Wherever this most terrible form of usury exists, the transaction of business follows a typical, traditional pattern; the issue of race comes to the fore and the businessman is a Jew.’ German text: ‘Uberall, wo es diese schlimmste Art des Wuchers gibt, ist der Verlauf der Geschäfte ein ganz typisch-gleichmäßiger, traditioneller, es ist Rasse im Geschäft und der Geschäftsmann ist ein Jude.’
to be found in popular, academic, and parliamentary debates was accompanied by an express desire to be rid of the so-called ‘foreign elements’ in that community, to expel outsiders. This rhetoric, laced with stories of communal or individual misery, lent itself to creating the sense of an acute state of emergency, which required drastic action. Characteristic in this respect is the conservative political economist Albert Schäffle who claimed that ‘movable capital was waging a war of annihilation against productive labour’ and that this movable capital deserved to be ‘thoroughly skinned once and for all’. \(^{40}\) In the words of another author, it was the purpose of law to prevent the ‘debilitation and marginalization of entire societal groups, to give the members of these groups living conditions that are both physically and mentally healthy at the expense of those individuals who gradually exhaust and use up the wealth’. \(^{41}\) The need to deal with Wucher was a ‘matter of life’, not a matter of legalistic hairsplitting. \(^{42}\) Law was to be derived from the experience of life in order to defend life and society. Law was to embody transpersonal, social criteria. Law was to be used, not least, to fulfil the state’s responsibility to uphold public morality (Sittlichkeit). The criticism of liberalism as allegedly biased against social aims, the defence of the moral authority of the state, and the organic concepts of state and society, so prevalent among Catholics, converged in a curious way in the debates on Wucher. \(^{43}\) At the core of all these complaints and legislative initiatives stood the appeal to material justice, which was based on ethical standards and, from a juridical point of view, antiformal norms. \(^{44}\)

Both the government and the majority in the Reichstag were eager to separate the realm of the law clearly from that of popular rhetoric. The language of those who were to define usury juridi-

\(^{40}\) In German: ‘Er müsse aus dem “Pelz endlich und gründlich herausgeschüttelt” werden’, cf. Albert Schäffle, Deutsche Kern- und Zeitfragen (Berlin, 1894), 304; see also Chorinsky, Der Wucher, 95ff. Cf. Drucksache No. 265 (n. 20), 1602.

\(^{41}\) Isopecul-Grecul, Das Wucherstrecrecht, p. vi.

\(^{42}\) In his somewhat esoteric treatment of usury, Lorenz von Stein stated that it was necessary ‘to avoid . . . purely theoretical discussions and to look at life as it really is’, Der Wucher und sein Recht: Ein Beitrag zum wirtschaftlichen und rechtlichen Leben unserer Zeit (Vienna, 1880), 6.

\(^{43}\) The authoritative statement of the Catholic view is by Hermann Ratzinger, Sittliche Grundlagen der Volkswirtschaft (Freiburg, 1881).

\(^{44}\) See also Max Weber, Wirtschaft und Gesellschaft: Grundriß der verstehenden Soziologie (5th rev. edn., Tübingen, 1972), 507.
cally was conspicuously different. Notions of material justice were to be erased: fixing interest-rate maxima was thus out of the question, since, as it was stated perceptively, 'there exist neither national-economic, nor legal, nor ethnic reasons to subject these freedoms to restrictions'. Such maxima served neither the interests of the debtor nor the needs of financial transaction.  

A similar shift away from social standards can be seen with respect to the formal juridical definition of the offence. The Chancellor’s son, Graf Herbert von Bismarck, who was an ardent proponent of interest-rate maxima (graduated according to whether the credit was for commercial or agricultural purposes), hit the nail on the head when he complained that once lawmakers neglected to set clear norms for what constituted usury, the law became ‘individualized’. His suspicion was corroborated by the twofold definition of the crime of usury: it had to be proven that the financial advantages were ‘strikingly out of proportion to the services’ rendered, and that there had been a ‘continuous effort’ on the part of the accused to exploit the ‘dire straits, the inexperience, the lack of judgment or the considerably weak will’ of the other party. In stressing the possible deficiencies of the plaintiff, this legal definition of usury narrowed down further the number and type of cases which could be brought to court.

