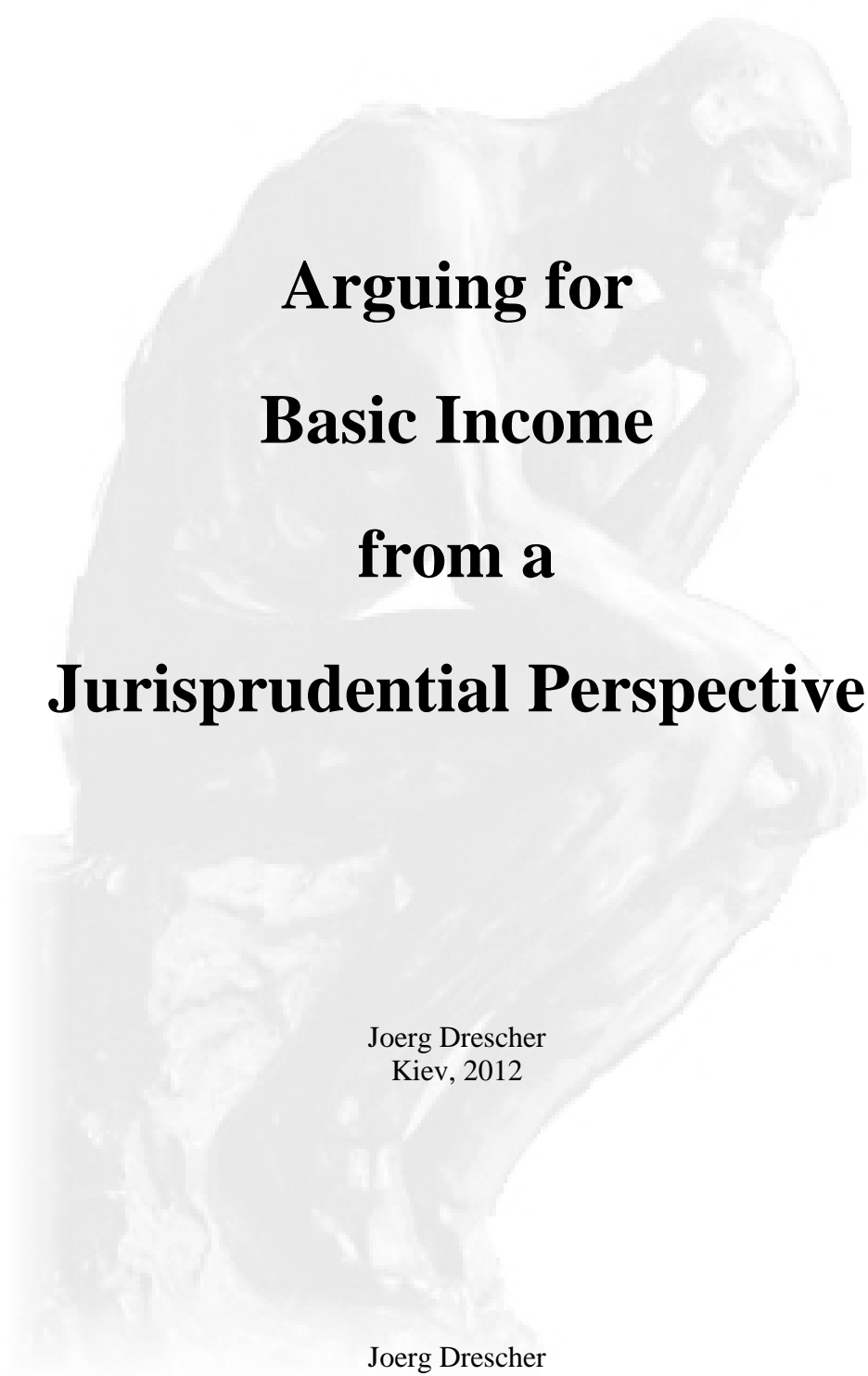


# Projekt **JOVIALISMUS**



**Arguing for  
Basic Income  
from a  
Jurisprudential Perspective**

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## Introduction

More than two years ago I came across an international conference on Constitutional Law while I was searching in the Internet for information on this topic. My attention was attracted by a workshop about human rights<sup>1</sup>. In its description I read about three major categories of human rights. One of them was called “rights to state benefits” and in brackets “status positivus.”