Yet at the same time it is obvious that judges were to be granted a great deal of discretionary power in usury cases. After the free presentation of the evidence, it was to be left to the judge to evaluate each case on its own merits and according to the judge’s individual authority, instead of along the guidelines laid down by a clearly defined set of norms. In other words, judges were to be the medium through which individual cases were adjudicated without recourse to clearly defined standards. It was thought that their own daily experience of life in general would be close enough to that of the people for them to be capable of evaluating each individual case of usury according to a ‘judicious interpretation of the law’.

This reliance on judicial prerogative was a sensitive point in the

45 Drucksache No. 265 (n. 20), 1600; see also the statements by Schelling on behalf of the government, Verh. des Reichstages, 4th legislative period, sess. III, vol. i, 8 Apr. 1880, 562f.
46 Ibid., vol. ii, 20 Apr. 1880, 829.
47 Drucksache No. 265, 1603.
48 Ibid. 1603f.
government's proposed legislation, and one which received considerable attention for good reason. The idea of judicial independence was criticized not only by conservative critics such as von Bismarck who, unlike his colleagues from the Centre Party, mistrusted the 'people'. By replacing social standards (defined by maxima as he had demanded) with the court's judgments, Bismarck argued, lawmakers were inadmissibly overlaying the law with 'morality' of their own; furthermore, legislators were thereby surrendering their sovereignty to the judges. Instead of furthering morality, others argued, the law would destroy the belief in law and justice once judges were left to rule on cases at their own discretion. In light of later developments, these words are noteworthy.

In statistical terms, the adjudication of usury is a story quickly told. In 1882, 176 people were charged in 261 cases; in 1885, the figures had dropped to only 99 people in 131 cases, and the numbers remained at this level in the years that followed. Remarkably, no other type of crime even came close to having such a large percentage of acquittals as usury. On a nationwide basis, the percentage of convictions decreased from 56.7 per cent to 37.4 per cent, whereas in the various individual regions they were significantly lower. With regard to Berlin, for example, where only 11.8 per cent of cases ended in conviction in 1885, one expert remarked that 'either the prosecutor's office was unduly resolute or the court was tremendously lenient in the proceedings'.

These figures might be interpreted as meaning that Wucher was nothing short of a rhetorical construct used to define political and social morality. It was not the legal means to prosecute usury that were missing, but the opportunity and the will to apply them. Having stated this, however, it is important to point out that, despite the relatively small number of cases actually tried in court and ending in a conviction, social and political mobilization in rural areas, headed by the Catholic Centre Party, the Conservatives, and anti-Semites, constituted a way of negotiating

50 Von Lilienthal, 'Die Wuchergesetzgebung', 382.
51 Karl von Lilienthal, 'Der Wucher auf dem Lande', Zeitschrift für die gesamte Strafrechtswissenschaft, 8 (1888), 157–221, 157; in the following years this trend continued, see 'Gesetz betr. Ergänzung der Bestimmungen über den Wucher', Drucksache No. 70, Verh. des Reichstages, 8th legislative period, sess. II, vol. i.
the relationship between creditors and debtors outside the courtroom. The law provided a means to put pressure on individuals who were identified with usurious practices. The effectiveness of this pressure, as well as of the public resonance of individual trials, should certainly not be underestimated.

Proponents of the usury laws argued that it was the inherent individualist construction of the law and its narrow focus on ‘interest’ that hindered its application. They referred to a long list of scams that had been discovered, for example, in the surveys published by the Verein für Sozialpolitik, namely Viehwucher, Landwucher, Warenwucher (‘cattle usury’, ‘land usury’, and charging ‘exorbitant prices’ for merchandise). In 1893 the laws were amended to include the criminalization of Sach- oder Leistungswucher (goods and services usury), which also covered legal transactions that were ‘strikingly out of proportion to services rendered’.

The intent of the new, expanded law as proposed by the government clearly aimed to give the debtor wider protection. Yet to the dismay of those propagating the amendment, the debates demonstrated that the language of morality, overwhelmingly appropriated by conservatives, was vulnerable to challenge. As early as 1880, one Social Democrat had argued that his party ‘naturally’ considered ‘almost everything that represents personal profit in society today to be a type of usury’. In the 1890s, the party orchestrated this theme much more forcefully: employment contracts should come under the usury laws since they often exhibited an ‘exploitation of distress’. As the debates on amendment in 1893 show, Wucher was interpreted as including a broad spectrum of exploitation. For example, some even claimed that the highly contested tariff policies possessed a ‘usurious character’, not only was a finger pointed at property usury, the right of retention by landlords, and rack-rent, but also at the usurious