I became interested in this “status,” and my research revealed that **Georg Jellinek** (1851-1911) had developed a “Theory of status.” Today his theory is still used to categorise basic human and citizens’ rights. Further research showed that his theory is based on the ancient Roman law system.

Jellinek dedicated his book *System of Subjective Public Rights* (in which the mentioned “Theory of status” is described) to **Rudolf von Jhering** (1818-1892), his former professor and a famous legal scholar in the 19<sup>th</sup> century. Jhering himself was concerned with the ancient Roman law system.

Another philosopher I came across through Jellinek’s writings is **Friedrich Jodl** (1849-1892) who saw himself in the tradition of David Hume and English and French Positivism.

Frankly speaking, I was doubtful about bringing up this topic. This was mainly caused by a quote Jellinek used from Goethe’s *Faust II*:<sup>2</sup>

*What wise or stupid thing can man conceive*

*That was not thought in ages passed away?*

The reason why I decided to speak in spite of that is based on my view that I only want to open a door into the intellectual world of the mentioned personalities. It is up to you to judge if their statements are wise or stupid.

In the first part, I am going to talk about general aspects of rights: what they are, their origins and means to guarantee them... In the second part, I will point out some statements in the writings of Jhering, Jellinek and Jodl to argue for Basic Income. Finally, I will make my conclusion in relation to Basic Income.

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<sup>1</sup> <http://www.juridicas.unam.mx/wccl/en/g10.htm>

<sup>2</sup> Page 12 Georg Jellinek „System der subjektiven öffentlichen Rechte“

## Part I

### What are rights?

We all love rights, the *right to life*, the *right to liberty*, the *right to work*, the *right of free expression*... People say the Germans insist on their rights extremely, but in a text of Jhering I read the same about the English people.<sup>3</sup>

On the other hand we fear the law, because it is seen as limiting our freedom by telling us what is right and wrong. Laws are influenced by or can become accepted as social norms which describe “oughts” in order to organize our social coexistence. Yet I am not differentiating between legal laws and other social norms, rather I am speaking in general about norms. Their content can be:

- *Permission*

Example: Permission to work means we are allowed to work

- *Exemption (also Privilege)*

Example: Exemption from work means we do not have to work

- *Prohibition*

Example: Prohibition on work means we are not allowed to work

- *Imperative*

Example: Imperative to work means we have to work

The first two are considered as rights, the last two are considered as duties. But sometimes people understand, for instance, the *right to work* as an *imperative to work* – this is based on the inconsistent use of the terms *right*, *norm* and *law*.

Laws are positive norms, not in the sense of good, but in the sense of set. Hereinafter in this text I will speak about rights in the general sense of norms and laws.

Jellinek ascribes the following characteristics to legal norms to differentiate them from other existing norms<sup>4</sup>:

- 1) *They are norms that regulate the way people behave towards one another*
- 2) *They are norms which originate from an accepted external authority*
- 3) *They are norms whose validity is guaranteed by external powers*

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<sup>3</sup> Page 61 et seq. Rudolf von Jhering „The struggle for law“

<sup>4</sup> Page 333 Georg Jellinek „Allgemeine Staatslehre“

Maybe today we would change point one only to read “the way people behave” because there are, for instance, also laws aiming to protect the environment.

## Origins of rights

No doubt, we are born into a world with already existing norms. Usually we do not question most of them, mainly because we see them as reasonable and useful (for instance, the norm *not to kill*). But this does not answer the question where they come from.

In a text of **Friedrich Heinrich Jacobi** (1743-1819) I read: *Jus constituit necessitas*<sup>5</sup> – Necessity makes the law. Jhering wrote his book *Law as a Means to an End* under the motto: “Purpose is the creator of all law.” Even if I could not find any connection between Jacobi and Jhering, but assuming that both are right, we get the relation: “A seen purpose is considered as necessary to constitute a norm or law.”

A few people might know the phrase Engels ascribed to Hegel<sup>6</sup>:

*Freedom is the insight into necessity.*

If we replace *necessity* with *law*, because the law already contains the necessity, we can deduce:

*Freedom is the insight into law.*

And if the result of such insights is freedom, the ultimate purpose of laws could be seen in freedom.

Jellinek also points to this idea, while he complains in his book *The Social-Ethical Significance of Right, Wrong and Punishment* about the atomistic concept of society in the Age of Enlightenment.<sup>7</sup> According to him, society is not seen as necessary by nature, but rather as dependent on the will of its members. A contract alone defines the most necessary things for the preservation of society.

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<sup>5</sup> Page 365 Friedrich Heinrich Jacobi

<sup>6</sup> Note: Actually, Friedrich Engels refers to this quote “Necessity is blind only in so far as it is not understood” (cfg. <http://www.marxists.org/archive/marx/works/1877/anti-duhring/ch09.htm>), but according to a passage in the book *Die europäische Idee der Freiheit* (The European Idea of Freedom) from Bernhard Lakebrink, Engels misinterpreted the respective quote (cfg. <http://books.google.com/books?id=rskUAAAIAAJ&pg=PA372&lpg=PA372>)

<sup>7</sup> Page 44-46 Georg Jellinek „Die socialethische Bedeutung von Recht, Unrecht und Strafe“

It means that there is no other natural need of establishing a society apart from guaranteeing the individual freedom of its members. The “insight into necessity” of any society is only seen in the purpose of guaranteeing individual autonomy.

But Jellinek says that because it is basically impossible to say no to society without saying no to all its advantages, you must support it. Thus he establishes this maxim:<sup>8</sup>

*If you want to have a society which develops, you must act in such a way that your actions contribute to the maintenance and advancement of the society.*

(I would add: *or, at least, that your actions do not damage it.*)

Further he notes:

*Science must not forget that every ought is a conditioned must.*

That is why I prefer to say: the origin of rights is a purpose-based necessity, while the purpose can aim for individual or common ends.

But what about the Natural Law we often hear about? Does our assumption that a purpose-based necessity is the origin of law work also for Natural Law?

Jellinek gives an interesting answer in his book *General Theory of the State* in the chapter *State and Law*, where he explains the development of norms.<sup>9</sup> He says that continuous changes within society also affect the content of norms. These changes go hand in hand with the effort to improve the existing law. But there are times when an idea of a new law appears. This new law is justified by more or less comprehensible reasons, but it is always considered to be a higher one. The Natural Law contrasts with the existing one and threatens to have more validity, because it promises the fulfilment of new claims or the restoration of vanished conditions. That is why Jellinek sees Natural Law as nothing else than the sum of demands of a changed society or social class.

Jellinek refers here to Jodl’s essay *About the Nature of Natural Law and its Importance for the Present*. Jodl writes:<sup>10</sup>

*Positive law is valid, but Natural Law should be valid; positive law has power, but Natural Law has authority.*

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<sup>8</sup> Page 20 Georg Jellinek „Die sociaethische Bedeutung von Recht, Unrecht und Strafe“

<sup>9</sup> Page 344/345 Georg Jellinek „Allgemeine Staatslehre“

<sup>10</sup> Page 68/69 Friedrich Jodl „Über das Wesen des Naturrechts und seine Bedeutung für die Gegenwart“

Finally, we find in Jellinek's chapter the root of the law and the task of Natural Law. He says that we are able to feel obligated by norms by nature. But naive people, who cannot or do not want to question the validity of a law, accept it because the law seems for them plausible. The idea of a source that lies outside one's own mind is either seen as redundant or the person believes that the respective law is based on theological and metaphysical speculations. Jellinek says:<sup>11</sup>

*The notion of a natural and objective law is a by-product of the psychological elementary facts underlying the very possibility of creating a legal system.*

Norms and laws are for Jellinek a part of us and a means to social coexistence.

Summarising the said, we find the origin of norms and laws in the psychological ability to be free to accept purpose-based necessities. But what, if we do not accept them?