53 Ibid. 216.
54 Der Spieler- und Wucherer-Prozeß in Hannover (2nd edn., Berlin, 1893).
55 Cf. Henle, Das Wuchergesetz, 89ff.
57 Verh. des Reichstages, 8th legislative period, sess. II, vol. iii, 14 Apr. 1893, 1843ff. (Stadthagen); cf. also Frohme, ibid., vol. i, 655ff. Similar initiatives were launched by the Social Democrat Stadthagen during the debates on the Civil Code in 1896, cf. Erste, zweite und dritte Beratung des Entwurfs eines Bürgerlichen Gesetzbuchs im Reichstage (Berlin, 1896), 272ff.
58 Verh. des Reichstages, 8th legislative period, sess. II, i. 656.
dealing of industrial cartels, of the stock exchange, and even of theatre agents. The Social Democrats called for people’s courts (Volksgerichte) to guarantee that the law would be applied. They argued that the people knew all too well what usury was. French Socialists undoubtedly shared these sentiments: the food riots of 1910 and 1911 caused by ‘la vie chère’ were replete with attacks on accapareurs and profiteers who needed to be punished.

On many of these issues the Conservatives, representatives of the Centre Party, and Social Democrats did form an alliance, especially the latter two groups. If Social Democrats tended to stress economic and social equality and liberty, the first two groups focused on the moral role of the state which allowed for intervention into the private law system. By the 1890s, the term Wucher had become synonymous with the exploitation of ‘national labour’ and a means, although often disguised in different terms, to advance issues of social protection and economic intervention. But the issues that divided the parties are equally important: unlike the Conservatives and certain factions within the Centre Party who strove to protect the ‘producers’—that is, artisans and farmers—the Social Democrats focused fully on the protection of ‘consumers’. In their view, tariff policies were nothing but publicly licensed Wucher. Furthermore, the issues of justice, and the morality of law, order, and society being addressed in the debates on usury were repeatedly intertwined with an equally important fault line, namely, the issue of anti-Semitism. During the parliamentary debates of 1893, anti-Semitism as a political code aligned the political right (including factions within the Centre Party) against the Social Democrats.

59 Verh. des Reichstages, 8th legislative period, sess. II, i. 65ff. 60 Ibid., iii. 1844.
61 Cf. Hanson, ‘The “Vie Chère” Riots’.

The debates that led to the law of 1896 regulating the stock market are full of indirect and direct allusions to Wucher. Cf. R. Gerhard, Wichtertum und Spekulation (Leipzig, 1894); T. Fritsch, Zwei Übel: Boden-Wucher und Börse (2nd edn., Leipzig, 1894); for the parliamentary debates cf. the unsystematic description by Wolfgang Schulz, Das deutsche Börsengesetz: Die Entstehungsgeschichte und wirtschaftlichen Auswirkungen des Börsengesetzes von 1896 (Frankfurt am Main, 1994).
64 Nonn, Verbraucherprotest.
65 Verh. des Reichstages, 8th legislative period, sess. II, i. 655ff., iii. 61ff., 1841ff., 2053ff.
Wucher and consumer policies during the First World War

In the debate on usury, as in many other aspects of social, political, and economic life, the First World War and its aftermath marked a fundamental turning point. Whereas legal codification in the pre-war period had drawn a distinct line between popular and juridical language, a fundamental realignment now occurred in the realm of legislative and state action, and judicial practice. The issue of Wucher suddenly lent itself to stipulating a system of transpersonal criteria by which the common good was defined, and to determining a level of state intervention that would hardly have been imaginable a few years earlier.

Because of shortages and steep price increases for food and soon for most other essentials of daily life, Wucher became one of the catchwords used by all social groups. To talk about Wucher meant to attack the deliberate exploitation of the grave economic circumstances by groups and individuals who either withheld goods for speculative reasons, charged ‘unjustly’ high prices, or drove up prices. Producers, that is, the agricultural interest groups which had lashed out against the ‘capitalist creditors’ before the war and which had initiated the usury laws, suddenly fell silent. Those groups that had complained about ‘slavery’ at the hands of creditors were now being accused by consumers of rapaciously exploiting the people, if not, as in the case of Germany, of being ‘profiteers’ who also tried to rid themselves of debt by taking advantage of inflation.66

Undoubtedly, the situation was aggravated in Germany and Austria by the fact that the pie of goods and income to be distributed had shrunk considerably since the war and that people in these two countries were much worse off than those in France or England.67 The threat of hunger was perceived not only as a state of emergency but as an emergency of the state, which called for far-reaching intervention: ‘Let provisions run short in the shops

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for a single moment, and panic will spread and riot be imminent,’ a French author argued. ‘A government desirous of maintaining order, of keeping the national spirit of resistance unimpaired must take measures in order to avoid such dangers.’ Moral outrage against ‘excessively’ high prices, Wucher, and the profiteering of small groups proved to be a tremendously powerful social and political force. Public outrage led to the passage of war emergency laws that intervened widely in the economy, going far beyond the rudimentary policing powers that still existed in some countries with respect to food prices. This constellation, in conjunction with the various degrees of pressure being exerted in these countries for social and political reform, made possible a critical renegotiation of rights and, in the end, a transformation of some aspects of the private law system. The individualistic construct of Wucher by nineteenth-century civil and criminal law was supplanted by vague and highly contested definitions of social justice. Germany is a particularly good example in this respect. Nowhere else did the government intervene so extensively into the economy on behalf of the consumer (and fail so miserably, perhaps with the exception of Austria) as in Germany. Prices became subject to public control, and major societal groups wanted to have a hand in setting them. While the people tended to decry almost any price increase as being usurious, a number of laws and ordinances tried to establish a framework for what legally constituted a ‘reasonable’ or ‘just price’, and for combating ‘regrading’, ‘engrossing’, and ‘forestalling’ (Schleich- und Kettenhandel). This framework was expanded upon by local and regional price-control and price-fixing committees and by precedents set by court decisions. Price-control committees consisted of

68 Michel Augé-Laribé, ‘Agriculture’, in id. and Pierre Pinot (eds.), Agriculture and Food Supply in France during the War (New Haven, 1927), 1–154, 69. It is, in fact, striking how similar was the legislation developed between 1914 and 1919 in France and Germany, as well as in a non-combatant country such as Switzerland.

69 For a survey of different countries cf. Peschke, ‘Wucher’, 1096ff. The legal justifications in Germany were § 3 of the Enabling Act of 4 Aug. 1914 and the law on the state of siege, according to which prohibitions could be issued in the interest of securing public order. Later reference was made to art. 48 of the Weimar constitution, cf. Max Alsberg, Preisreibereistrafrecht (Leipzig, 1922), 1 ff.

members of local or regional administrations and of corporate bodies representing groups such as merchants, producers, and consumers, that is, representatives of blue- and white-collar workers, civil servants, pensioners’ organizations, and tenants’ and housewives’ organizations.

The rapidly expanding volume of consumer legislation sought to combat wartime usury (*Kriegswucher*) primarily by setting standards in a way that was distinctly different from the approach of the pre-war period. Whereas the earlier legislation had been centred around the individual victim and the offender, the new ordinances referred to the overall conditions of the market and prohibited ‘excessive profits’. Once maximum prices had been introduced for most essential commodities, it was not difficult to determine what constituted ‘excessive profit’. This development reflects most clearly how the earlier concept of criminalizing usury on a case-by-case basis was replaced by one in which the crime was defined by social and political criteria: maximum prices were the consumer’s equivalent of maximum interest rates for producers.

The definition of excessive profit remained critically important, especially from 1920 when maximum prices for most goods, with the exception of bread, were abolished. Beleaguered by public protest and the threat of riots, the authorities repeatedly declared an emergency market situation (*Notmarktlage*) in order to combat *Wucher* during phases of the Mark’s rapid decline after the war. In conjunction with the courts, the authorities took the liberty of defining what ‘reasonable’ prices were.

It is no wonder that such events soon produced a highly charged situation. In the press, in publicly distributed pamphlets, and in speeches, the authorities urged consumers to report ‘excessive’ and ‘usurious’ prices to them. In turn, farmers, artisans, and shopkeepers were up in arms because their economic freedoms were being infringed for the benefit of consumers. Equally important was that their business dealings were tainted with an aura of illegality and that they faced possible punishment, which they claimed—not unjustifiably—deprived them of such fundamental rights as those of property and due process of law. This is interesting not least because the radical rhetoric of *Wucher* before the First World War had called for extraordinary measures to combat the evil. At the end of the war, special courts (*Wuchergerichte*) with
extensive powers were set up in Germany, as in many other countries including England. Each court consisted of three judges and two jurors all of whom exercised their own discretion in determining the extent of the evidence heard; their decisions were binding and not contestable. Later, in 1920, property could be confiscated in the case of conviction.