## **Means to Guarantee Rights**

The very first means to guarantee rights is the ability to guarantee rights. Jodl calls this ability "social authority" as he writes in his essay *About the Nature of Natural Law and its Importance for the Present*:<sup>12</sup>

*For every legal system to be valid in a society there has to be a social authority which has a power behind it to sustain and support the legal system, to protect it from infringement and violation, and which can guarantee those to whom the norm has been granted its validity. Law and power are twins and not thinkable without each other.*

Jellinek also points to this idea in his book *General Theory of the State*:<sup>13</sup>

*To ensure the validity of the law it is important to guarantee its psychological potency.*

Further he says that a law is only then guaranteed if there is a power supporting the belief that the norm can be enforced.

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<sup>11</sup> Page 352/353 Georg Jellinek „Allgemeine Staatslehre“

<sup>12</sup> Page 73 Friedrich Jodl „Über das Wesen des Naturrechts und seine Bedeutung für die Gegenwart“

<sup>13</sup> Page 334 Georg Jellinek „Allgemeine Staatslehre“

Both Jellinek and Jodl talk about “power” and in Jhering’s book *Law as a Means to an End* we find four of them, which Jhering calls levers:<sup>14</sup>

*Two of them have egoism as their motive and presupposition; I call them the lower or egoistic social levers; they are reward and coercion. [...] Opposed to these are two other impulses which have not egoism as their motive and presupposition, but on the contrary the denial thereof; [...] I call them the higher; [...] the moral and ethical levers of social motion. They are the feeling of duty and of love; the former the prose, the latter the poetry of the moral spirit.*

Further, Jhering describes the “egoistic levers” in more detail:<sup>15</sup>

*Of the two egoistical levers, coercion holds psychologically the lowest position. Reward stands psychologically a degree higher, for reward appeals to the freedom of the subject; it expects its success exclusively from the free resolve of the latter. In an indolent person reward fails of its purpose, whereas coercion proves its power over him, for it either excludes freedom entirely, where it operates mechanically, or limits it, where it operates psychologically.*

Jellinek mentions other powers in his *General Theory of the State*:<sup>16</sup>

*Until now, under the influence of Natural Law, civilised jurisprudence has usually regarded coercion as the sole guarantee and thus as an essential characteristic of the law. [...] But it is absolutely not comprehensible why only the motivation based on the fear of legal disadvantages, penalty or similar means should be seen as legal guarantee.*

He infers that the sole power of an authority is not enough to guarantee rights and is therefore supported by<sup>17</sup>

*the non-organized pressure put on individuals by the general social moral, by special etiquettes of social classes and professions, by the press and literature [...].*

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<sup>14</sup> Page 73 Rudolf von Jhering „Law as a means to an end“

<sup>15</sup> Page 73/74 Rudolf von Jhering „Law as a means to an end“

<sup>16</sup> Page 334/335 Georg Jellinek „Allgemeine Staatslehre“

<sup>17</sup> Page 335/336 Georg Jellinek „Allgemeine Staatslehre“

Jellinek calls the last and most powerful means to guarantee rights “normative power of the factual.” This power is not only important for the warranty of rights but also for the development of rights:<sup>18</sup>

*Because the factual has everywhere the psychological tendency to change into the effective, it is the prerequisite in the whole legal system to the justification of a given social situation and thus that everyone, who wants to change this situation, has to prove his better right.*

I will present arguments now to prove that Basic Income would be a better right.

## **Part II**

### **Arguments for Basic Income**

Beside the “normative power of the factual,” another resistance to Basic Income can be explained by the fear that one (egoistic) lever for the social cohesion could get lost by granting a Basic Income, while it is seen as reward.

But Jodl writes in his paper *Morals in History*:<sup>19</sup>

*To-day we are well aware that true humanity does not dispense alms but rights, and tries to develop energies where before oppression and weakness reigned. And so the development of humanity is accompanied by an increasing tenderness towards individuals within the limits unchangeably set by the needs of the community.*

This passage is in my opinion an argument for seeing Basic Income as a right rather than as alms.