These courts were established in response to public demands for far more drastic measures, such as ‘public flogging’ and ‘hanging’, which inflamed the fantasies of even highly respectable people. Although there were great regional variations in the number of usury cases, the incidence of usury was not a minor phenomenon. Whereas, since the 1890s, there had never been more than 150 cases of Wucher in the courts per year in the whole of Germany, by 1917 there were 1,538 successful prosecutions in Hamburg alone on the basis of the new laws. These led to the closure of 5,551 firms, custodial sentences totalling 12,208 days, and fines totalling 92,300 Mark. By 1920, there were over 27,000 cases pending in the Reich; after a decline in 1921 and 1922, the number rose even higher in the year of hyperinflation. Most of these cases were petty offences, and some of the convictions were politically expedient examples used to pacify the public. In other words, a great deal of symbolic politics was involved. However, this enraged those accused of Wucher even more, not least since it seemed to demonstrate not only how powerful consumers had become but also the cynical truism that the little fish were always caught while the big ones, namely industry and wholesalers, swam free.

The profiteering laws regulating prices for daily commodities proved to be short-lived; they were repealed in 1926 under circumstances that will be described later. They were outlived by another type of emergency war legislation, namely that of rent control. Although it might at first appear strange to view rent control within the context of Wucher, the parallels are quite obvious. For one, the protection of tenants from Auswucherung,

73 Mitteilung der Preisprüfungsstellen, 6 (1921), 168; 8 (1923), 34.
rack-renting, played an important part in public and political discourse. For another, the issue here was also to determine ‘equitable prices’ for rent, an issue that appealed to large sections of society. Setting such prices became an equally contested public issue following the war because soon rents were no longer freely negotiable in the marketplace. Before the war, the housing market had sometimes favoured landlords, sometimes the tenants, but traditionally had been defined to a large degree by a public consensus on what constituted a reasonable price for housing. Although there were apparently cases when the courts applied the usury clauses on individual rental contracts, there is no indication that this was used to set uniform standards.

Scarcities in the housing market and the desire to protect tenants from excessive price increases led to the Mieterschutzverordnungen (Renter Protection Ordinances) of 26 July 1917 and September 1918, which were amended and extended by a host of local and state ordinances especially during the months of the revolution. In the years that followed, legislation at national level tried to establish more uniform legal regulations. Although local housing agencies had existed in many cities before the war, their function had been limited to mediating disputes between landlords and tenants and, more importantly, to monitoring standards of hygiene. Now the establishment of local housing agencies became obligatory, and the agencies gained substantial control over the rental market and rental prices.

The introduction of rent-control legislation deeply divided landlords and tenants, virtually undoing the pre-war power relationship described by Tilman Repgen in this volume. Again, this was anything but typical for Germany. From 1914, and even more so from 1917, it became easier for tenants to challenge both rent increases and evictions, and during the revolutionary turmoil, many cities established control boards (Ausschüsse für Mietpreisbildung). Representing landlords, consumer groups, and members of local government, these boards acquired extensive powers because their discretionary decisions were (at least until 1923) incontestable in regular civil courts. Although these boards were constituted somewhat differently from the Wucher courts mentioned above, the

similarities are striking. In 1918–19, private negotiations between landlords and tenants ceased almost completely; instead, the fixing of rents was transferred to the public arena. Even though no outright socialization of housing occurred, strong public controls did remain in place, especially for rents. Under the Reichsmietengesetz (Reich Rental Law) of 1922, guidelines were set up for determining legally stipulated rents (‘gesetzliche Miete’). Theoretically, landlords and tenants still had the freedom to negotiate rent. Yet in practice, the legally stipulated rents quickly became a sort of price ceiling, since tenants had the right to refuse to pay more. To landlords, this infringement on their property rights was socialism, pure and simple. By the time hyperinflation set in, rents were usually fixed at ridiculously low levels. Even though this trend was reversed when the economy stabilized in 1923–4, rent controls were maintained. Indeed, compared with the pre-war period, tenants enjoyed an unprecedented degree of protection and legal empowerment.

The courts, social justice, and the issue of equity

All these attempts to combat Wucher and to set ‘reasonable’, ‘just’, and ‘equitable prices’ had troubling repercussions. If, for example, consumers accused shopkeepers of Wucher, the latter complained in turn that the true villains were the wholesalers and the industries. Landlords complained that their tenants sublet rooms at excessive rents; but they themselves were to come under fire from other groups for paying off their mortgages cheaply during the period of hyperinflation, if not before. Almost every societal group could, and indeed did, claim to be the victim of Wucher.

To understand this phenomenon, it is necessary to examine the dynamics of inflation itself, which in 1922–3 developed into hyperinflation in Germany. The widespread destitution associated with the devaluation of money during and after the war is very important, but it was certainly not the only source of social disorder. Of far greater importance was the fact that inflation reversed a seemingly stable system of social inequality, whether between creditors and debtors (in the broad sense of the term, namely contractual relations), or between consumers and producers. Formal contracts, as well as informal social relations
defined by custom, had to be renegotiated. Emergency laws enacted during the war and described above fundamentally changed the rules of the economic game and, as many observers argued at the time, contributed a good deal to creating the usury problems that they were meant to solve.

Each of these cases, in which one group or party to a contract accused another of Wucher, shows that the courts were left with the task of constructing formulas of social equity of their own. Understandably, the definitions of 'excessive profit' offered by the courts were unsatisfactory and highly contested. Yet such definitions of equity in the field of consumer protection influenced other areas of contractual relations. Even if formulas were seldom long-lasting, unequivocal, and viable, it was made clear time and again that the profits made by farmers, artisans, and shopkeepers were not to exceed the rises in income of groups such as civil servants. This also applied to the contracts being contested. Judges could be vehement on establishing such rules of justice.77

This development had far-reaching implications. Only by broadly interpreting the general clauses of the German Civil Code (‘equity and good faith’, the clausula rebus sic stantibus) could judges address the constant complaints of injustice. However, once formulas of ‘equity’ were introduced and left to be defined by judges, these formulas fundamentally redefined the traditional concepts of the rule of law. There was a clear ‘shift from reason to morality’.78 Moreover, judges abandoned the laissez-faire basis of contract and made contracts a means of guaranteeing vague, socially based concepts of equity.79 The issue of justice and morality was a sharp wedge driven into established notions of private law. As Joachim Rückert has demonstrated in his study of the

language in which major court decisions were framed, judges appealed to the ‘realities of life’ as opposed to the mere ‘rule of law’. The widening gap between ‘justice’ and ‘law’ had to be closed. The strong appeal to Rechtsgefühl, Rechtsempfinden (feeling and sense of justice), and Volksgeist (spirit of the people) is striking.\(^80\)

A widely shared sentiment, especially in 1922–3, was that ‘justice’ could not be obtained through the ‘law’, that in fact ‘injustice’ would result from adhering to the law. Food rioters referred to the same issues, if for different reasons, as did grocers or landlords or judges, who, after all, were also consumers, landlords, tenants, or creditors. The rhetoric of ‘justice’ appealed strongly to sentiments of ‘self-defence’ and thus natural law; the belief that society was in a state in which ‘every man must fend for himself’ flourished among all societal groups. When some of the judges in the Reich courts clashed with the executive branch in 1923–4 by ruling in favour of the claims of impoverished creditors—arguing that the legal principle of ‘Mark = Mark’ would have bankrupted creditors—the struggle was couched in terms of ‘battling the law in the name of justice’.\(^81\)

These controversial questions all but disappeared after the stabilization of the currency in the winter of 1923–4. ‘Revaluation’ (Aufwertung) of debts was just one hotly contested issue. A ruling by the Reich Court in November 1925 that a barber shop shave was to be considered a ‘necessary everyday commodity’ was equally symptomatic. The court thereby upheld the ruling of a lower court, which had punished a hairdresser for Wucher since, on the recommendation of his trade association, he had charged 30 Pfennig for a shave instead of 20 Pfennig, which the price-control committees considered to be an ‘equitable price’.\(^82\) Equally typical was the case of a business deal in which one party had signed a contractual agreement to purchase goods valued at 2,610 Mark, and, after having paid 2,000 Mark, refused to pay the rest of the money, claiming the original price was tantamount to Wucher, a claim the courts upheld.\(^83\) Even more disturbing was the fact that the courts started to regulate interest rates, which skyrocketed to unprecedented levels in 1923–4 as a result of the policies of economic stabilization. The courts were responding to complaints