And to defend Jellinek, that he was not strict against individualism, I quote from his paper *Adam in the Theory of The State*:<sup>20</sup>

*An unconditional sacrifice of one’s individuality to the State equals just as little our deepened moral awareness as the complete degeneration of the state to achieve pure individual ends.*

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<sup>18</sup> Page 339/340 Georg Jellinek „Allgemeine Staatslehre“

<sup>19</sup> Page 214 Friedrich Jodl „Morals in History“

<sup>20</sup> Page 28 Georg Jellinek „Adam in der Staatstheorie“



This sentence makes clear why those “rights to state benefits,” which I mentioned at the beginning of my paper, are so controversially discussed.<sup>21</sup> State benefit, and hence Basic Income, is seen as “degeneration of the state to archive pure individual ends.”

This brings us to the question of whether rights to state benefits should be seen as private or public rights. According to Jellinek, private rights benefit individuals, while public rights concern the interest of the whole polity, even if they are also beneficial for individuals<sup>22</sup>. The exercise of public rights is more of a reaction, which Jellinek calls “reflex right,”<sup>23</sup> to the duties of the State.

Here I would like to raise a rhetorical question: Who owns the law and who is responsible for it?

Jhering asks himself similar questions in his famous book *The Struggle for Law* and determines who is responsible for rights: Basically all – on the one hand in the sense of duty to one’s moral self-preservation,<sup>25</sup> on the other hand in the sense of duty which one owes the society.<sup>26</sup>

Here I would like to bring to your attention a footnote on “popular actions” which I believe to be important:<sup>27</sup>

*I would remark [...] that these suits (actiones populares) afforded an opportunity to all who desired it to appear as representatives of the law and to bring those who had violated it to account [...]. These actions, therefore, involved an appeal to the ideal feeling which defends the law because it is the law, and not account or any personal interest. [...] When I add that the action [...] disappeared in the later Roman law, and [...] disappeared in our own,*

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<sup>21</sup> Note: Already in the times of Jellinek, Paul Laband argued that because citizens have duties with respect to the state they also have rights to state benefits. Jellinek criticised this in a footnote (see footnote 23). Laband reacted to this footnote in a new edition of his book to which Jellinek had earlier referred (cf. Paul Laband “Staatsrecht des deutschen Reichs” vol. 1, p. 136, footnote 1) <http://ia600304.us.archive.org/14/items/dasstaatsrechtd02labagoog/dasstaatsrechtd02labagoog.pdf>

<sup>22</sup> Page 64 et seq Georg Jellinek „System der subjektiven öffentlichen Rechte“

<sup>23</sup> Page 113 footnote 2 Georg Jellinek „System der subjektiven öffentlichen Rechte“

<sup>24</sup> Note: Jellinek refers on the topic to Jhering who gives the following explanation to the reflex effect in the German edition of *Law as a Means to an End*:

Whoever installs light at the entrance to an apartment building must take into account that others will also benefit from it, even if the person did it for himself. In such a case it is wrong to speak about acting *for others*, because *for* would express a purpose-based wanting.

(Page 35/36 Rudolf von Jhering „Der Zweck im Recht“)

<sup>25</sup> Page 29 et seq. Rudolf von Jhering „The struggle for Law“,

<sup>26</sup> Page 64 et seq. Rudolf von Jhering „The struggle for Law“

<sup>27</sup> Page 74/75 footnote Rudolf von Jhering „The struggle for Law“

*every reader will be able to draw the correct conclusion from these premises, viz: that the conditions which they supposed had disappeared.*

Jhering shows clearly in all his works that the “spirit of the ancient Roman law” is still alive. One characteristic of this spirit points to the difficulty of making Basic Income unconditional. Jhering writes in his *Law as a Means to an End* about the absence of deeds of gifts in the ancient Roman law:<sup>28</sup>

*The idea of gift is not given legal expression to – an ancient Roman was not in the habit of making gifts.*

To further stress his point, Jhering cites the following quote of Polybius:<sup>29</sup>

*Unheard of in Rome, for in this city no one gives away of his own accord any of his belongings to another as a present.*

Jhering writes in a later paragraph:<sup>30</sup>

*The fact that we meet the same phenomenon also in other laws at a lower stage of development, leaves no doubt possible, according to my opinion, of the reason of this phenomenon. It was not the limitation of the legal form, which was adapted only to the most important cases of transfer of ownership, but the limitation of human egoism, which had not yet been able to rise to the idea of gift.*

In the same book I came across a paragraph about reward which reminded me of arguments for Basic Income:<sup>31</sup>

*He who devotes himself to the service of the State or the Church must not have in view the acquisition of money, but his vocation. In order, however, that he may devote himself to it entirely, the State and the Church relieve him of the care for his sustenance - the declared purpose of salary consists in making possible economically an undivided devotion to one's calling.*

On top of that, in this book, Jhering seems to advocate the idea of Basic Income:<sup>32</sup>

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<sup>28</sup> Page 208 Rudolf von Jhering „Law as a means to an end“

<sup>29</sup> Page 208, footnote Rudolf von Jhering „Law as a means to an end“

<sup>30</sup> Page 209 Rudolf von Jhering „Law as a means to an end“

<sup>31</sup> Page 156 Rudolf von Jhering „Law as a means to an end“

<sup>32</sup> Page 278 Rudolf von Jhering „Law as a means to an end“

*A society which desires to flourish must be sure of the complete devotion of the particular member to the purposes of the society; and in order to have this it must grant him the full equivalent for his co-operation. If it does not do so, it endangers its own purpose. The interest of the injured member in the carrying out of the common purpose becomes weakened, his zeal and energy are impaired, one of the springs of the machine refuses to work, and finally the machine itself comes to a standstill. Inequality in the distribution of the advantages of society, and injury to the individual which results therefrom is an injury to society itself.*

And what about Jellinek? Do his works contain something which can be used to argue for Basic Income?

Maybe in combination with an excerpt from Thomas More's *Utopia* where More says it would be better to provide everyone with some means of livelihood instead of letting them become a thief,<sup>33</sup> Jellinek could be understood to advocate Basic Income, too:<sup>34</sup>

*The most important, most significant and most momentous way, in which a state can counteract crime, is prevention. Rational prophylaxis is the best protection against all evil. [...] [The State] can, so far as it is in its power, remove motives, which might incite crime.*

Jellinek remarks before:<sup>35</sup>

*Crime is a social product. [...] You could blame the society for every injustice committed within it, if the term 'guilt' did not presuppose a moral agent [...]*

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<sup>33</sup> cfg. „A short history of Basic Income“ on BIEN's website:  
<http://basicincome.org/bien/aboutbasicincome.html#history>

<sup>34</sup> Page 86/87 Georg Jellinek „Die sociaethische Bedeutung von Recht, Unrecht und Strafe“

<sup>35</sup> Page 80 Georg Jellinek „Die sociaethische Bedeutung von Recht, Unrecht und Strafe“

## Conclusion

As for me, I see Basic Income as a right (and here as explicitly guaranteed freedom) to be self-responsible for one's ability to be a free human, but also to be responsible for supporting others in fulfilling their ideas to be free human beings or at least not preventing them from doing so as long as they do not damage the society.

Basic Income would just guarantee us the financial means<sup>36</sup> required to have access to that what usually nature grants us for free, as Jhering writes in his book *Law as a means to an end*:<sup>37</sup>

*Every living being is so constituted as to be its own keeper, the guardian and preserver of itself, and nature further has provided that this fact shall not remain hidden from it, and that the living being shall not lack the necessary means to solve his own problems of existence.*

If Jhering, Jellinek and Jodl were alive and I could talk with them about Basic Income, I would present these arguments to them and let them decide whether such an income security is necessary for the benefit of society and thus also of its members.

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<sup>36</sup> Cfg. Jörg Drescher: "Appendix: Exchange System and the Freedom to say No" (page 11)

<http://basicincome.org/bien/pdf/dublin08/5aiidrescherfundingbi.pdf>

<sup>37</sup> Page 3 Rudolf von Jhering „Law as a means to an end“

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