that usurious practices were widespread and that these should be curtailed. They therefore intervened in contractual relations between banks and their customers—a development quite inconceivable a decade earlier. The argument put forward was that money represented the ‘bread of the economy’, and that the usury laws of 1923, which had been extended to include ‘services’, should be applied. To lend money became a matter of ‘regrading’. After all, it was argued, the aim of the usury laws had been to protect the general public against profit-seeking exploitation of hardship and to prevent an increase in the general cost of living. On 19 July 1926, the Reichstag repealed the war emergency laws, thereby pulling the rug from underneath the broadly interpreted definitions of the ‘common good’ used by some of the judges in their rulings.84

Summary

The Weimar constitution explicitly stated that ‘freedom of contract’ was to be guaranteed; yet in the same clause (§ 152) it forbade Wucher and declared legal transactions that transgressed the moral order (gute Sitten) to be null and void. Provisions from the criminal and civil codes were adopted almost literally. Yet the idea was ‘to define the term Wucher more comprehensively and to declare such legal transactions illegal and thereby void’.85 This vague wording fitted the general idea of the constitution that the freedom to dispose of property was subject to social restrictions. Transformed and concealed in the language of social policy and social justice in the public and political discourse, the term Wucher had become a means by which to order social life and tackle vital aspects of social inequality. Whereas the pre-war usury laws had addressed the critical balance of social power primarily between creditors and debtors, the debates and social conflicts over setting ‘just and equitable prices’ during the war


appealed to ‘consumers’ as an abstract group that needed and deserved legal protection.

In this context a private law construction of rights was superseded by a social, public type of law. In order to understand this, one must look at both structural and political developments. Before 1914, the rhetoric of *Wucher* had addressed a relatively static system of social inequality that could be sharply criticized but, on the basis of the existing laws, only marginally changed. In fact, the private law system was a bulwark against change because in a certain sense it kept the populist debates within manageable confines. The very arguments against an extensive legal interpretation of *Wucher*, namely the issues of freedom of contract and the inability to define moral standards and thereby justice, came to the fore after the outbreak of the war. The war created an emergency of the state that allowed for intervention in economic and social affairs to a degree hardly imaginable in the past. In addition, a seemingly static system of social inequality was becoming more fluid as a result of inflation and the interventionist war economy. Contractual and thus social relationships of all sorts had to be renegotiated under the worst of all circumstances, namely a declining gross national product, with the issues of ‘social justice’ and moral arguments creeping up on all fronts. Structurally, it might be argued that the individualistic, and, for that matter, liberal legal concept of *Wucher* was not adequate to solve the ubiquity of the social, economic, and political problems. Hence public intervention was necessary, and there were strong political pressures to intervene.

In the context of such change, the courts obtained tremendous discretionary power. Again, it is noteworthy how much the popular debates on *Wucher* in the pre-war period had lent themselves to creating enemies and developing a logic of intervention in order to safeguard morality and the authority of the state. In the face of such public criticism, the courts had to tackle the relationship between law and justice—so fundamental to the issue of *Wucher* before the war and so hotly debated in all walks of life since 1914. Whereas the earlier legal positivism had made great efforts to ensure that issues concerning morality and material justice were sealed off by the very idea of the rule of law—the codification of the usury laws in 1880 and 1893 exemplifies this well—these fundamental certainties on which the legal system was
based had become increasingly questionable since the war. It has often been noted that judges expanded their discretionary powers in the light of this development, arguing (as did many other societal groups when justifying their actions) that they were attempting to reconcile justice and law. The reference to a Volksrecht, to be left to judges to interpret, is related to similar ideas voiced in the 1870s. In addition to the contested issue of the revaluation of debts, attempts to set interest rates in 1923–4 show not only how far judges were willing to go in defining standards of the ‘common good’ but also how far they had departed from nineteenth-century concepts of legal recourse.

The application of notions of justice and equity to the discussion of prices remained a critical issue in Germany, one that was addressed time and again by the courts, the parliament in its social policy, and, later, by Brünning in his rule by decree. The central task was to mend a social system in which the balance of power—both social and political—had been fundamentally disturbed.